

**The Partial Award of September 13, 2001
in the UNCITRAL Arbitration Proceedings**

CME Czech Republic B.V. (The Netherlands)
v.
The Czech Republic

Legal Opinion Prepared by

Christoph Schreuer
(Professor of Law at the University of Vienna)

and

August Reinisch
(Professor of Law at the University of Vienna)

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Preliminary Statement

Counsel for the Czech Republic have requested us to prepare an opinion in connexion with the proceedings before the Svea Court of Appeal for the invalidity and challenge in accordance with the Swedish Arbitration Act of the UNCITRAL Award of 13 September 2001.

Our opinion is directed at three major areas where we believe the Award of 13 September 2001 displays serious shortcomings that would be relevant in proceedings for the invalidity and challenge of an arbitral award. The first of these concerns the Tribunal's failure to apply the proper law, in particular its failure to apply the law of the Czech Republic. The second concerns the Tribunal's use of a theory of joint tortfeasors that has no foundation in international law. The third concerns the Tribunal's failure to apply the principles of *res judicata* and *lis pendens* in relation to the parallel UNCITRAL arbitration proceedings that ended with the Final Award of 3 September 2001.

In preparing the opinion, Christoph Schreuer has drafted the section dealing with failure to apply the proper law. August Reinisch has drafted the section dealing with *res judicata* and *lis pendens*. Professor Philippe Sands has supplied valuable information on that section. With regard to the section on joint tortfeasors, we were greatly assisted by Dr. Stephan Wittich, an experienced specialist in the field of State responsibility. Despite this division of labour in the opinion's drafting, we have closely cooperated in its overall preparation. Therefore, we are jointly responsible for the opinion as a whole.

We have appended statements of our qualifications at the end of this opinion.

Christoph Schreuer
August Reinisch

Vienna, 22 May 202

PART ONE: FAILURE TO APPLY THE PROPER LAW

1. Arbitration Agreements and Choice of Law

1. Arbitration is based on an agreement between the disputing parties. The power of arbitrators derives from this agreement. The parties have much latitude in determining the framework for the tribunal's activity. On the other hand, the tribunal is bound by the arbitration agreement and the instructions of the parties contained therein. Any substantial deviation from the arbitration agreement by the tribunal constitutes an excess of powers (*excès de pouvoir*). Most arbitration systems provide that an excess of powers makes the award a nullity. Arbitral practice confirms this finding.

2. The applicable law is part of the issues that may be agreed by the parties in their arbitration agreement. An agreement on applicable law or choice of law is part of the framework for decision that the tribunal is bound to observe.¹ As will be shown below, non-observance of an agreement on applicable law amounts to an excess of powers and leads to nullity. This finding too, is confirmed by arbitral practice.

3. In the instant case, the parties' choice of law is contained in Article 8(6) of the Bilateral Investment Treaty between the Netherlands and the Czech and Slovak Federal Republic [now: the Czech Republic] (the BIT) in the following terms:

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

¹ For a general analysis of this point see *E. Gaillard/J. Savage* (eds.), *Fouchard, Gaillard, Goldman On International Commercial Arbitration 785 et seq.* (1999).

4. This choice of law provision is contained in the Article dealing with dispute settlement between the host State and the investor. The same Article also contains the consent to arbitration which is the basis of the arbitration proceedings which led to the Stockholm Award of 13 September 2001. The choice of law clause, by its own terms, applies to these arbitration proceedings. Therefore, there is no doubt that the choice of law clause, as quoted above, is part of the parties' arbitration agreement which is binding on the Tribunal.

5. In the case of investor/State arbitration based on BITs, consent to arbitration is also the result of an agreement between the disputing parties, i.e. the host State and the foreign investor. The clause on dispute settlement in the BIT, in our case Article 8 of the Netherlands/Czech BIT, constitutes a standing offer by the two countries to investors from the other country. The arbitration agreement is perfected by the acceptance of this offer by the investor. This acceptance may take place simply by the institution of arbitration proceedings. This way of reaching an arbitration agreement between a host State and a foreign investor is accepted by international arbitral practice.² The same method of entering into investor/State arbitration agreements is also employed on the basis of multilateral treaties and domestic legislation.³

6. The offer to arbitrate contained in a BIT may be subject to conditions and specifications. Many, though not all, BITs contain choice of law clauses as part of the offer to arbitrate. By taking up the offer of consent to arbitration, the investor accepts the choice of law clause contained in the BIT. The provision on applicable law becomes part of the arbitration agreement. Therefore, the clause on applicable law becomes a choice of law agreed by the parties to the arbitration.

7. In the case of arbitration based on the UNCITRAL Arbitration Rules, like in the present case, the tribunal's obligation to respect a choice of law made by the parties is reinforced by Article 33(1) of these rules:

² *AMT v. Zaire*, Award, 21 February 1997, 36 ILM 1531, 1545/6 (1997); *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 251; *Fedax v. Venezuela*, Decision on Jurisdiction, 11 June 1997, 37 ILM 1378, 1384 (1998); *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 264 (1999); *LANCO v. Argentina*, Decision on Jurisdiction, 8 December 1998, 40 ILM 457, 460, 468, 471; *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 16 ICSID Review – FILJ 212 (2001); *Antoine Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review – FILJ 454 (2000).

³ *Schreuer, C.*, *The ICSID Convention: A Commentary* 198-210, 221-224 (2001).

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.⁴

8. It follows that the provision on choice of law contained in Article 8(6) of the BIT is part of the arbitration agreement between the parties which was binding upon the Tribunal.

2. Types of Agreements on Applicable Law

9. Choice of law clauses in arbitration agreements are common but by no means the norm.⁵ Some BITs contain them⁶, others do not.⁷ Multilateral documents providing for investor/State arbitration are also not uniform in this regard. The North American Free Trade Agreement (NAFTA)⁸ and the Energy Charter Treaty⁹ contain choice of law clauses for investor/State arbitration. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) defers to an agreement by the parties on applicable law but provides its own choice of law clause in the absence of such an agreement.¹⁰ By contrast, the ICSID Additional Facility Rules do not specify the applicable law, in the absence of an agreement by the parties, but merely prescribes a method for ascertaining it.¹¹

⁴ <http://www.uncitral.org/en-index.htm>.

⁵ *Parra, A. R.*, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, *Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 *ICSID Review—Foreign Investment Law Journal* 287, 332 (1997); *Peters, P.*, Dispute Settlement Arrangements in Investment Treaties, 22 *Netherlands Yearbook of International Law* 91, 147/8 (1991).

⁶ See note 16.

⁷ See e.g. Sri Lanka-United Kingdom BIT, see *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 *ICSID Reports* 250.

⁸ Article 1131, 32 *ILM* 605 (1993).

⁹ Article 26(6), 34 *ILM* 400 (1995).

¹⁰ Article 42(1), 4 *ILM* 524 (1965).

¹¹ Article 55, 1 *ICSID Reports* 249: (1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.

10. Treaties containing provisions on the applicable law for investor/State arbitration, employ different formulae. Some choice of law clauses only refer to international but not to domestic law. For instance, the NAFTA refers to international law including the NAFTA itself:

Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.¹²

11. The Energy Charter Treaty contains a very similar provision¹³.

12. Other agreements dealing with investor/State arbitration contain choice of law clauses that include the domestic law of the host State as well as international law.¹⁴ These compound choice of law clauses combining domestic and international law have much to commend themselves. Most investments are complex operations involving numerous transactions of different kinds. In the vast majority of instances these transactions will be closely linked to the local law whether it is commercial law, property law, company law, administrative law, labour law or any other area of regulation by the host State. In terms of the conflict of laws, the transaction will have its closest connection to the host State's legal system. From a practical perspective, it seems hardly realistic not to include the law of the country where the investment takes place since international law does not provide guidance for many of the questions that are likely to arise. On the other hand, the applicability of international law gives the investor the necessary security in case the local law should fall below international minimum standards.

13. Combined choice of law clauses are not a recent invention. Clauses of this kind can be found already in some older investor/State agreements. For instance, Deeds of Concession concluded between Libya and two American companies between 1955 and 1968 contained a provision on arbitration part of which was the following choice of law clause:

(7) This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of

¹² 32 ILM 605, 645 (1993).

¹³ Article 26(6), 34 ILM 400 (1995).

¹⁴ For a general analysis of combined or concurrent choice of law clauses see *Redfern, A. / Hunter, M., Law and Practice of International Commercial Arbitration* 104-106 (1999).

law, including such of those principles as may have been applied by international tribunals.¹⁵

14. Where BITs contain a choice of law in the context of investor/State arbitration, the applicable law is typically also national as well as international. Most of these clauses refer to the host State's law, to the BIT itself and to the rules and principles of international law. Some BITs add a reference to agreements relating to the particular investment.¹⁶ Article 8(6) of the BIT between the Netherlands and the Czech Republic, which is applicable in this case, is fairly typical of this group of BITs.

15. The ICSID Convention¹⁷ also contains a compound choice of law clause, containing a reference to the host State's law as well as to international law. But the parties retain the freedom to make their own selection of the applicable law. Article 42(1) of the ICSID Convention provides:

(1) 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.¹⁸

16. Under this provision, there are two ways whereby the applicable law may be determined. The first is by agreement of the parties. Such an agreement on applicable law may be expressed in a direct contract between the host State or the investor. It may also come about through the operation of a treaty such as a BIT or legislation offering arbitration subject to a choice of law clause. The operation of these treaties and their possibilities for a choice of law have been described above.

¹⁵ *Texaco v. Libya*, Award, 19 January 1977, 53 ILR 389, 404. The Tribunal proceeded to analyse and apply the domestic law of Libya, in addition to international law in some detail. See also *LIAMCO v. Libya*, Award, 12 April 1977, 62 ILR 140, 172; *British Petroleum v. Libya*, 10 October 1973, 53 ILR 297.

¹⁶ See e.g. Art 10(7) of the Argentina/Netherlands BIT of 1992 quoted in *Schreuer, C.*, *The ICSID Convention: A Commentary*, p. 582 (2001); Art. 9(5) of the Netherlands/Venezuela BIT of 1991, see *Fedax v. Venezuela*, Award, 9 March 1998, 37 ILM 1391, 1396 (1998); Art. 8(5) of the Belgian-Luxemburg Economic Union/Burundi BIT of 1989, see *Antoine Goetz v. Burundi*, Award, 10 February, 1999, 15 ICSID Review-FILJ 454, 498-499; Art. 10(5) of the Argentina/Spain BIT of 1991, see *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 16 ICSID Review-FILJ 207, 219 (2001).

¹⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, in force: 14 October 1966.

¹⁸ <http://www.worldbank.org/icsid/basicdoc/22.htm>.

17. If the parties have not reached an agreement on the applicable law, Article 42(1) of the ICSID Convention offers an autonomous rule: the tribunal is to apply the law of the host State and applicable international law rules. Therefore, in the absence of an explicit choice of law by the parties, the ICSID Convention also offers a compound choice of law rule combining the host State's law as well as international law. This formula incorporating both the host State's law and international law is the result of a carefully considered compromise.¹⁹

18. This survey of provisions dealing with the law applicable in investor/State arbitration leads to the following conclusion: An explicit agreement on applicable law is not uncommon but by no means always present. Where a choice of law is made, it often but not always combines a reference to the host State's domestic law and to international law. It follows that a choice of law clause forming part of an arbitration agreement is not a formality that may be neglected by arbitrators. Its existence as well as its contents merit serious consideration and observance. Where a provision on applicable law combines reference to domestic as well as to international law, tribunals are enjoined to analyze and apply both systems of law.

19. The fact that some or all of the arbitrators are not familiar with the domestic law of the host State is no reason for its non-application. A tribunal has several possibilities to ascertain the legal rules of a legal system that it is bound to apply. First and foremost, the parties will rely on the relevant provisions of the applicable law in their pleadings. If the pleadings do not shed sufficient light on the applicable law, the tribunal may obtain information through expert witnesses or otherwise. Arbitral practice demonstrates that tribunals have routinely applied legal systems even where arbitrators had no training in a legal system to be applied by them.

3. Practice of Arbitral Tribunals

20. An examination of arbitral practice confirms the conclusion that tribunals must carefully observe the clauses on applicable law under which they operate. In particular, where the dispute is governed by a combined choice of law clause, such as in the present case, a

¹⁹ For the drafting history see *Schreuer, C.*, *The ICSID Convention: A Commentary*, pp. 598-600 (2001).

tribunal may not restrict itself to applying one of several sources of law listed in that clause. Combined choice of law clauses do not offer the tribunal an alternative. Rather, the tribunal must examine and apply the entire range of legal rules prescribed by the parties' agreement. Put differently, the choice of law is not with the tribunal but with the parties. The tribunal is bound to follow the parties' instructions.

21. Arbitration taking place under the ICSID Convention has generated a considerable amount of practice dealing with combined choice of law clauses. The cases making up this practice involve situations in which the parties had agreed on the application of domestic and international law as well as cases that were decided under the residual rule of Article 42(1) of the ICSID Convention which also combines the host State's law and international law. In all these cases, the tribunals did not confine themselves to applying just one system of law but attempted to strike a careful balance between the different systems of law that they had been instructed to apply. In doing so, they also developed a doctrine which defines the relationship of domestic law to international law for purposes of investment disputes.

22. The practice of ICSID tribunals on this point is fully relevant to an UNCITRAL arbitration such as in the present case. The ICSID cases, discussed below, deal with situations in which the applicable law is a combination of the host State's law and international law, just like in the present case. Both Article 33(1) of the UNCITRAL Rules and Article 42(1) of the ICSID Convention (see paras. 7, 15 *supra*) instruct tribunals to respect a choice of law made by the parties. Where there is no choice of law, Article 42(1) of the ICSID Convention instructs the tribunal to apply the law of the host State and applicable rules of international law leading to essentially the same result as the choice of law made by the parties in the present case. Therefore, no valid distinction can be made between ICSID and non-ICSID arbitration as far as the applicable law is concerned.

23. The following analysis of the practice of tribunals on this point will first look at cases in which the parties had reached a direct agreement on applicable law that included the host State's law and international law. After that, practice under the residual rule of Article 42(1), which combines the same systems of law, will be examined. Finally, an analysis will be made of cases in which a choice of law had been made through a BIT. It is obvious that this latter category is most relevant to the case at hand. Cases that gave rise to annulment proceedings on the basis of complaints that the relevant domestic law of the host State had not been

applied will be examined in a separate section (paras. 51-69 *infra*). Issues arising from the relationship of the host State's law and international law will also be examined in a separate section (paras. 70-93 *infra*).

a. Direct Agreement on Applicable Law

24. In *AGIP v. Congo*, the choice-of-law clause contained in an agreement of the parties read as follows:

The law of the Congo, supplemented if need be by any principles of international law, will be applicable.²⁰

25. The Tribunal stated that the nationalisation measures in question “must be considered first of all in relation to Congolese Law. The Tribunal will then ask itself whether the question must also be viewed with respect to international law.”²¹ The Tribunal went through an examination of Congolese Law including the Constitution. On that basis, it reached the conclusion that a breach of Congolese Law by the acts of nationalization that were the object of the dispute had been established. Only after having reached this result did the Tribunal find that it also had to examine the acts of nationalization from the point of view of international law. That examination led to the same result.²²

b. The Residual Rule under the ICSID Convention

26. As pointed out above (para. 17 *supra*), the ICSID Convention, in the absence of an agreed choice of law, instructs the tribunal to apply the law of the host State and international law. Therefore, it leads to a situation on applicable law that is very similar to the one in the present case.

²⁰ Art. 15 of the Agreement of 2 January 1974, Award, 30 November 1979, 1 ICSID Reports 313. This provision was supplemented by stabilization clauses contained in separate Articles.

²¹ *AGIP v. Congo*, Award, 30 November 1979, 1 ICSID Reports 322.

²² At pp. 322-324.

27. In *Benvenuti & Bonfant v. Congo*, the Tribunal found that the agreements between the parties did not contain any provision regarding the applicable law. Therefore, it had to apply Congolese law and international law. The Tribunal said:

4.2. These Articles do not contain any provisions regarding the law applicable. In this case, according to Article 42(1) of the Convention, the Tribunal applies the law of the contracting State which is a party to the dispute as well as the principles of international law in the matter.

4.3 Congolese law applies to civil and commercial matters French law as it existed at the time of the accession of the country to independence (1960). This body of rules, and in particular the French Civil Code, has the force of law by virtue of Article 23 of the French decree of 28 September 1897. This legislation falls within the framework of the Constitution of the People's Republic of the Congo...²³

28. In *SOABI v. Senegal*, the claim was based on a breach of contract between the Government and the investor. The Tribunal quoted Art. 42(1) of the ICSID Convention and noted the absence of an agreement on the applicable law. This led the Tribunal to the conclusion that the law of Senegal was applicable:

In the Tribunal's view, in the absence of agreement between the parties, the national law applicable to the relations of two Senegalese parties in respect of a project that was to take place in Senegal, can only be Senegalese law. The Tribunal is of the opinion that the agreements in question must be characterized as "government contracts", the effect and execution of which are governed primarily by the Code of Governmental Obligations (C.G.O.)...²⁴

29. The Tribunal proceeded to examine and apply Senegalese Law, especially the Code of Governmental Obligations.²⁵ It also noted that the Senegalese legal systems was heavily influenced by French law and relied on that law as a way of establishing the appropriate rules of the host State's domestic law.²⁶

30. In *LETSCO v. Liberia*, there was disagreement between the parties as to whether there had been an express choice of law by the parties. The Tribunal said with respect to Article 42(1) of the ICSID Convention:

²³ *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 349.

²⁴ *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 221.

²⁵ At pp. 221 et seq., 229, 249 et seq., 257.

This provision of the ICSID Convention envisages that, in the absence of any express choice of law by the parties, the Tribunal must apply a system of concurrent law. The law of the Contracting State is recognized as paramount within its own territory, but is nevertheless subjected to control by international law. ... the Tribunal is satisfied that the rules and principles of Liberian law which it has taken into account are in conformity with generally accepted principles of public international law governing the validity of contracts and the remedies for their breach.²⁷

31. The Tribunal proceeded to examine the legality of the revocation of the concession and the question of damages under both Liberian and international law. It came to the conclusion that

. . . both according to international law and, more importantly, Liberian law, LETCO is entitled to compensation for damages...²⁸

32. In *SPP v. Egypt*,²⁹ the question of whether there had been an agreement on the applicable law was also disputed. Egypt argued that there had been a choice of Egyptian Law. The Claimant denied that an agreement on choice of law in favour of Egyptian law existed and argued that the second sentence of Art. 42(1) would have to be applied leading to the application of Egyptian law and of applicable rules of international law.³⁰ The Tribunal refused to take a position on this question. It said:

The Parties' disagreement as to the manner in which Article 42 is to be applied has very little, if any, practical significance.³¹

33. The Tribunal held that under either solution Egyptian and international law would have to be applied and that the same sources of law would apply under the first and second sentences of Art. 42(1).³² It found that if municipal law contained a lacuna or if international law was violated by the exclusive application of municipal law, the Tribunal was bound to apply

²⁶ At pp. 222-223.

²⁷ *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 358/9.

²⁸ At p. 372.

²⁹ *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 189.

³⁰ At p. 207.

³¹ *Loc. cit.*

³² At pp. 207-209.

international law directly. It proceeded to apply international law in addition to national law in a variety of contexts.³³

34. In *Cable TV v. The Federation of St. Christopher (St.Kitts) and Nevis*, the Tribunal, after quoting Art. 42(1) of the ICSID Convention, said:

The Agreement is silent on the matter of applicable law and, in the circumstances, in accordance with Article 42(1) of the Convention the law of the Federation and applicable international law will apply.³⁴

35. The Tribunal proceeded to apply the Companies Act of the host State and other pertinent sources of domestic law.

36. In *CDSE (Santa Elena) v. Costa Rica*, the Tribunal found that the parties had not reached a clear and unequivocal agreement that their dispute would be decided solely in accordance with international law. The Tribunal said:

This leaves the Tribunal in a position in which it must rest on the second sentence of Article 42(1) ... and thus apply the law of Costa Rica and such rules of international law as may be applicable. No difficulty arises in this connection. The Tribunal is satisfied that the rules and principles of Costa Rican law which must be taken into account, relating to the appraisal and valuation of expropriated property, are generally consistent with the accepted principles of public international law on the same subject. To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail.³⁵

37. This case law demonstrates unequivocally that in applying the residual rule of Article 42(1) of the ICSID Convention, tribunals have sought to follow carefully the instruction to apply the host State's domestic law as well as international law. In none of these cases did the tribunals ignore domestic law or even less claim that it was irrelevant to their decision.

³³ At pp. 208, 225-228, 234/5, 242-244.

³⁴ *Cable TV v. The Federation of St. Christopher (St.Kitts) and Nevis*, Award, 16 December 1996, 13 ICSID Review-FILJ 328, 371.

³⁵ *CDSE v. Costa Rica*, Award, 17 February 2000, 15 ICSID Review-FILJ 191 (2000).

c. Choice of Law Clauses in BITs

38. Investment arbitration based on consent clauses in BITs has become common. Some of these cases have involved BIT clauses that included a choice of law. These choice of law clauses refer to the law of the host State as well as to international law, including the BIT itself, and are very similar to Article 8(6) of the Czech/Netherlands BIT (see para. 3 *supra*) which governs the present arbitration. Therefore, these decisions are particularly pertinent to the case at hand.

39. In *Fedax v. Venezuela*, jurisdiction was based on the Netherlands/Venezuela BIT of 1991. The Netherlands/Venezuela BIT contains the following provision on applicable law to investor/State disputes in its Article 9(5):

5. The arbitral award shall be based on:
 - the law of the Contracting Party concerned;
 - the provisions of this Agreement and other relevant Agreements between the Contracting Parties;
 - the provisions of special agreements relating to the investments;
 - the general principles of international law; and
 - such rules of law as may be agreed by the parties to the dispute.

40. The Tribunal said:

30. Besides the provisions of the [ICSID] Convention and the Agreement [i.e. the BIT], the Tribunal finds that Venezuelan law is also relevant as the applicable law in this case. In fact, the promissory notes subject matter of the dispute are in turn governed by the provisions of the Venezuelan Commercial Code and more specifically by those of the Law on Public Credit, having been issued under the terms of the latter. Both parties have pointed in their pleadings to relevant aspects of the Venezuelan legislation and the Tribunal has examined these provisions with particular attention. It is of interest to note in this respect that the various sources of the applicable law referred to in Article 9(5) of the Agreement [i.e. the BIT], including the laws of the Contracting Party, the Agreement, other special agreements connected with the investment and the general principles of international law, have all had an important and supplementary role in the consideration of this case as well as in providing the basis for the decision on jurisdiction and the award on

the merits. This broad framework of the applicable law further confirms the trends discernible in ICSID practice and decisions.³⁶

41. This case confirms unequivocally that the law of the host State is part of the law to be applied where the applicable law is governed by a choice of law clause in a BIT such as the one in the instant case.

42. In *Maffezini v. Spain*, jurisdiction was based on the BIT between Argentina and Spain of 1991. That BIT contains the following provision on applicable law to investor/State disputes in its Article 10(5):

5. The Arbitral Tribunal shall decide the dispute in accordance with the provisions of this Agreement, the terms of other Agreements concluded between the parties, the law of the Contracting Party in whose territory the investment was made, including its rules on conflict of laws, and general principles of international law.³⁷

43. The Tribunal did not embark upon a theoretical discussion on the law applicable to the dispute but did, in fact, apply Spanish law. It referred to and applied the Spanish Law on Public Administration and Common Administrative Procedure,³⁸ the Spanish Constitution,³⁹ environmental legislation, including an EEC Directive,⁴⁰ the Spanish Civil Code as well as the Spanish Commercial Code together with authoritative commentaries.⁴¹ With respect to one of the claims the Tribunal concluded:

71. The Kingdom of Spain and SODIGA [a State entity] have done no more in this respect than insist on the strict observance of the EEC and Spanish law applicable to the industry in question. It follows that Spain cannot be held responsible for the decisions taken by the Claimant with regard to the EIA [Environmental Impact Assessment]. Furthermore, the Kingdom of Spain's action is fully consistent with Article 2(1) of the Argentine-Spain Bilateral Investment Treaty, which calls for the promotion of investment in compliance with national legislation. The Tribunal accordingly also dismisses this contention by the Claimant.⁴²

³⁶ *Fedax v. Venezuela*, Award, 9 March 1998, 37 ILM 1391, 1396 (1998). Footnotes omitted.

³⁷ *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 16 ICSID Review – FILJ 219 (2001).

³⁸ Award, 13 November 2000, paras. 47-49, 92, http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

³⁹ Para. 68.

⁴⁰ Paras. 68,69.

⁴¹ Paras. 82, 89, 90.

⁴² Para 71.

44. This case too, confirms that a tribunal acting under a BIT which contains a choice of law clause, such as the one in the present dispute, is enjoined to apply the domestic law of the host State.

45. Perhaps the clearest statement on the issue at hand came from the Tribunal in *Antoine Goetz v. Burundi*.⁴³ Jurisdiction was based on the BIT between the Belgium-Luxembourg Economic Union and Burundi of 1989. That BIT contains the following provision on applicable law to investor/State disputes in its Article 8(5):

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 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.⁴⁴

46. The Tribunal specifically confirmed that a choice of law clause contained in a provision of a BIT dealing with investor/State disputes constituted an agreement on applicable law between the parties to the dispute. This was a consequence of the host State's offer contained in the BIT and the investor's acceptance of that offer expressed through the institution of the proceedings:

Sans doute la détermination du droit applicable n'est-elle pas, à proprement parler, faite par les parties au présent arbitrage (Burundi et investisseurs requérants), mais par les parties à la Convention d'investissement (Burundi et Belgique). Comme cela a été le cas pour le consentement des parties, le Tribunal estime cependant que la République du Burundi s'est prononcée en faveur du droit applicable tel qu'il est déterminé dans la disposition précitée de la Convention belgo-burundaise d'investissement en devenant partie à cette Convention et que les investisseurs requérants ont effectué un choix similaire en déposant leur requête d'arbitrage sur la base de ladite Convention. Si ce n'est pas la première fois, on l'a signalé, que la compétence du Centre résulte directement d'une convention bilatérale de protection des investissements, et non pas d'un accord distinct entre l'Etat hôte et l'investisseur, c'est l'une des premières fois, semble-t-il, qu'un tribunal du CIRDI est appelé à faire

⁴³ *Antoine Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review – FILJ 454 (2000), <http://www.worldbank.org/icsid/cases/goetz.pdf>.

⁴⁴ At p. 499.

application du droit directement déterminé par une telle convention.⁴⁵

47. The Tribunal concluded that the applicable legal rules were a combination of domestic and international law. The four categories of sources listed in the BIT could be regrouped into two: the law of Burundi on one hand and international law on the other. The provisions of the BIT were part of the applicable rules and principles of international law.⁴⁶ After summarizing the opinions on the relationship between domestic law and international law under the second part of Article 42(1) of the ICSID Convention (see para. 15 *supra*), the Tribunal turned to the applicable law in the case before it:

98. Dans la présente affaire – qui met en cause, il faut le rappeler, la première phrase de l’article 42 de la Convention du CIRDI – c’est un rapport de complémentarité qui doit prévaloir. Que le Tribunal doive faire application du droit burundais ne saurait faire de doute, puisque aussi bien ce dernier est cité en tout premier lieu par la disposition pertinente de la Convention belgo-burundaise d’investissement.⁴⁷

48. Therefore, the Tribunal pointed out that the obligation to apply the law of Burundi was beyond doubt not least because it was listed first in the pertinent provision of the BIT. The Tribunal continued by saying that international law was also applicable for two reasons. First, because it was incorporated into the law of Burundi, second because Burundi was bound by the international obligations it had assumed under the BIT.

49. The Tribunal's analysis of the merits of the case followed a two-pronged approach. First, it undertook a detailed analysis of the problem from the perspective of the law of Burundi.⁴⁸ This analysis led to the conclusion that under the law of Burundi the actions in question were not illegal and, consequently, the State had not incurred responsibility. This result was reached both by looking at delictual responsibility as well as at non-delictual responsibility (*responsabilité sans faute*). Having reached this result, the Tribunal then examined the same issue from the perspective of international law, in particular in light of the BIT. This

⁴⁵ *Loc.cit.*

⁴⁶ At p. 500.

⁴⁷ At p. 501.

⁴⁸ At pp. 502-510.

examination led to the result that the Republic of Burundi was under an obligation to pay compensation to the Claimant.⁴⁹

50. These cases demonstrate clearly that a Tribunal operating under a BIT which contains a provision on applicable law that includes the law of the host State may not restrict itself to looking at international law alone but must examine and apply both systems of law. The last case also demonstrates that this method does not disadvantage the investor but may lead to an entirely satisfactory result from the investor's perspective. The consequences of disregarding the rules on applicable law will be examined in the next chapter.

4. Consequences of the Non-Application of the Proper Law

51. The provisions on applicable law are essential elements of the parties' agreement to arbitrate and constitute part of the parameters for the tribunal's activity. The application of a law other than that agreed to by the parties constitutes an excess of powers and is a ground for annulment. On the other hand, a mere error in the application of the proper law is not a ground for annulment.⁵⁰

52. The ICSID Convention contains a provision on annulment of awards. This provision (Article 52) includes among the reasons for annulment "that the Tribunal has manifestly exceeded its powers."⁵¹ During the drafting of this provision the Chairman explained that while a mistake in applying the law would not be a valid ground for annulment, applying a different law from that agreed to by the parties would lead to an award that could be properly

⁴⁹ At pp. 510-516.

⁵⁰ For an incisive analysis of this distinction see *Caron, D. D., Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID Review—Foreign Investment Law Journal 21 (1992).

⁵¹ Article 52(1) of the ICSID Convention provides:

- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
 - (a) that the Tribunal was not properly constituted;
 - (b) that the Tribunal has manifestly exceeded its powers;
 - (c) that there was corruption on the part of a member of the Tribunal;
 - (d) that there has been a serious departure from a fundamental rule of procedure; or
 - (e) that the award has failed to state the reasons on which it is based.

challenged on the ground that the arbitrators had gone against the terms of the *compromis*.⁵² A failure to apply the proper law would constitute an excess of powers if the parties had instructed the tribunal to apply a particular law.⁵³ This view is widely shared by scholars writing on this topic.⁵⁴ The Swedish Arbitration Act of 1999 contains a similar provision in Section 34(1) providing for the setting aside of an award where the arbitrators have “exceeded their mandate”. There is every reason to assume that this provision should be read in the same sense as the excess of powers under Article 52 of the ICSID Convention.

53. Under the ICSID Convention applications for annulment are dealt with by *ad hoc* Committees which are specifically established for this purpose.⁵⁵ These *ad hoc* Committees have held consistently that a failure to apply the proper law constitutes an excess of powers which may lead to the annulment of the award.

54. The principle that a failure to apply the proper law constitutes an excess of powers and hence a ground for annulment was expressed by the *ad hoc* Committee in *Amco v. Indonesia* in the following terms:

The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of

⁵² History of the Convention, Vol. II, p. 518.

⁵³ At p. 851.

⁵⁴ See esp. *Berranger de, T.*, L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique, *Revue de l'Arbitrage* 93, 108 (1988); *Broches, A.*, Observations on the Finality of ICSID Awards, 6 *ICSID Review—Foreign Investment Law Journal* 321 (1991); *Gaillard, E.*, Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales, 114 *Journal du Droit International* 135, 188 *et seq* (1987); *Niggemann, F.*, Das Washingtoner Weltbankübereinkommen von 1965—Das Nichtigkeitsverfahren im Ad-Hoc-Komitee, 4 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 97, 109 *et seq* (1990); *Pirrwitz, B.*, Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 23 *Texas International Law Journal* 73, 103 *et seq.* (1988); *Rambaud, P.*, L'annulation des sentences Klöckner et Amco, 32 *Annuaire Français de Droit International* 259, 263 *et seq* (1986); *Reisman, W. M.*, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold, 15 *ICSID Review – FILJ* 370/71 (2000); *Seidl-Hohenveldern, I.*, Die Aufhebung von ICSID Schiedssprüchen, 2 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 100, 104 (1989); *Schreuer, C.*, *The ICSID Convention: A Commentary*, pp. 555-558, 943-966 (2001).

⁵⁵ Article 52(3) provides:

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention.⁵⁶

55. The *ad hoc* Committee in *MINE v. Guinea* reached the same result. Its reasoning was based on party autonomy and the tribunal's terms of reference. It said:

... the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.⁵⁷

56. The principle that failure to apply the proper law leads to annulment is best illustrated by giving brief summaries of the pertinent cases.

57. In *Klöckner v. Cameroon* there was no agreement on choice of law. Therefore, the second sentence of Art. 42(1) of the ICSID Convention (see para. 15 *supra*) became operative. That provision directs the Tribunal to apply the law of the State party to the dispute and such rules of international law as may be applicable. The Tribunal determined that it had to apply the law of the State, that is the civil and commercial law applicable in Cameroon, which in its relevant part is based on French law.⁵⁸ The Tribunal's analysis does indeed contain some references to French authorities.⁵⁹ But the Tribunal, while purporting to apply domestic law, added that a "duty of full disclosure to a partner in a contract" was not only a principle of French civil law but that this was "indeed the case under the other national codes which we know of" and that this was the criterion which "applies to relations between partners in simple forms of association anywhere"⁶⁰.

58. The *ad hoc* Committee took these allusions as a reference to general principles of law.⁶¹ In annulling the Award, it deplored the absence of any authority for these general principles

⁵⁶ *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 515.

⁵⁷ *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 87.

⁵⁸ *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 59.

⁵⁹ At pp. 62 *et seq.*, 66/7, 70/1.

⁶⁰ At p. 59.

⁶¹ *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 121/2.

or universal requirements⁶² and concluded that the Award's reasoning seemed more like a simple reference to equity.⁶³ On the permissibility to resort to international law the *ad hoc* Committee said:

the arbitrators may have recourse to the "principles of international law" only *after* having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to *one* principle, even a basic one) and *after* having applied the relevant rules of the State's law.

Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the "rules" or "principles of international law."⁶⁴

59. The *ad hoc* Committee also found it unacceptable that the Tribunal had simply asserted the existence of a domestic legal principle without relying on any sources. The absence of specific legal authority made it impossible to determine whether the proper law had been applied:

71. Does the "basic principle" referred to by the Award ... as one of "French civil law" come from positive law, i.e., from the law's body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions.⁶⁵

60. By not demonstrating the existence of concrete rules, the Tribunal had not applied the proper law:

79. *In conclusion*, it must be acknowledged that in this reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied "the law of the Contracting State."⁶⁶

61. It followed that the Award had to be annulled.

⁶² At p. 123.

⁶³ At p. 124.

⁶⁴ At p. 122. Italics original.

⁶⁵ At p. 122.

⁶⁶ At p. 125. Italics original.

62. In *Amco v. Indonesia*,⁶⁷ the Tribunal found that, since the Parties had not expressed agreement as to rules of applicable law, Indonesian law and such rules of international law as it deemed applicable were to be applied by virtue of Article 42(1), second sentence of the ICSID Convention.⁶⁸ The Tribunal examined a number of legal questions from the perspectives of Indonesian law and international law finding that both systems led to identical solutions.⁶⁹

63. The *ad hoc* Committee in *Amco v. Indonesia* took it for granted that a failure to apply the proper law constitutes a manifest excess of powers and a ground for annulment.⁷⁰ It said:

The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity...⁷¹

64. The *ad hoc* Committee also had no doubt as to the relevance of the host State's law:

The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with ...⁷²

65. The Tribunal had calculated the total sum of actual investments at U.S. \$2,472,490 and had concluded that the shortfall in relation to the required amount of U.S. \$3,000,000 had been immaterial and did not justify the revocation of Amco's investment licence.⁷³ The *ad hoc* Committee found the Tribunal's calculation faulty since, under the relevant provision of Indonesian law, only amounts recognized and registered by the competent Indonesian authority were investments within the meaning of the Foreign Investment Law. Amco had not complied with the approval and registration formalities for all the amounts involved. The *ad hoc* Committee concluded:

95. The evidence before the Tribunal showed that as late as 1977, Amco's investment of foreign capital duly and definitely registered

⁶⁷ *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 413.

⁶⁸ At p. 452.

⁶⁹ At pp. 466/7, 473, 490-494, 498-501, 504, 506.

⁷⁰ *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 515.

⁷¹ At p. 515.

⁷² *Loc. cit.*

⁷³ *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 489.

with Bank Indonesia in accordance with the Foreign Investment Law, amounted to only US \$983,992 The Tribunal in determining that the investment of Amco had reached the sum of US \$2,472,490 clearly failed to apply the relevant provisions of Indonesian law. The *ad hoc* Committee holds that the Tribunal manifestly exceeded its powers in this regard and is compelled to annul this finding.⁷⁴

66. This case demonstrates that the omission or neglect of a single provision in the applicable law may lead to annulment. The Tribunal had identified the applicable law, including Indonesian law, correctly and had purported to apply it. In the *ad hoc* Committee's view, the non-application of one important rule of Indonesian law dealing with the approval and registration of invested capital was enough to annul the Award.

67. In *MINE v. Guinea*, the *ad hoc* Committee confirmed the view that disregard of the agreed rules of law would constitute a derogation from a tribunal's terms of reference and could hence constitute an excess of powers (see para. 55 *supra*). In that case the parties had agreed on the law of Guinea, subject to a stabilization or intangibility clause, as the applicable law.⁷⁵ The *ad hoc* Committee did not find that there was a failure to apply the proper law. MINE had relied on Art. 1134 of the Code Civil de l'Union Française applicable in Guinea and containing the principles of *pacta sunt servanda* and good faith. The Tribunal had erred in that it had cited Art. 1134 of the French Civil Code.⁷⁶ In its Application for Annulment, Guinea claimed that the Tribunal had "failed to apply any law, let alone the correct law" thereby committing a manifest excess of powers.⁷⁷ The *ad hoc* Committee noted that the two Articles in the two Codes not only bore the same number but also had the same contents and that this technical error did not warrant annulment.⁷⁸

68. Therefore, *MINE* confirms the principle that failure to apply the proper law will lead to annulment. But in the particular case, the *ad hoc* Committee found that there was no failure to apply the proper law.

⁷⁴ *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports, 534/5.

⁷⁵ *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 94.

⁷⁶ See *MINE v. Guinea*, Award, 6 January 1988, 4 ICSID Reports 73.

⁷⁷ *MINE v. Guinea*, Decision on Annulment, p. 95.

⁷⁸ At pp. 95/6, 98.

69. The above cases, which were decided under Article 52 of the ICSID Convention, confirm the principle that a failure by a tribunal to apply the proper law constitutes an excess of powers. Such an excess of powers makes the award liable to annulment. The same principle would apply in an UNCITRAL arbitration except that the annulment of an UNCITRAL award depends on the intervention of domestic courts. The Swedish Arbitration Act 1999 provides the basis for such an annulment in its Section 34(1) providing for the setting aside of an award in case the arbitrators have exceeded their mandate.

5. The Relationship of Domestic and International Law

70. As demonstrated above, combined choice of law clauses embracing the law of the host State as well as international law are common. This raises the question of the relationship of the two legal system in a particular decision situation before a tribunal.

71. The BIT between the Netherlands and the Czech Republic contains a provision that deals with certain aspects of the relationship of the host State's law and the substantive provisions of the BIT. Article 3(5) provides:

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

72. This clause provides that if rules of the host State's domestic law, of general international law and of the BIT should not lead to identical results, the rule more favourable to the investor shall prevail. The application of this "whichever is more favourable" clause by no means exhausts the question of the relationship of the sources of law listed in Article 8(6) of the BIT. Article 3(5) merely attempts to secure the highest level of protection to the investor. It does not deal with the numerous technical issues that arise under the law of the host State and under international law which cannot be resolved by applying this formula. Therefore, it

is necessary to take a broader look at the relationship of the two legal systems in situations where both have been made applicable.

73. During the negotiating process for the ICSID Convention this problem was discussed to some extent. As pointed out above, the ICSID Convention contains a clause that, in the absence of an agreement between the parties on applicable law, provides for the application of the domestic law of the host State and of international law (see para. 15 *supra*). In the course of the deliberations leading to the ICSID Convention it was made clear that international law would prevail where the host State's domestic law violated international law, for instance, through a subsequent change of its own law to the detriment of the investor.⁷⁹ The Chairman explained that international law would come into play both in the case of a lacuna in domestic law and in the case of any inconsistency between the two.⁸⁰ This formula of the supplemental and corrective effect of international law in relation to domestic law has since found wide acceptance. Most commentators agree that the function of international law in this context is to close any gaps in domestic law as well as to remedy any violations of international law which may arise through the application of the host State's law.⁸¹

⁷⁹ History of the Convention, Vol. II. pp. 570/1, 985

⁸⁰ At p. 804.

⁸¹ *Broches, A.*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 *Recueil des Cours* 331, 392 (1972-II); *Delaume, G. R.*, Transnational Contracts, Applicable Law and Settlement of Disputes Ch. XV, 68 *et seq.* (1990); *Feuerle, P.*, International Arbitration and Choice of Law under Article 42 of the Convention on the Settlement of Investment Disputes, 4 *Yale Studies in World Public Order* 89, 118/119 (1977); *Giardina, A.*, The International Centre for Settlement of Investment Disputes between States and Nationals of other States (ICSID), *in: Essays on International Commercial Arbitration* (*Sarcevic, P.* ed.) 214 at 217 (1989); *Goldman, B.*, Le droit applicable selon la Convention de la B.I.R.D., du 18 mars 1965, pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, *in: Investissements Etrangers et Arbitrage entre Etats et Personnes Privées, La Convention B.I.R.D.* 133, 151 (1969); *Hirsch, M.*, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 134, 140/1 (1993); *Jaenicke, G.*, The Prospects for International Arbitration: Disputes between States and Private Enterprises, *in: International Arbitration: Past and Prospects* (*Soons, A. H. A.* ed.) 155 at 159 (1990); *Kahn, P.*, The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes, 44 *Indiana Law Journal* 1, 27-29 (1968); *Lauterpacht, E.*, The World Bank Convention on the Settlement of International Investment Disputes, *in: Recueil d'études de droit international en hommage à Paul Guggenheim* 642, 660 (1968); *Rubino-Sammartano, M.*, International Arbitration Law 55 (1990); *Chukwumerije, O.*, International Law and Municipal Law in ICSID Arbitration, 1 *Canadian Journal of International Business Law and Policy* 61, 82 *et seq.* (1996); *Elombi, G.*, ICSID Awards and the Denial of Host State Law, 11 *Journal of International Arbitration* 61, 66 *et seq.* (1994); *Igbokwe, V. C.*, Developing Countries and the Law Applicable to International Arbitration, 14 *Journal of International Arbitration* 99, 114 *et seq.* (1997); *Nassar, N.*, Internationalization of State Contracts: ICSID, The Last Citadel, 14 *Journal of International Arbitration* 185, 202 *et seq.* (1997); *Shihata, F.I./Parra, A.R.*, Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention, 9 *ICSID Review - FILJ* 183 (1994); *Schreuer, C.*, The ICSID Convention: A Commentary, 622-631 (2001).

74. Arbitral practice does not always offer a theoretical analysis on this point. In some cases the tribunals looked at domestic law and at international law without any discussion of their relationship. In these cases the tribunals simply stated that the host State's domestic law was in conformity with international law or that the application of domestic law and of international law led to the same result.

75. For instance, in *Adriano Gardella v. Côte d'Ivoire* the Tribunal found that the principles of "pacta sunt servanda" and of good faith, on which the Claimant had relied, were equally recognized by the law of the Ivory Coast as well as by French law.⁸² In *Benvenuti & Bonfant v. Congo*, the Tribunal found that the principle of compensation in case of nationalization was in accordance with the Congolese Constitution and constituted one of the generally recognized principles of international law as well as of equity.⁸³ In *Klöckner v. Cameroon*, the Tribunal, after examining the law of the host State on the *exceptio non adimpleti contractus*, simply added that international law reaches similar conclusions.⁸⁴ In *Amco v. Indonesia*, the Tribunal examined a number of legal questions from the perspectives of Indonesian law and international law finding in each case that both systems led to identical solutions.⁸⁵

76. These instances of a parallel application of domestic and international law, coupled with assurances of their harmony, confirm the position that both legal systems must be applied. But they do not provide much useful information on the interaction of the two legal systems. In particular, they do not offer any guidance as to the applicable law in case of any contradiction between the two legal systems.

77. In *SOABI v. Senegal*, the Tribunal had to apply the host State's law and international law. But it examined the legal questions surrounding the Government's unilateral termination of a contract purely from the perspective of the host State's law. On that basis, it found in favour of the investor and awarded compensation.⁸⁶ The Tribunal did not offer an explanation for its choice of law.

⁸² *Adriano Gardella v. Côte d'Ivoire*, Award, 29 August 1977, 1 ICSID Reports 287.

⁸³ *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 357.

⁸⁴ *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 63.

⁸⁵ *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 466/7, 473, 490-494, 498-501, 504, 506.

⁸⁶ *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 221 *et seq.*

78. In another group of decisions, a more careful discussion of the interaction of international and national law can be observed. These cases follow the doctrine of the supplemental and corrective function of international law in relation to the host State's domestic law.

79. The *ad hoc* Committee in *Klöckner v. Cameroon*, found that where the host State's domestic law had to be applied together with international law, the principles of international law had a dual role namely:

... *complementary* (in the case of a "lacuna" in the law of the State), or *corrective*, should the State's law not conform on all points to the principles of international law. *In both cases*, the arbitrators may have recourse to the "principles of international law" only *after* having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to *one* principle, even a basic one) and *after* having applied the relevant rules of the State's law.

Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the "rules" or "principles of international law."⁸⁷

80. The Tribunal in *LETCO v. Liberia* reached a similar result. In discussing the system of concurrent law under the second sentence of Article 42(1) of the ICSID Convention it said:

The law of the Contracting State is recognized as paramount within its own territory, but is nevertheless subjected to control by international law. The role of international law as a "regulator" of national systems of law has been much discussed, with particular emphasis being focused on the problems likely to arise if there is divergence on a particular point between national and international law. No such problem arises in the present case; the Tribunal is satisfied that the rules and principles of Liberian law which it has taken into account are in conformity with generally accepted principles of public international law governing the validity of contracts and the remedies for their breach.⁸⁸

81. The *ad hoc* Committee in *Amco v. Indonesia* also subscribed to the formula of the supplemental and corrective function of international law:

20. It seems to the *ad hoc* Committee worth noting that Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the

⁸⁷ *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 122. Italics original.

⁸⁸ *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 358/9.

rules of the applicable domestic law are in collision with such norms. 21. ...The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every ICSID award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention...⁸⁹

82. The second Tribunal in the resubmitted case of *Amco v. Indonesia* accepted that international law was only relevant if there was a lacuna in the law of the host State, or if the law of the host State was incompatible with international law, in which case the latter would prevail. The Tribunal said:

40. This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as “only” “supplemental and corrective” seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law.⁹⁰

83. The Tribunal proceeded to examine the substantive questions before it in accordance with this method.⁹¹

84. In *SPP v. Egypt*, the Tribunal found that Egyptian and international law had to be applied. It held that if municipal law contained a lacuna or if international law was violated by the exclusive application of municipal law, the Tribunal was bound to apply international law directly. The Tribunal said:

84. When municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law.⁹²

⁸⁹ *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 515.

⁹⁰ *Amco v. Indonesia*, Resubmitted Case: Award, 5 June 1990, 1 ICSID Reports 580.

⁹¹ At pp. 599, 604/5, 611-613, 617.

⁹² *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 208.

85. The Tribunal applied international law in addition to national law in a variety of contexts. The Tribunal's findings on interest offer some interesting insights concerning the interaction of national and international law. On the rate of interest it held that the determination must be made according to Egyptian law because there was no rule of international law that would fix the rate or proscribe the limitation imposed by Egyptian law.⁹³ On the other hand, the Tribunal observed that Egyptian law lacked any provision concerning the date from which interest would run for compensation arising out of an act of expropriation. In the face of this gap in the host State's law, the Tribunal turned to international law, which it found to offer a rule providing for interest from the date on which the dispossession effectively took place.⁹⁴

86. In *CDSE (Santa Elena) v. Costa Rica*, the Tribunal stated that the relevant rules and principles of Costa Rican law were generally consistent with international law. But it added that in case of any inconsistency public international law would have to prevail.⁹⁵

87. In some cases tribunals have used language that might be interpreted in the sense of a priority or precedence of the host State's domestic law over international law. For instance, in *AGIP v. Congo*, the Tribunal said that the nationalisation measures in question "must be considered first of all in relation to Congolese Law."⁹⁶ But it does not appear that that this phrase was meant to signify a relationship of precedence. Rather it seems to indicate a temporal or methodological sequence: the examination of the issue should be undertaken first in relation to domestic law, then in relation to international law.

88. In *Antoine Goetz v. Burundi*,⁹⁷ the Tribunal applied a clause on applicable law in a BIT that listed the host State's law first and the other sources of law, including the BIT itself and principles of international law, subsequently. The Tribunal used language that seems to attribute significance to this succession of sources of law:

Que le Tribunal doive faire application du droit burundais ne saurait faire de doute, puisque aussi bien ce dernier est cité en tout premier

⁹³ At p.241/2.

⁹⁴ At pp. 243/4.

⁹⁵ *CDSE v. Costa Rica*, Award, 17 February 2000, 15 ICSID Review – FILJ 191 (2000).

⁹⁶ *AGIP v. Congo*, Award, 30 November 1979, 1 ICSID Reports 322.

⁹⁷ *Antoine Goetz v. Burundi*, Award, 10 February 1999, 15 ICSID Review – FILJ 454 (2000), <http://www.worldbank.org/icsid/cases/goetz.pdf>.

lieu par la disposition pertinente de la Convention belgo-burundaise d'investissement.⁹⁸

89. But it would seem that here too the phrase “en tout premier lieu” cannot be interpreted as endowing the host State’s law with a higher rank than international law. The Tribunal’s own analysis (see para. 49 *supra*) demonstrates that the Claimant’s right to compensation was upheld by reference to international law despite the fact that the Tribunal had found no illegality under the law of Burundi.

90. In a recent article in the ICSID Review,⁹⁹ Professor *W. Michael Reisman* of Yale Law School goes one step further. In interpreting the phrase “...the Tribunal shall apply the law of the Contracting Party to the dispute (...) and such rules of international law as may be applicable”, as it appears in Article 42(1) of the ICSID Convention, he postulates a primacy for the operation of the host State’s law over international law. A *lacuna* in the host State’s law requiring supplementation would, in his opinion, exist only when the State engages in transactions for which its legal system has not yet considered regulations or remedies, in other words in circumstances in which there is a socio-legal lag.¹⁰⁰ The corrective function of international law would only come into play in case domestic law violates fundamental international legal norms, in other words *jus cogens*. A mere inconsistency between domestic law and international law would not suffice.¹⁰¹

91. Even if one is not prepared to go as far as *Reisman*, the practice, as outlined above, makes it clear that the starting point for any analysis governed by a combined choice of law clause, such as in the present case, must be the host State’s law. The result thus reached may then be checked against international law. International law may be used to close gaps left by national law and to correct a result achieved on the basis of domestic law that is in violation of international law. But it is clearly impermissible to apply international law alone and to ignore or bypass the host State’s domestic law in this process.

⁹⁸ At p. 501.

⁹⁹ *Reisman, W. M.*, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold, 15 ICSID Review – FILJ 362 (2000).

¹⁰⁰ At pp. 371-373.

¹⁰¹ At pp. 374-377.

92. The correct position has been summarized succinctly by *A. Broches*, the leading authority on ICSID. He writes with respect to the second sentence of Article 42(1) of the ICSID Convention which provides for the application of domestic law and international law:

The Tribunal will first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law.¹⁰²

93. The fact that international law has a corrective function and that domestic law that is in violation of international law is to be disregarded does not make the examination and application of domestic law superfluous. There are good reasons why the tribunals, in the cases cited above, have insisted on the application of the host State's domestic law before turning to international law. Many questions are subject to detailed regulation in domestic law for which there is simply no corresponding rule in international law. The numerous provisions of civil law, commercial law, administrative law and corporate law of domestic legal systems illustrate this point. International law merely offers a broad international minimum standard against which these provisions of domestic law may be checked. A decision which can be based on the host State's domestic law need not be sustained by reference to international law. A tribunal may give a decision based on the host State's domestic law, even if it finds no positive support in international law as long as it is not prohibited by any rule of international law.¹⁰³ If the host State's law is more favourable than international law, including the BIT, Article 3(5) of the BIT gives precedence to domestic law. All of this makes the examination and application of domestic law indispensable.

6. The Partial Award of 13 September 2001

94. The above analysis makes it possible to evaluate the Stockholm Partial Award of 13 September 2001 from the perspective of the applicable law. As pointed out above (see para. 3

¹⁰² *Broches, A.*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 *Recueil des Cours* 331, 392 (1972-II).

¹⁰³ See also *Schreuer, C.*, The ICSID Convention: A Commentary 631 (2001).

supra), the parties choice of law in that case is contained in Article 8(6) of the BIT between the Netherlands and the Czech Republic. The law thus chosen combines the law of the Czech Republic and international law. Article 33(1) of the UNCITRAL Rules, applicable to the present arbitration, requires that the tribunal shall apply the law designated by the parties (see para. 7 *supra*). Therefore, the Stockholm Tribunal should have examined all relevant issues before it, first of all, from the perspective of the law of the Czech Republic. After doing so, it should have checked the result thus obtained for compliance with international law, especially the BIT. The record of the proceedings before the Stockholm Tribunal shows that Czech law was pleaded extensively. If the Tribunal had any remaining doubts as to the substance of Czech law, it should have requested more information from the parties, including expert opinions.

a. Denial of the Applicability of Czech Law

95. What the Tribunal did was entirely different. The Tribunal not only failed to apply the proper law, as set out in Article 8(6) of the BIT. It also stated quite openly that it was ignoring the law of the Czech Republic.¹⁰⁴ In paras. 467 and 469 the Tribunal said:

The Tribunal is not to decide on the Czech Administrative Law aspects of this question.

And

The Tribunal need not decide whether the contribution of the “use of the Licence” in 1993 was legally valid under Czech law.

96. Later on, the Tribunal was even more explicit and sweeping in para. 476:

It is not the Tribunal’s role to pass a decision upon the legal protection granted to the foreign investor for its investment under the Czech Civil Law and civil court system.

97. Finally it said in para. 590:

It is not the task of the Arbitral Tribunal to judge whether these acts [of the Media Council] were in compliance with Czech law and

¹⁰⁴ The one-sided attitude towards the applicable law is also demonstrated in the Partial Award’s dispositif, at para. 624(1), where the Tribunal finds violations of the BIT but does not even mention the equally applicable law of the Czech Republic.

regulations. The only task for this Tribunal is to judge whether the actions and omissions of the Media Council were in compliance with the Treaty [i.e. the BIT].

98. These statements are startling and unprecedented. They are startling because the Tribunal stated quite openly that it was not following the governing provision on applicable law in Article 8(6) of the BIT. They are unprecedented because they run counter to the entire practice of previous tribunals applying clauses on choice of law that combine references to the host State's domestic law and to international law. The authors of this opinion have not been able to find a single previous case in which a tribunal that was instructed to apply the host State's law in combination with international law declared that it was not its task to decide upon the basis of the host State's law but on the basis of international law or of a particular treaty alone.

99. It is not possible to distinguish the present case from the previous decisions on applicable law as set out above. Any attempt to distinguish the cases in which the choice of law clauses were contained not in a BIT but in a direct agreement between the parties (see paras. 24-25 *supra*) or in the second sentence of Article 42(1) of the ICSID Convention (see paras. 26-37 *supra*) would be highly unconvincing. The decisive common factor is the combination of the host State's law and international law in a choice of law clause governing the dispute. Even if such a distinction were possible, the fact remains that the Partial Award of 13 September 2001 also flatly contradicts a number of cases in which BIT clauses on the applicable law were applied by tribunals. These BIT clauses bear a close resemblance to Article 8(6) of the Netherlands/Czech BIT governing the present case (see paras. 3, 39-50 *supra*).

100. To appreciate the extraordinary nature of the decision on applicable law in the instant case one has to recall the cases in which awards were annulled for failure to apply the proper law. In *Klöckner* (see paras. 57-61 *supra*), the Tribunal had correctly identified the applicable law as the law of the State party to the dispute and such rules of international law as may be applicable. But despite this correct initial identification, it had shown negligence in identifying and articulating the precise provisions of the domestic law that it purported to apply. This was enough for the *ad hoc* Committee to annul the Award. In *Amco* (see paras. 62-66 *supra*) the Tribunal had also correctly found that the applicable law was Indonesian law and such rules of international law as it deemed applicable. But in applying Indonesian

law it had failed to take into account one particular rule of law that seemed decisive to the case. This was enough to lead to the annulment.

101. In the Partial Award of 13 September 2001, the Tribunal's mistake was much more egregious. Unlike the Tribunals in *Klöckner* and in *Amco*, the Stockholm Tribunal did not even clear the initial hurdle of identifying the applicable law correctly. On the contrary, it made statements that fly in the face of the clearly expressed choice of law clause in Article 8(6) the BIT between the Netherlands and the Czech Republic.

b. Non-Application of Decisive Elements of Czech Law

102. The Tribunal's mistake was not restricted to general statements on the applicable law. Its mistake on applicable law is manifest also in a number of specific contexts where the Tribunal was bound to apply the law of the Czech Republic but failed to do so.

103. The reluctance of the Tribunal to deal with issues of Czech law is not difficult to explain. For arbitrators who are not trained in a legal system that they are bound to apply the temptation to ignore or bypass that legal system is great. But yielding to that temptation may have serious consequences. As *W.M. Reisman* has put it:

Since [the]... task of exploration of the law may involve substantial investigation into a legal system with which the arbitrators have no training, first-hand experience, or even basic language facility, the burden may be great. But the difficulty of the task is no excuse for avoiding it.¹⁰⁵

104. As mentioned before, the burden was somewhat limited in the instant case by pleadings referring to Czech law extensively. In addition, it was open to the Tribunal actively to seek information on Czech law.

¹⁰⁵ *Reisman, W. M.*, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold, 15 ICSID Review – FILJ 362, 369 (2000).

105. The fact that Czech law was pleaded before the Tribunal is no indication that the Tribunal actually applied it.¹⁰⁶ Pleadings before the Tribunal merely show that the parties provided the necessary information. These pleadings and witness testimony relating to Czech law do not demonstrate that the Tribunal applied Czech law. Only the text of the Award itself indicates on what legal foundation it is based.

106. The issues to which Czech law should have been applied are numerous. But for purposes of this opinion it will suffice to take four examples to demonstrate that the Tribunal failed to apply Czech law to decisive questions before it. The examples are merely illustrative of a larger number of issues to which the Tribunal should have applied Czech law. The examples are:

1. The nature and consequences of the alleged coercion in 1996 and 1999;
2. The legal significance of the changes in the contractual arrangements between ČNTS and CET 21;
3. The legal significance of the action pending in the Czech courts for wrongful termination of the Service Agreement;
4. The issue of joint liability.

107. Point 1.: The Tribunal found that the Media Council in 1996 coerced CME to abandon the legal security for its investment in the Czech Republic.¹⁰⁷ It referred to the actions that it classified as coercion as “unlawful pressure”, “unlawful acts” and “(unlawful) situation of coercion”.¹⁰⁸ The Tribunal never indicated under what law it found these actions “unlawful”. Nor did it examine whether the Media Council’s actions were lawful or even required under Czech law. In fact, it was in this context that the Tribunal found that it was “not to decide on the Czech Administrative Law aspects of this question.”¹⁰⁹

108. The Tribunal’s treatment of the Media Council’s letter of 15 March 1999 was similar. In this context too, the Tribunal speaks of an “(unlawful) situation of coercion”,¹¹⁰ of

¹⁰⁶ The Statement of Defence of CME Czech Republic B.V. of 8 April 2002 seems to proceed from this erroneous assumption at pp. 43-46.

¹⁰⁷ Paras. 460-538.

¹⁰⁸ Paras. 515, 516, 518 and 521.

¹⁰⁹ Para. 467.

¹¹⁰ Para. 518.

“threat”,¹¹¹ of “interference by the Media Council in the economic and legal basis of CME’s investment”¹¹² “that would destroy the legal basis (the safety net) of the foreign investor’s investment.”¹¹³ The letter is described as “a tool to undermine the legal foundation of CME’s investment”¹¹⁴ supporting “efforts to destroy CME’s investment”.¹¹⁵ Here too, there is no reference whatsoever to the applicable Czech law by which this allegedly unlawful threat, act of coercion and interference is to be judged. It stands to reason that actions of a regulatory authority with the power to impose sanctions cannot be described in such wholesale manner without any examination of the legal parameters governing its actions. By the same token, describing the activities of tax authorities as “extortion” may have a popular ring but would be meaningless without an examination of the relevant law.

109. Neither did the Tribunal examine the consequences of coercion under Czech law. Under Czech law a contract obtained under coercion is null and void.¹¹⁶ In other words, even if the Tribunal’s finding of coercion was correct, under Czech law this could not possibly have had the consequence on the parties’ legal relationship that the Tribunal assumed. But the Tribunal never examined this question from the perspective of Czech law. In fact, it explicitly disavowed Czech civil law for purposes of its analysis.¹¹⁷

110. Point 2: The Tribunal treated the legal significance of the changes in the contractual arrangements, allegedly brought about by the “coercion”, in a similarly cavalier manner. It found that that the changes in the contractual arrangements between ČNTS and CET 21 substantially weakened the investor’s legal situation.¹¹⁸ In particular, it held that these changes “vitiating the Claimant’s protection”,¹¹⁹ “prejudiced the protection of the Claimant’s investment”,¹²⁰ “undermine the legal protection of CME’s investment”,¹²¹ that the changes

¹¹¹ Para. 550.

¹¹² Para. 551.

¹¹³ Para. 554.

¹¹⁴ Para. 555.

¹¹⁵ Para. 558.

¹¹⁶ Section 37(1) of the Czech Civil Code states that the contract must be made “svobodně” (i.e. freely), “vážně” (i.e. with a bona fide intention to enter into a contract); “určite” (i.e. in such a manner that the content of the contract can be determined) and “srozumitelně” (i.e. in such a manner that the parties’ intentions are sufficiently clear). The coercion element is covered by “svobodně” (i.e. freely).

¹¹⁷ Para. 476.

¹¹⁸ Paras. 471, 473, 475, 531, 573, 595, 598.

¹¹⁹ Para. 469.

¹²⁰ Para. 478.

¹²¹ Para. 480.

were “dismantling the legal basis of the foreign investor’s investments”,¹²² that “CME lost its legal protection for the investment”,¹²³ that the changes resulted in a “coerced vitiation of CME’s basis for its investment”¹²⁴ and led to “giving up legal security for CME’s investment”,¹²⁵ that it did “destroy the legal basis (the safety net) of the foreign investor’s investment”,¹²⁶ “jeopardized the legal basis of CME’s investment”,¹²⁷ “deprived the Claimant of it’s investment’s security”¹²⁸ and led “to the elimination of basic rights for the protection of its investment”¹²⁹.

111. It is clear that the contract between ČNTS and CET 21 was governed by Czech law. It follows that any such fundamental change in the contractual relationship between the two business partners could only be governed by Czech law. Therefore, it is astounding that none of these numerous assertions of a legal change to the detriment of the investor are substantiated by any references to Czech civil, commercial or corporate law. The deterioration of the investor’s legal situation is simply postulated.

112. Point 3: Under the Tribunal’s analysis, this weakening of the Claimant’s position led to the termination of the Service Agreement by CET 21 on 5 August 1999. This, in the Tribunal’s opinion, constituted a breach of contract. The immediate consequence was a lawsuit by ČNTS against CET 21 in the courts of the Czech Republic. The Regional Commercial Court in Prague on May 4, 2000 judged the termination void. On appeal, the Court of Appeal on 14 December 2000 confirmed the validity of the termination. Upon further appeal, the Czech Supreme Court on 14 November 2001 vacated the decision of the Court of Appeal and remanded the case.

113. Therefore, the issue of the consequences under Czech law of the “coercion” and of the legal relationship between ČNTS and CET 21 after the changes of 1996 are under consideration by the Czech courts. It is impossible to assess the situation under Czech law governing the contractual relationship between ČNTS and CET 21 without considering the

¹²² Para. 520.

¹²³ Para. 527.

¹²⁴ Para. 533.

¹²⁵ Para. 538.

¹²⁶ Para. 554.

¹²⁷ Para. 574.

¹²⁸ Para. 599.

¹²⁹ Para. 603.

position of the Czech courts on this matter. Whether the investor's legal position was really undermined as a consequence of the 1996 changes in the contract with CET 21 can only be assessed by reference to Czech law as applied by the Czech courts. If ČNTS were to fully prevail before the Czech courts, if the termination of the Service Agreement is held void and if CET 21 has to bear all legal consequences it is impossible to say that the 1996 change of the contractual arrangements undermined the investor's legal position.

114. The principle that an international court or tribunal must apply questions of domestic law by reference to the decisions of domestic courts of that country has long been established. Already in 1929 the Permanent Court of Justice stated:

Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. ...

It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.¹³⁰

115. This principle has been confirmed, more recently, by the International Court of Justice:

Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, ...¹³¹

116. The Stockholm Tribunal's position on the role of the courts of the Czech Republic is in stark contrast to these authoritative statements. The Tribunal's attitude towards these courts is dismissive if not disdainful. The outcome of the court proceedings is dismissed as irrelevant¹³² and "not dispositive".¹³³ The Court of Appeal is criticized for having "inadequately dealt with the facts and circumstances"¹³⁴ in "a highly unconvincing

¹³⁰ *Case of Brazilian Loans*, PCIJ Ser. A, Nos. 20/21, 1929, p. 124

¹³¹ *Case Concerning Elettronica Sicula (ELSI)* ICJ Reports 1989, p. 47.

¹³² Paras. 416, 417, 522, 525, 575.

¹³³ Para. 530.

¹³⁴ Para. 477.

judgment”.¹³⁵ No reasons are given for this harsh criticism. The fact that the decision of the court of first instance was overturned by the Court of Appeal which in turn is subject to review by the Supreme Court, in the Tribunal’s view, demonstrated a “legal uncertainty” through “contradictory Civil Court judgments”¹³⁶ or “differing court decisions”.¹³⁷ The nature of the Czech court decisions, in the Tribunal’s eyes, “clearly shows how fragile the Claimant’s investment is”.¹³⁸ The investment “was put at the risk of civil court decisions”.¹³⁹ The arrangement could easily be jeopardized again by “dragging ČNTS into Civil Court proceedings”.¹⁴⁰ The court proceedings exposed the investor to the “unacceptable legal and commercial risk of prolonged legal battles”.¹⁴¹ The Court of Appeal’s judgment “is a clear proof of the fragile character of the (coerced) 1996 amendment.”¹⁴²

117. It appears that the mere fact that the investor had to resort to the courts of the Czech Republic was taken as proof that the legal arrangements between ČNTS and CET 21, allegedly coerced upon the investor, were unsatisfactory. The system of appeal in the hierarchy of domestic courts was seen as constituting an unacceptable risk to the investor. No denial of justice or other impropriety by the courts of the Czech Republic was ever alleged. Rather, it appears that the Tribunal found that the need to resort to domestic courts in a dispute with a business partner in itself was enough to violate the investor’s rights regardless of the outcome of these court proceedings. The degree of protection granted to the investor by the domestic courts was immaterial to the Tribunal:

It is not the Tribunal’s role to pass a decision upon the legal protection granted to the foreign investor for its investment under the Czech Civil Law and civil court system.¹⁴³

118. The correct approach to the legal issues arising from the contractual arrangements between ČNTS and CET 21 would have been to examine them from the perspective of Czech law. The last word on matters of Czech law is with the Czech courts, notably the Supreme

¹³⁵ Para. 532.

¹³⁶ Para. 414.

¹³⁷ Paras. 474 and 598.

¹³⁸ Para. 414.

¹³⁹ Para 474.

¹⁴⁰ Para 475.

¹⁴¹ Para. 532.

¹⁴² Para. 597.

¹⁴³ Para. 476.

Court. Only after examining these issues from the perspective of Czech law and in the light of the final court decisions would it have been possible to check the result thus reached for compliance with international law. Not until the Czech courts have decided the issue will we know whether the change in the contractual arrangements deprived CME of the protection of its investment. What the Tribunal did was entirely different. It passed judgment on these questions on a discretionary basis without applying any discernible system of law, certainly not Czech law. It dismissed the role of the Czech courts as irrelevant and described any need to resort to them as an inherently unacceptable risk to the investor. In doing so, the Tribunal failed to apply the law applicable to the dispute as set out in Article 8(6) of the BIT between the Netherlands and the Czech Republic.

119. Awaiting the final decision of the Czech courts on this question would have been quite different from an exhaustion of local remedies. The exhaustion of local remedies deals with the prior pursuit of the primary claim against the State in question, in our case the Czech Republic. The lawsuit pending in the Czech courts is of a different nature. The lawsuit is between the two business partners ČNTS and CET 21. From the Tribunal's perspective, the domestic lawsuit concerns the preliminary question whether the Media Council's actions really contributed to destroying the legal protection of CME's investment under Czech law.

120. Point 4: In paragraphs 580-585 of its Award the Tribunal develops a theory of liability of joint tortfeasors. It states that "the Media Council's actions and omissions in 1999 must be characterized similar to actions in tort." It finds that the "aggrieved Claimant may sue the Respondent in this arbitration and it may sue Dr. Železný in separate proceedings". It finds that "[i]n this arbitration the Claimant's claim is not reduced by the Claimant's and/or ČNTS's possible claims to be pursued against Dr. Železný in other courts or arbitration proceedings, although the Claimant may collect from the Respondent and any other potential tortfeasor only the full amount of its damage."¹⁴⁴

121. These very specific findings on liability are not substantiated by any reference to Czech civil law. They are based exclusively on an interpretation of the International Law Commission's Draft Articles on State Responsibility of 2001. This interpretation, as developed by the Tribunal, does not reflect current international law (see paras. 149-200 *infra*). It does not even purport to represent Czech civil law which contains a very specific

provision on joint tortfeasors.¹⁴⁵ Therefore, Czech law, which would have been applicable, is totally ignored also in this context.

122. These four instances suffice to demonstrate that the Tribunal's rejection of the applicable Czech law was not merely theoretical. The Stockholm Award not only says that it is not applying Czech law. The Tribunal, in fact, ignored Czech law systematically on points where it clearly should have applied it. In the previous cases in which awards were annulled for non-application of the proper law, the Tribunals failed to apply individual provisions of the applicable law or showed negligence in substantiating the rules they were applying (see paras. 57-66 *supra*). By contrast, the Award of the Stockholm Tribunal systematically and consistently failed to apply Czech law contrary to the choice of law provision in Article 8(6) of the BIT.

c. Decision *ex aequo et bono* by *amiable compositeurs*

123. An overall reading of the Partial Award of 13 September 2001 creates the impression that over large portions of the Award the arbitrators felt that they were not bound by positive law but were performing the role of *amiable compositeurs* deciding *ex aequo et bono*. This impression is created by the explicit disavowal of Czech law as applicable and by numerous conclusions on legal matters without any accompanying legal authority. The Tribunal frequently passes judgment on the parties' activities without offering any legal basis. It refers to reasonableness¹⁴⁶ and to matters being unacceptable.¹⁴⁷ It denies that the Media Council's actions were "part of proper administrative proceedings"¹⁴⁸ without reference to Czech administrative law or, for that matter, any administrative law.

¹⁴⁴ Para. 582.

¹⁴⁵ Section 438(1) of the Czech Civil Code provides that "if damage is caused by more tortfeasors, they shall be jointly and severally liable for such damage". Under Section 438(2), the Czech court may use its reasonable discretion and, "in the circumstances justifying such discretion", rule that the joint tortfeasors should be liable in proportion to their individual participation on the causing of the damage. The Czech case law indicates that one of such circumstances may be a situation where one of the joint tortfeasors acted with a clear intention to cause the damage whilst the other joint tortfeasor(s) merely acted with negligence.

¹⁴⁶ Para. 526.

¹⁴⁷ Paras. 475, 532.

¹⁴⁸ Para. 603.

124. Decisions of international courts and tribunals based not on law but on equity are not unheard of. A number of documents governing international adjudication provide for decision *ex aequo et bono*.¹⁴⁹ The most famous provision of this kind is Article 38(2) of the Statute of the International Court of Justice.¹⁵⁰ The underlying idea is to free the decision-maker from the rigidities of positive law and to permit considerations of justice and fairness.

125. The relevant rule governing the proceedings before the Stockholm Tribunal is Article 33(2) of the UNCITRAL Arbitration Rules:

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.¹⁵¹

126. Therefore, the power of the tribunal to decide *ex aequo et bono* is contingent upon an agreement by the parties. This is the normal rule in international arbitration. If breached it would justify the setting aside of the award (see paras. 130-133 *infra*). No such agreement exists in the present case. Article 8(6) of the Netherlands/Czech BIT, which governs the applicable law in the instant case, is detailed and explicit in directing a tribunal to apply positive law. Article 8(6) specifically says in part:

The arbitral tribunal shall decide on the basis of the law, ...

127. A subsequent agreement between the parties before the tribunal on a decision *ex aequo et bono* would have been possible.¹⁵² But there is no evidence of such an agreement in the instant case. Consequently, there is no need to look into the question of whether the law applicable to the arbitral procedure permits arbitration by *amiable compositeurs*.

¹⁴⁹ ICC Rules of Arbitration (1998), Art. 17(3), 36 ILM 1612 (1997); ICSID Convention, Article 42(3) ; ILC Model Rules on Arbitral Procedure (1958), Art. 10(2), YBILC 84 (1958-II). See also *Sohn, L. B.*, The Function of International Arbitration Today, 108 Recueil des Cours 1 at 41-59 (1963-I); *Scheuner, U.*, Decisions *ex aequo et bono* by International Courts and Arbitral Tribunals, *in*: International Arbitration Liber Amicorum for Martin Domke 275 (1967); *Lauterpacht, E.*, Aspects of the Administration of International Justice 117 *et seq.* (1991); *Schreuer, C.*, Decisions *Ex Aequo et Bono* Under the ICSID Convention, 11 ICSID Review – FILJ 37 (1996).

¹⁵⁰ Art. 38(2): This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

¹⁵¹ <http://www.uncitral.org/en-index.htm>.

¹⁵² *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 338, 342, 349; *Schreuer, C.*, Decisions *Ex Aequo et Bono* Under the ICSID Convention, 11 ICSID Review – FILJ 42-44 (1996).

128. The fact that the Stockholm Tribunal does refer to international law in some contexts, notably to the substantive provisions of the Netherlands/Czech BIT, is no proof that it did not decide *ex aequo et bono*.¹⁵³ Other than the provisions of the BIT, the Tribunal did not in fact apply international law. Occasional and selective references to certain sources of international law are not proof that the Tribunal applied international law. The Tribunal was required to apply international law systematically, consistently and fully to all issues to which Czech law is not applicable. The Tribunal did not do so. Reference to one international arbitration case,¹⁵⁴ to one publicist,¹⁵⁵ or to an ILC Commentary¹⁵⁶ are not sufficient evidence of international law.

129. For example, the Tribunal purported to apply international law to the issue of coercion. In doing so, it made reference to one article by one professor.¹⁵⁷ This is not sufficient evidence of international law. This could possibly be the case if that article clearly established the elements of coercion in international law. But Professor Vagts' recommendations on the elements of a code of unfair bargaining practices during investor-government negotiations¹⁵⁸ are not principles of international law. Professor Vagts himself presents his conclusions as desirable possible solutions for the future and not as existing law.¹⁵⁹ The Tribunal also purported to apply international law to the issue of joint liability, relying exclusively on the International Law Commission's Articles on State Responsibility.¹⁶⁰ But the ILC Articles and Commentary on State Responsibility do not purport to restate current international law. Rather, they constitute a combination of codification and of progressive development. This issue is discussed in more detail below (see paras. 149-200 *infra*).

¹⁵³ It is not uncommon for tribunals that decide *ex aequo et bono* to deal with certain aspects of a case in accordance with the law and with others on the basis of equity. See *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 350, 357, 361; *Atlantic Triton v. Guinea*, Award, 21 April 1986, 3 ICSID Reports 17, 19, 23, 30, 32, 33, 36, 42. See also *Schreuer, C.*, *The ICSID Convention: A Commentary* 639 (2001).

¹⁵⁴ Para. 398.

¹⁵⁵ Para. 517, 526.

¹⁵⁶ Paras. 580, 583-584.

¹⁵⁷ Para. 526.

¹⁵⁸ *Vagts, D.F.*, *Coercion and Foreign Investment Rearrangements*, 72 *American Journal of International Law* 17 (1978).

¹⁵⁹ At pp. 33-36.

¹⁶⁰ At paras. 580, 583-584.

130. A decision based on equity, rather than on law, without an authorization by the parties, constitutes an excess of powers for failure to apply the proper law.¹⁶¹ The ICSID Convention contains a provision on decision *ex aequo et bono* which is similar to Article 33(2) of the UNCITRAL Arbitration Rules.¹⁶² In annulment proceedings under the ICSID Convention, *ad hoc* committees have consistently held that a decision *ex aequo et bono* without a party authorization amounts to an excess of powers.

131. In *Klöckner v. Cameroon*, the *ad hoc* Committee, relying on earlier non-ICSID arbitral awards, held:

Excess of powers may consist of the non-application by the arbitrator of the rules contained in the arbitration agreement (*compromis*) or in the application of other rules. Such may be the case if the arbitrator ... reaches a solution *in equity* while he is required to decide *in law*¹⁶³

132. In *Amco v. Indonesia*, the Tribunal noted that the parties had not agreed to entrust the Tribunal with the power to decide *ex aequo et bono* and that, therefore, it had to decide according to the applicable rules of law.¹⁶⁴ The *ad hoc* Committee found that no impermissible resort to equitable principles appeared in the Award. But it still pointed out that in view of the law applicable to the case a decision *ex aequo et bono*

... would constitute a decision annulable for manifest excess of powers. Nullity would be a proper result only where the Tribunal decided an issue *ex aequo et bono* in lieu of applying the applicable law.¹⁶⁵

¹⁶¹ See *Broches, A.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, 18 Yearbook of Commercial Arbitration 627, 666 (1993); *Delaume, G. R.*, L'affaire du Plateau des Pyramides et le CIRDI. Considérations sur le droit applicable, Revue de l'arbitrage 39, 55 (1994); *Feldman, M. B.*, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID Review—Foreign Investment Law Journal 85, 104 (1987); *Giardina, A.*, ICSID: A Self-Contained, Non-National Review System, in: International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity? (*Lillich, R. B./Brower, C. N.* eds.) 199, 212 (1994); *Seidl-Hohenveldern, I.*, Die Aufhebung von ICSID Schiedssprüchen, 2 Jahrbuch für die Praxis der Schiedsgerichtsbarkeit 100, 108 (1989); *Schreuer, C.*, Decisions Ex Aequo et Bono Under the ICSID Convention, 11 ICSID Review—Foreign Investment Law Journal 37, 53, 61 (1996); *Schreuer, C.*, The ICSID Convention: A Commentary 956-962 (2001).

¹⁶² Article 42(3) of the ICSID Convention: "(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree." For Article 42(1) of the ICSID Convention see para.15 *supra*. Article 42(2) contains a prohibition of a finding of *non liquet*.

¹⁶³ *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 119. Italics original.

¹⁶⁴ *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 452.

¹⁶⁵ *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 516, 517.

133. The principle that a decision based on equity without authorization constitutes an excess of powers was confirmed in *MINE v. Guinea*. The *ad hoc* Committee pointed out that, unless the parties had agreed on a decision *ex aequo et bono*, a decision not based on any law would constitute a derogation from the tribunal's terms of reference.¹⁶⁶ In the particular case, no such decision was found to exist.

134. The approach of the Stockholm Tribunal may be illustrated by looking at one particular finding in the Partial Award. In referring to Dr. Železný's activities, the Tribunal speaks of an "unconcealed violation ... of his duties under corporate and civil law", again without any references to Czech or any other system of law. The Tribunal concludes that this breach of duties, which led to the harmful consequences for the investor, was "a breach of law that must be assessed as a serious criminal offence in any functioning judicial system."¹⁶⁷

135. These unspecific references to corporate, civil and criminal law and the reliance on standards inherent in any functioning judicial system are strongly reminiscent of an episode in the *Klöckner* case. In that case the applicable law was Cameroonian law based on French law. The parties had not authorized the Tribunal to decide *ex aequo et bono*. In looking at the investor's obligations the Tribunal made the following statement:

We take for granted that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under the other national codes which we know of. This is the criterion that applies to relations between partners in simple forms of association anywhere.¹⁶⁸

136. The Tribunal did not substantiate this statement with any further reference to French law but continued to refer to "universal requirements of frankness and loyalty."¹⁶⁹

137. In the annulment proceedings, the *ad hoc* Committee held that the Tribunal's broad finding on an obligation of full disclosure amounted to an unauthorized resort to equitable principles:

¹⁶⁶ *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 87.

¹⁶⁷ Para 552.

¹⁶⁸ *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 59.

¹⁶⁹ At p. 60.

77. Now, the Award's reasoning and the legal grounds on this topic (...) seem very much like a simple reference to equity, to "universal" principles of justice and loyalty, such as amiable compositeurs might invoke.¹⁷⁰

138. This, in the Committee's view, constituted a manifest excess of powers since the Tribunal had acted

... outside the framework provided by Article 42(1), applying concepts or principles it probably considered equitable (acting as an amiable compositeur, which should not be confused with applying "equitable considerations" as the International Court of Justice did in the *Continental Shelf* case). However justified its award may be (a question on which the Committee has no opinion), the Tribunal thus "manifestly exceeded its powers" within the meaning of Article 52(1)(b) of the Washington Convention.¹⁷¹

Therefore, the Award was annulled in its entirety.

139. The annulment decision in *Klöckner* has attracted criticism.¹⁷² In particular, it was argued that the Tribunal had identified the applicable law correctly but had merely erred in the details of its application. The *ad hoc* Committee in *Klöckner* was not so much concerned with the application or not of the proper law, nor even with its correct application, but rather with the judicial quality of the reasoning underlying it. The main shortcoming of the Tribunal's reasoning in *Klöckner* was its laxity in citing sources and its failure to rely on specific legal authority (see paras. 57-61 *supra*).

¹⁷⁰ *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 124.

¹⁷¹ At p. 125.

¹⁷² *Broches, A.*, Observations on the Finality of ICSID Awards, 6 ICSID Review—Foreign Investment Law Journal 321, 360 *et seq.* (1991); *Feldman, M. B.*, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID Review—Foreign Investment Law Journal 85, 92, 101 *et seq.* (1987); *Paulsson, J.*, ICSID's Achievements and Prospects, 6 ICSID Review—Foreign Investment Law Journal 380, 389 (1991); *Pirrwitz, B.*, Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 23 Texas International Law Journal 73, 103, 106 (1988); *Redfern, D. A.*, ICSID—Losing its Appeal?, 3 Arbitration International 98, 106 *et seq.* (1987); *Reisman, W. M.*, The Breakdown of the Control Mechanism in ICSID Arbitration, Duke Law Journal 739, 766 *et seq.* (1989); *Berranger de, T.*, L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique, Revue de l'Arbitrage 93, 112, 114 (1988); *Gaillard, E.*, Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales, 114 Journal du Droit International 135, 140 (1987); *Kahn, P.*, Le contrôle des sentences arbitrales rendues par un Tribunal CIRDI, *in*: La juridiction internationale permanente (Société Française pour le Droit International, Colloque de Lyon) 363, 376 (1986); *Schreuer, Ch.*, Decisions Ex Aequo et Bono Under the ICSID Convention, 11 ICSID Review—Foreign Investment Law Journal 57-59 (1996).

140. The situation in the instant case is different. The Stockholm Tribunal declared quite openly that it was not applying Czech law (see paras. 95-97 *supra*). In addition, the Award of 13 September 2001 displays a major and systematic departure from the applicable law coupled with numerous findings that are not based on any law. The Stockholm Tribunal did not just make isolated mistakes or failed to substantiate findings based on the proper law but chose to disregard the proper law in favour of what it perceived as equitable. This is strong evidence that the Tribunal chose to decide *ex aequo et bono* without being authorized to do so by the parties. Therefore, any misgivings expressed in relation to the annulment in Klöckner would not apply to the case under review.

7. Conclusions on the Failure to Apply the Proper Law

141. The conclusions of this part of the opinion may be summarized as follows:

142. The power of arbitrators derives from an agreement of the parties. The applicable law is often determined as part of this agreement. In the present case, this choice of law is based on Article 8(6) of the Bilateral Investment Treaty between the Netherlands and the Czech Republic. This clause refers to the host State's law as well as to international law.

143. Where a provision on applicable law combines reference to domestic law as well as to international law, tribunals are under an obligation to apply both systems of law. This is borne out by the practice of previous arbitration tribunals. In particular, in the cases in which tribunals had to apply choice of law clauses in BITs that are similar to the one applicable in this arbitration they have carefully examined and applied the relevant domestic law.

144. Failure to apply the proper law constitutes an excess of powers. Tribunals that failed to apply the host State's domestic law, although the latter was part of the applicable law, were found to have committed an excess of powers. The awards tainted by this form of excess of powers were annulled.

145. In the relationship between the host State's domestic law and international law, the latter has a supplemental as well as a corrective function. This means that domestic law that

is in violation of international law will not be applied by the tribunal. But the tribunal remains under the obligation to apply domestic law and then examine it for compliance with international law.

146. The Stockholm Tribunal did not respect the clause on applicable law in the Bilateral Investment Treaty. Rather, it flatly denied that it was its task to apply the law of the Czech Republic.

147. The Tribunal's failure to apply the proper law was not restricted to general statements. Rather, the Tribunal failed to apply provisions of Czech law to numerous specific questions where it should have done so.

148. A decision *ex aequo et bono* is permissible only with the express authorization of the parties. No such permission was given in the present case. The Tribunal's widespread failure to rely on law and its recurrent references to principles that appear appropriate creates the impression of an unauthorized decision *ex aequo et bono*. Such a decision constitutes an excess of powers and is liable to lead to annulment.

PART TWO: JOINT TORTFEASORS

1. The Award of the Stockholm Tribunal

149. The Award of the Stockholm Tribunal bases its findings concerning the alleged joint and several liability of Dr. Železný and the Czech Republic largely on the work of the International Law Commission (ILC) of the United Nations on the responsibility of States for internationally wrongful acts.¹⁷³ The Stockholm Tribunal argues that the ILC "in its Commentary on State responsibility recognizes [that] a State may be held responsible for

¹⁷³ Partial Award, paras. 580-585.

injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury”.¹⁷⁴

150. With regard to cases of concurrent causality, i.e. where several acts or factors combine to cause damage, the award reproduces the text of the ILC commentaries to article 31 on the duty of a State having committed an internationally wrongful act to make good the damage caused by that act. In particular, the Award quotes from the ILC commentary that “international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes”.¹⁷⁵

151. The Award further argues that “[t]his approach is consistent with the way in which liability of joint tortfeasors is generally dealt with in international law and State practice” and quotes from a chapter of the *International Encyclopaedia of Comparative Law*.¹⁷⁶

152. With regard to the facts as established by it, the Tribunal holds that the interference in 1996 of the Media Council with CME’s investment “by depriving ČNTS’s broadcasting operations of their exclusive use of the broadcasting licence, which was contributed by CET 21 to ČNTS as a corporate contribution”, as well as the “Media Council’s actions and omissions in 1999 must be characterized similar to actions in tort”.¹⁷⁷ Therefore, the Tribunal concludes that the legal principles and “standards” as established above apply, and that “CME as aggrieved Claimant may sue the Respondent in this arbitration and it may sue Dr. Železný in separate proceedings”. And further: “In this arbitration the Claimant’s claim is not reduced by the Claimant’s and/or ČNTS’s possible claims to be pursued against Dr. Železný in other courts or arbitration proceedings, although the Claimant may collect from the Respondent and any other potential tortfeasor only the full amount of its damage.”¹⁷⁸

153. Concerning the question of concurrent causation, the Tribunal finally concludes that the allocation of the entire injury or loss allegedly “suffered by CME to the Media Council’s acts

¹⁷⁴ *Ibid.*, at para. 580, with reference to the commentary on article 31 of the ILC’s Articles. The ILC’s Articles are reproduced in the Report of the ILC on the work of its 56th session (2001), <http://www.un.org/law/ilc/index.htm>.

¹⁷⁵ Partial Award, para. 583. ILC commentary to article 31, *supra* note 174, at para. (12). The two most prominent cases in this respect are the *Diplomatic and Consular Staff in Tehran* and the *Corfu Channel* cases, both of which are referred to by the ILC.

¹⁷⁶ Partial Award, para. 581.

¹⁷⁷ *Ibid.*, para. 582.

¹⁷⁸ *Ibid.*

and omissions is appropriate”.¹⁷⁹ The main argument of the Stockholm Tribunal is that the Media Council “must have understood the foreseeable consequences of its actions, depriving CME of the legal ‘safety net’ for its investment in the Czech Republic”.¹⁸⁰ The Tribunal also takes the view that “in 1999 the Media Council must have foreseen the consequences of supporting Dr. Železný, in dismantling the exclusiveness of ČNTS’ services for CET 21 by the Council’s regulatory letter of May 15, 1999, which supported Dr. Železný’s actions ‘to harm ČNTS’”.¹⁸¹

2. General Considerations on State Responsibility

a. Codification of State Responsibility by the International Law Commission

154. Before addressing the question of “joint liability” or “liability of joint tortfeasors” under international law, several basic principles of the international responsibility of States, which appear to have been confounded by the Arbitral Tribunal, shall be briefly explained and, more importantly, distinguished.

155. To date, there is no treaty, convention, or other binding instrument which prescribes in a comprehensive manner the international legal rules on State responsibility. The International Law Commission (ILC) of the United Nations has been working on a codification of this topic since 1956. After decades of debate and discussion, the ILC adopted the “Draft Articles on Responsibility of States for Internationally Wrongful Acts” upon second reading without a vote and with consensus in its session in 2001. These articles were annexed to a resolution of the General Assembly of the United Nations in which the General Assembly welcomed the

¹⁷⁹ *Ibid.*, para. 585.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

conclusion of the ILC's work on State responsibility and commended the articles to the attention of Governments.¹⁸²

156. The ILC was established in 1947 as a subsidiary organ of the United Nations General Assembly according to Article 22 in conjunction with Article 13 para. 1a of the Charter of the United Nations.¹⁸³ It consists of 34 independent experts elected by the General Assembly, whose task is to elaborate draft rules on various topics of international law and to adopt solutions which are acceptable to governments.

157. Article 13 of the UN Charter as well as Article 1 of the ILC Statute provide for a distinction in the tasks of the ILC between codification and progressive development.¹⁸⁴ According to Article 15 of the ILC Statute, codification means the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine. By contrast, progressive development of international law is to be understood as the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.

158. However, despite this strict separation of codification and progressive development in the UN Charter and the ILC Statute, the theoretical value of this distinction is very limited.¹⁸⁵ As the record shows, no convention elaborated by the ILC clearly constitutes either codification or progressive development; on the contrary, most conventions and drafts consist of elements of codification as well as progressive development, and even individual provisions at times combine the processes of restatement of existing principles with the formulation of new principles.

159. This holds also true for the ILC's Articles on State responsibility which have to date not taken the form of a treaty or convention, but constitute a mere recommendation. Some parts

¹⁸² UN GAREs 56/83.

¹⁸³ Article 13 para. 1a provides that "[t]he General Assembly shall initiate studies and make recommendations for the purpose of [...] encouraging progressive development of international law and its codification". Article 22 reads as follows: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." For details on the ILC see *Briggs, H.*, *The International Law Commission* (1965); *Sinclair, I.*, *The International Law Commission* (1987).

¹⁸⁴ Article 1 para. 1 of the ILC Statute provides: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."

¹⁸⁵ *Jennings, R & Watts, A.*, *Oppenheim's International Law* (9th ed. 1992), volume I, 110, § 31.

of the draft undoubtedly are declaratory of customary international law,¹⁸⁶ while others contain certain elements of progressive development.

b. Basic Principles of State Responsibility as Relevant in the Present Case

1.) The Rules of Attribution

160. The law of State responsibility is based on the essential premise that a State is only responsible for conduct, consisting in an action or an omission, which violates an obligation incumbent on it under international law and which is attributable to it. Accordingly, the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts stipulates in Article 2:¹⁸⁷

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

161. As Article 2 para. (a) makes it clear, attribution is a necessary condition for State responsibility. A State is not responsible for conduct unless that conduct is attributable to it under at least one of the "positive attribution" principles set out by the International Law Commission in chapter II of Part One (articles 4-11). This means that a State cannot be held responsible for conduct of other States or of private individuals. This principle appears to be valid without exception, for even in those cases where conduct of other entities (States,

¹⁸⁶ See, e.g., the Articles on state of necessity and *force majeure*, which have been acknowledged as reflecting customary international law: *Rainbow Warrior (New Zealand v. France)*, Arbitral Tribunal, Decision of 30 April 1990, 20 Reports of International Arbitral Awards 218, 252-255, paras. 76-79; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, 7, 39-46, paras. 49-58; *The MV "Saiga" (No. 2) case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea 1999, paras. 132-125. In the *Lafico* case the Tribunal did not express opinion on the customary character of the ILC's articles on the circumstances precluding wrongfulness. The Tribunal nevertheless applied the relevant articles to the case it had to decide, see *Lafico and the Republic of Burundi*, Arbitral Tribunal, Award of 4 March 1991, 96 International Law Reports 282, 318, paras. 55-56.

¹⁸⁷ The ILC's Articles are reproduced in the Report of the ILC on the work of its 56th session (2001), <http://www.un.org/law/ilc/index.htm>.

international organisations etc.) or of private individuals are “imputed” to a State, the latter is only responsible for its own internationally wrongful conduct. For instance, in case of an attack by private individuals against the embassy of the sending State, the receiving State can only be responsible for its own conduct consisting in a failure to prevent the attack; but it is not responsible for the attack itself, which is committed by private individuals.¹⁸⁸ The latter’s acts are only the “occasion” for, and not the basis of, the receiving State’s responsibility for its own omissions.

162. The rules of attribution relevant for the present case are the rule on direction or control of the State over the conduct of the private individual, and the rule on the acknowledgement and adoption of the individual’s conduct by the State. They will be dealt with in the following paragraphs.

163. The rule on direction or control is governed by article 8 of the ILC’s articles which provides:

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the persons or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

164. In the exceptional circumstances that a State instructs, directs or controls the conduct of private persons or entities, this private conduct may be converted to conduct of the State under strict conditions. In particular with regard to conduct carried out “under the direction or control” of a State, the degree of control which must be exercised by the State in order for the conduct to be attributable to it is very high. This was held by the International Court of Justice in the *Military and Paramilitary Activities* [hereinafter *Nicaragua*] case. There the Court had to address the question whether the conduct of the Nicaraguan *contras*, who were supported by the United States, was attributable to the latter so as to hold the United States responsible for breaches of international humanitarian law committed by the *contras*. The

¹⁸⁸ See already the Report of the Committee of Jurists in the *Tellini* case of 1923, which established the modern rule: “In accordance with the criteria which have gradually been affirmed in international legal relations, the act of a private person not acting on behalf of the State cannot be attributed to the State and cannot as such involve the responsibility of the State.” League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924), p. 524, as adopted unanimously by the Council of the League.

Court came to the conclusion that the *contras* heavily depended on the United States in terms of planning, financial, military and logistic support. Nevertheless, the Court held that

even the general control by the respondent State over a force with a high degree of dependency on it, would not in [itself] mean [...] that the United States directed or enforced the perpetration of the acts contrary to [international law]. [...] For this conduct [of the *contras*] to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.¹⁸⁹

165. As the ILC commentary to article 8 points out,¹⁹⁰ the Court thus confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State. Instead, what is required is that the State directs or controls a specific operation and the conduct of the individual is an integral part of that operation.¹⁹¹

166. It is true that the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case applied a lower degree of control of a State over the actions of individuals.¹⁹² However, the Yugoslavia Tribunal was concerned with legal issues as well as facts which were completely different from those relevant in the *Nicaragua* case. The Tribunal's mandate is directed to issues of criminal responsibility of individuals, not State responsibility; and the question in that case concerned not responsibility at all, but the applicable rules of international humanitarian law.¹⁹³

167. In the present case, neither Dr. Železný nor CET 21 have been dependent on or effectively controlled by the Czech Republic. Both acted in their capacity as private individuals, and the Media Council at no moment exercised *control*, let alone *effective control* over their conduct; nor did the Media Council direct Dr. Železný or CET 21 in their conduct towards CME.

¹⁸⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, ICJ Reports 1986, 14, at para. 115.

¹⁹⁰ Commentary to article 8, para. (4).

¹⁹¹ *Ibid.*, para. (3).

¹⁹² *Prosecutor v. Tadić*, Case IT-94-1, International Criminal Tribunal for the Former Yugoslavia (1999), 38 International Legal Materials, p. 1518, at p.1541, para. 117.

¹⁹³ This important point is made clear in the ILC's commentary to article 8, para. (5).

168. The second relevant rule of attribution relevant in the present context is that of acknowledgement and adoption of the conduct of the private individual by the State as its own. The relevant provision is article 11:

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

169. Article 11 covers cases where a State acknowledges and adopts a conduct previously carried out by private individuals or entities. The *cause célèbre* in this respect is the *Diplomatic and Consular Staff in Tehran* case decided by the International Court of Justice. After militant students had seized the United States embassy and its personnel in Tehran, the Iranian State issued a decree which expressly approved and maintained the situation. The Court drew a clear distinction between the two events, when it held:

The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.¹⁹⁴

170. Despite the clarity of the rule so established, several remarks must be made. First, the elements of “acknowledgement” and “adoption” are formulated in a cumulative way. Only if a State acknowledges *and* adopts the private conduct as its own, will this conduct be attributable to it.¹⁹⁵ Second, the act of acknowledgment and adoption, whether it takes the form of words or conduct, “must be clear and unequivocal”.¹⁹⁶ Thus, in the *Diplomatic and Consular Staff* case, the Ayatollah issued an official decree in his capacity of head of State.

¹⁹⁴ *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, ICJ Reports 1980, 3, at 35, para. 74.

¹⁹⁵ ILC commentary to article 11, para. (9).

¹⁹⁶ ILC commentary to article 11, para. (8).

Moreover, this decree and its content were repeatedly confirmed and generally complied with by other State organs of Iran.¹⁹⁷

171. Third, it must be emphasized that the principle established by article 11 governs the question of attribution only. Even where conduct has been acknowledged and adopted by a State, it will still be necessary to establish that the conduct itself was internationally wrongful.¹⁹⁸ For example, in the *Tehran* case, it was clear that Iran violated its obligation under international law by not applying due diligence in preventing the attack against the United States embassy and the taking of hostages of the personnel. However, if Iran had applied due diligence but if it could nevertheless not prevent the attack, it would not have become responsible for this attack under international law, even if it had subsequently acknowledged and adopted this attack.¹⁹⁹ The mere attribution of private conduct does not replace the illegality of that conduct, illegality being a necessary element for State responsibility.

172. This is made clear by the commentary of the International Law Commission which states that “a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity”.²⁰⁰

173. Finally, article 11 provides that the State must acknowledge and adopt the conduct in question “as its own”. This phrase is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.²⁰¹ In international controversies, States often take positions which amount to approval or endorsement of private conduct in some general sense but do not involve any assumption of responsibility. Accordingly, what is required by article 11 is something more than a general acknowledgement, endorsement or support of private conduct; rather, the State must make the conduct in question its own in a clear and unequivocal manner.

¹⁹⁷ See the part of the Judgment in the quotation accompanying footnote 194.

¹⁹⁸ ILC commentary to article 11, para. (7).

¹⁹⁹ This assumption of course holds only true for Iran’s obligation to prevent the attack. The legal situation is certainly different with regard to the continuing obligation to free the hostages.

²⁰⁰ ILC commentary to article 11, para. (7).

²⁰¹ ILC Commentary to article 11, para. (6).

174. In applying article 11 to the present case and in the light of the commentary by the International Law Commission as set out above, it is clear that there is no such clear and unequivocal acknowledgement and adoption on the part of the Czech Republic of the conduct by Dr. Železný. The Stockholm Tribunal itself takes the view²⁰² that “[t]he Czech Republic, acting through its broadcasting regulator, the Media Council, massively supported Dr. Železný in his efforts to destroy CME’s investment in the Czech Republic”. However, according to article 11 of the ILC’s Articles on State Responsibility and the commentary thereto, such mere support — even if it may be massive — does not suffice of itself to attribute the private conduct of Dr. Železný to the Czech Republic.

175. Further, the actions of the Media Council fail to be of such a nature as to amount to an acknowledgement and adoption of the private conduct of Dr. Železný. The letter dated 15 March 1999, which the Stockholm Tribunal considers so essential in establishing Respondent’s responsibility,²⁰³ did not contain any binding order, directive, instruction or similar official act. The Stockholm Tribunal itself considers that by this letter “the Media Council did not pursue any regulatory purpose”.²⁰⁴ Compared to the official decree by the Ayatollah, which the International Court of Justice deemed so essential in the *Diplomatic and Consular Staff* case, the conduct by the Media Council can hardly be considered as an adoption and acknowledgement of the acts performed by CET 21 and Dr. Železný.

2.) Causality/Causation

176. The various factors relevant in the context of the origin of State responsibility are strictly to be distinguished. Thus even where a specific conduct is attributable to a State, it will still be necessary to establish that this attributable conduct is contrary to an international legal obligation of the acting State. In other words, to demonstrate that a certain conduct is attributable to a State does not imply or even prejudice the legality or illegality of this conduct. Conversely, an act which is said to be in violation of an international obligation of a State must, in order to entail the responsibility of that State, be attributable to the latter.

²⁰² Partial Award, para. 558.

²⁰³ See, e.g., Partial Award, paras. 544-558.

²⁰⁴ Partial Award, para. 554.

177. Likewise, the fact that the conduct of a State is considered causal in relation to an injury suffered says nothing about the question as to whether this conduct was contrary to international law or, more specifically, contrary to an international legal obligation of that State. International law requires for responsibility to attach to an act of a State that the conduct must constitute a breach of an international legal obligation in force for that State at that time.²⁰⁵ As Graefrath puts it, “State responsibility results from an internationally wrongful act, not from damage”.²⁰⁶ Neither the establishment of attribution of a conduct to a State, nor the establishment of the causation of damage by this attributable conduct suffice of themselves to entail State responsibility.

178. The award of the Stockholm Tribunal erroneously confounds these separate requirements or elements of State responsibility, i.e. wrongful conduct, attribution, and causality. In particular, it finds that the Media Council’s alleged actions and omissions “caused the complete destruction of CME’s investment”.²⁰⁷ The Tribunal thus equates the alleged causality of the Media Council’s conduct with the alleged violation of international law. And it does so by incorrectly relying on the work of the International Law Commission. The Tribunal wrongly refers to the commentary of the International Law Commission to article 31 on reparation. It is true that the International Law Commission in its commentary states that in cases where the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international judicial practice appears not to support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.²⁰⁸ However, this general observation must be qualified in two aspects.

179. First it is clear that article 31 of the ILC’s articles requires that it is established that the State whose conduct is in question has violated an obligation incumbent on it under international law. Only after the illegality of the conduct is clearly ascertained, may the causality of this conduct be scrutinized. It is significant that the Stockholm Tribunal deals with the issue of causation *before* it addresses the question as to whether the acts and

²⁰⁵ This is clearly evidenced by para. (b) of Article 2. With the exception of a few specific treaty regimes, not relevant here, international law does not provide for liability of States for lawful activities causing damage or injury to other States.

²⁰⁶ Graefrath, B., Responsibility and Damages Caused: Relationship between Responsibility and Damages, 185 *Receuil des cours – Collected Courses of The Hague Academy of International Law* 9, 34 (1984 II).

²⁰⁷ Partial Award, para. 579.

²⁰⁸ ILC commentary to article 31, para. (12).

omissions by the Respondent, as established by the Tribunal, amounted to a violation of the Treaty at all.

180. Second, the International Law Commission bases its comment on concurrent causes on two cases decided by the International Court of Justice, namely the *Corfu Channel* and the *Diplomatic Staff in Tehran* cases, the former also being invoked by the Stockholm Tribunal.²⁰⁹ Yet these cases have to be distinguished from the present case in that they were concerned with direct injury between two States. More importantly, in the *Corfu Channel* case²¹⁰ as well as in the *Diplomatic and Consular Staff* case²¹¹ the relevant conduct of the State whose responsibility was clearly established was performed *after* the concurrent acts by the other State or the private individuals. Thus in the *Corfu Channel* case, after a third State had laid the mines Albania did not warn other States of the presence of those mines. In the *Diplomatic and Consular Staff* case, the militant students first attacked and seized the United States Embassy. Thereafter, this illegal situation was acknowledged and approved by Iran. Hence in both cases the unlawful conduct of the responsible State itself was the intervening and last cause for the damage inflicted.

181. In the present case, however, the situation is exactly the reverse. The acts by the Media Council were superseded by the acts of a private individual or entity, respectively. The termination by CET 21, which was controlled by Dr. Železný, of the Service Agreement in 1999 was the ultimate or immediate cause for the damage allegedly suffered. The “chain of causes”, as it were, was thereby interrupted by a superseding later conduct of a private individual, a conduct which is not attributable to the Respondent under the rules of attribution generally recognised.²¹²

182. Two conclusions may be drawn from these observations. First it is doubtful whether the acts by the Media Council constituted a condition *sine qua non* for the alleged damage. But even if this is the case, it is clear that, second, the real cause for the damage was the conduct of a private individual which was an intervening cause that broke the chain of causation.

²⁰⁹ Partial Award, para. 583.

²¹⁰ *Corfu Channel (Merits) (United Kingdom v. Albania)*, ICJ Reports 1949, 4.

²¹¹ *Supra* footnote 194 and accompanying text.

²¹² See paras. 160-175 *supra*.

183. Finally, it must be emphasised that in establishing the proximate cause, the Tribunal also misapplied the “foreseeability test”. This test does not establish causation only by recognizing a mere factual link or relationship between the act and the damage; rather it provides that the causality of a conduct is adequately established if the injurious consequences are *reasonably* foreseeable.²¹³ One of the leading cases in this regard is the *Samoan Claims Award*, where the commissioners stated that “damages for which a wrongdoer is liable are the damages [...] which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to ensue from his action”.²¹⁴

184. According to the foreseeability test not all the consequences which are in general foreseeable and *in abstracto* possible are considered as proximately caused; rather only those consequences which are likely to ensue from the wrongful conduct are considered as falling under the ambit of reparation. This restriction of the obligation to reparation is also confirmed by the well-known *dictum* of the Permanent Court of International Justice in the *Chorzów Factory* case which the Stockholm Tribunal refers to.²¹⁵ In that case the Permanent Court held that reparation is only due to the extent it re-establishes “the situation which would, *in all probability*, have existed if [the wrongful] act had not been committed”.²¹⁶

185. Applied to the present case, the principle of foreseeability might well lead to the result that the injurious consequences inflicted upon Applicant were conceivable as a theoretical possibility. However, it cannot be argued that this conduct would in all probability and likelihood lead to the damage allegedly suffered by Applicant. Since the ultimate decision to terminate the Service Agreement lay with CET 21 and Dr. Železný, the Media Council could reasonably and validly expect that Applicant would not suffer any damage at all.

²¹³ *Rovine, A. & Hanessian, G.*, Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission, in *Lillich, R.B.* (ed.), *The United Nations Compensation Commission*, p. 235, at p. 247 (1995).

²¹⁴ Joint Report No. 2 of 12 August 1904, as quoted in *Whiteman, M.*, *Damages in International Law*, volume 3, p. 1779-1780 (1943).

²¹⁵ Partial Award, para. 617.

²¹⁶ *Factory at Chorzów (Germany v. Poland) (Merits)*, 1928 PCIJ Ser. A, No. 17, p. 41 (emphasis added).

3. Joint and Several Liability in International Law

186. After having referred to the work of the International Law Commission on State responsibility and having concluded that “the State is not absolved because of the participation of other tortfeasors in the infliction of the injury”,²¹⁷ the Stockholm Tribunal in its Partial Award states that “[t]his approach is consistent with the way in which the liability of joint tortfeasors is generally dealt with in international law and State practice”.²¹⁸ To substantiate this view, the Stockholm Tribunal then proceeded to quote from the *International Encyclopaedia of Comparative Law*.²¹⁹ However, this reference is flawed. Contrary to the Stockholm Tribunal’s assumption, the Encyclopaedia is neither an instance of State practice, nor reflects the relevant rules of *international* law. As the title of the publication makes clear it deals with comparative, and thus domestic, law.

187. In international law, questions of a plurality of responsible States are rarely dealt with both in doctrine and judicial and arbitral practice. In the context of the responsibility of States, there has to date been no case where a court or tribunal applied the concept of joint and several liability.

188. The position taken by the Stockholm Tribunal is not supported by international law. This point is made clear by the International Law Commission whose work is referred to repeatedly by the Stockholm Tribunal. The ILC’s Special Rapporteur on State responsibility, Professor James Crawford, was clear on the matter, when he stated that with regard to joint and several liability “more than usual care [was] needed in the use of municipal law analogies here” since “[d]ifferent legal traditions have developed in their own ways, subject to their own historical influences”.²²⁰

189. The ILC itself was even more succinct in its commentary to Article 47 dealing with several responsible States:²²¹

²¹⁷ Partial Award, para. 580.

²¹⁸ *Ibid.*, at para. 581.

²¹⁹ *Weir, J.A.*, “Complex Liabilities”, in *Tunc, A.* (ed.), *International Encyclopaedia of Comparative Law*, volume XI, p. 41 (1983).

²²⁰ *Crawford, J.*, Third report on State responsibility, UN Doc. A/CN.4/507/Add.2, para. 263, note 489.

²²¹ Article 47 reads as follows:

It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as ‘joint’, ‘joint and several’ and ‘solidary’ responsibility derive from different legal traditions and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that *each State is separately responsible* for conduct attributable to it [...]. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.²²²

190. The fact that an international law concept of joint and several liability would, at best, constitute progressive development may also be inferred from the fact that the ILC omitted any reference to multiple State responsibility in its draft as adopted on first reading in 1996.

191. Professor Brownlie considers the concept of joint responsibility as a candidate among the general principles of law, in principle. Nevertheless he states that “the practice of states [...] strongly suggests by its silence the absence of joint and several liability in delict in state relations”.²²³ In his recent edition of “Principles of Public International Law”, Brownlie reaffirms this view by stating that “[t]he principles relating to joint responsibility of states are as yet indistinct, and municipal analogies are unhelpful”.²²⁴ Brownlie continues to argue *de lege ferenda* that “[a] rule of joint and several liability in delict should certainly exist as a matter of principle”. Even authors who argue in favour of a regime of joint and several liability in case of multiple State responsibility, deem it necessary to underline that such a regime would constitute a measure of progressive development.²²⁵

192. There is also evidence that there is no *opinio iuris* of States as to the existence of the concept of joint and several liability of States in international law. In the *Certain Phosphates*

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

- (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
- (b) is without prejudice to any right of recourse against the other responsible States.

²²² Commentary to Article 47, para. (3) (emphasis added, footnote omitted).

²²³ Brownlie, I., System of the Law of Nations. State Responsibility, Part I, p. 189 (1983).

²²⁴ Brownlie, I., Principles of Public International Law, p. 459 (5th ed. 1998).

²²⁵ See, in particular, Noyes, J.E./Smith, B.D., State Responsibility and the Principle of Joint and Several Liability, 13 Yale Journal of International Law 225, at 258 *et seq* (1988). See also Graefrath, B., Complicity in the Law of International Responsibility, 29 Revue belge de droit international 370, at 379 (1996).

Land in Nauru case,²²⁶ Australia was sued by Nauru for having violated its obligations as one of the three administering powers under the Trusteeship Agreement. Australia contested that it could be sued alone by Nauru and argued that the alleged responsibility of the three States making up the Administrative Authority (Australia, New Zealand and the United Kingdom) was “solidary” rather than joint and several and that a claim could not be made against only one of them. Thus Australia clearly rejected the idea of joint and several liability.²²⁷

193. The foregoing considerations illustrate that to date, the international law of responsibility of States for wrongful conduct does not know of the concept of joint and several liability or responsibility. The only (limited) area where the subject of multiple party compensation in cases of concerted activity by several States is regulated, is the law governing activities of States in outer space. Thus, Article V of the Convention on International Liability for Damage Caused by Space Objects²²⁸ provides that the States jointly participating in a launch of a space object “shall be jointly and severally liable for any damage caused”.

194. However, this provision certainly does not form a precedent for two reasons. First, it is significant for the underdeveloped status of the general international law of State responsibility that, in order to be applicable, the concept of joint and several liability had to first find its way into a treaty. This reaffirms the statement by the ILC that in the absence of agreement to the contrary between the States concerned, general international law only provides for an *independent* responsibility of States. Second, the cited Convention on the Liability for Space Objects is concerned with *liability* for damage caused by *lawful* activities, whereas under the law of State responsibility, States are only accountable for damage caused by internationally wrongful conduct.²²⁹

195. In any event, even if one came to the conclusion that the concept of joint and several liability forms part of the international law of State responsibility, the concept is only applicable as between States. State responsibility, by its very nature, only regulates the origin and consequences of violations of international law by States. Even if one were to assume

²²⁶ *Certain Phosphates Land in Nauru (Nauru v. Australia), Preliminary Objections*, ICJ Reports 1992, at 240.

²²⁷ The case was subsequently withdrawn by agreement.

²²⁸ Convention on International Liability for Damage Caused by Space Objects, 29 March 1979, 961 United Nations Treaty Series 187.

²²⁹ See introductory para. 4 of the ILC Commentary.

that the concept of joint and several liability forms part of the international law of State responsibility, there is no indication whatsoever in the ILC's articles or elsewhere that this concept is applicable as between States and individuals as responsible subjects. Accordingly, the few authors who deal with the issue of joint and several liability confine themselves to the relation between States as the responsible entities.²³⁰

196. The idea of States and individuals being jointly and severally liable towards an injured party runs counter to the basic principle of State responsibility that a State shall only be liable for its own unlawful conduct which constitutes a breach of an obligation. The assumption of joint and several liability of States and individuals ignores the different layers in which the legal relations between States and individuals operate. General international law on State responsibility does not regulate the relation between the responsibility of States on the one side, and that of individuals on the other side. Therefore, joint and several liability of States and individuals has no basis in international law.

4. Conclusions on Joint Tortfeasors

197. The Stockholm Tribunal incorrectly applied the rules of the international law on State responsibility in several ways. First, it confounded the various independent prerequisites or conditions of State responsibility. In particular, it attributed the actions and omissions of private individuals to the Czech Republic without applying the relevant rules of attribution set forth in the ILC's Articles on State Responsibility. According to these rules, neither the actions of CET 21 nor those of Dr. Železný may be attributed to the Czech Republic.

198. Second, with regard to causation the Stockholm Tribunal drew false conclusions from international case law. Both cases invoked by the Tribunal, the *Corfu Channel* as well as the *Diplomatic and Consular Staff* case, deal with concurrent causation as between States, where the responsible State carried out the final and ultimate conduct which directly led to severe damage. By contrast, the present case is concerned with State conduct which is supervened

²³⁰ Noyes, J.E./Smith, B.D., *supra* note 225, *passim*; Brownlie, *supra* note 223, at 189-192; Graefrath, *supra* note 225, at 379; Quigley, J.; Complicity in International Law: A New Direction in the Law of State Responsibility, 57 *British Yearbook of International Law* 77, at 105-107 (1986).

by conduct of private individuals. Since the chain of causation is thus interrupted, the conduct by the Czech Republic is *no proximate cause* for the damage allegedly suffered by CME.

199. Third, the Stockholm Tribunal erroneously applied the concept of joint and several liability. It drew wrong analogies from municipal law by applying this concept which, however, has developed differently in the various systems of municipal law. The Tribunal failed to take into account one of the most fundamental principles of State responsibility in international law, namely that even in case of a plurality of responsible States, each State is *separately* responsible for its *own internationally wrongful conduct*.

200. Finally, even if such a concept of joint and several liability existed in international law, it would only operate as between States. The law of State responsibility only regulates the consequences of internationally wrongful acts by States. Therefore the idea of a joint and several liability between a State and a private individual is conceptually mistaken from the perspective of the general international law on State responsibility.

PART THREE: *RES JUDICATA* AND *LIS PENDENS*

1. The Principle of *res judicata* and *lis pendens*

201. The principle of *res judicata* derives from the Roman Law ideals of legal security and finality of decisions which was widely followed in Common and Civil Law countries²³¹ and is sometimes considered inherent to any legal system.²³² The “end of litigation” achieved via

²³¹ Supreme Court Act 1981, s. 49(2)(England); Civil Jurisdiction and Judgments Act 1982, s. 34 (England). A legal action brought in violation of the *res judicata* principle is to be deemed an abuse of process, and the courts are expected to strike it out. Rules of the Supreme Court, Order 18, rule 11 (1)(England); U.S. Constitution, Art. IV, Sec. 1; Code Civil § 1351 (France); *Harold Koch and Franck Diedrich*, Civil Procedure in Germany 70 (1998).

²³² See *Peter R. Barnett*, Res judicata, estoppel and foreign judgments (2001); *Elihu Harmon*, Res Judicata and Identity of Actions - Law and Rationale, 1 Israel L. Rev. 539 (1966).

*res judicata*²³³ is also emphasized in the related Latin maxim of *ne bis in idem* or *non bis in idem*. It protects defendants from having to defend themselves twice in the same matter. At the same time *res judicata* is a principle of judicial economy aimed at preventing (costly) re-litigation of already decided cases. Further, it serves the purpose of legal security by avoiding the potential of divergent decisions in identical cases.

202. For the Common Law, *res judicata* has been defined as

[a] matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.²³⁴

203. Similarly, Civil Law traditions follow this concept.²³⁵

204. The corollary principle of *lis pendens* applies when proceedings first instituted have not yet resulted in a decision. It equally bars a second litigation between the same parties in the same case. According to the *lis pendens* or *lis alibi pendens* rule it is not permissible to initiate new proceedings if litigation between the same parties and involving the same dispute is already pending. This principle is firmly embedded in national procedural rules in all legal systems.²³⁶ It serves the same policy rationale as the *res judicata* rule of judicial economy (by preventing costly parallel litigation), of legal security (by avoiding conflicting judgments), and of protection of defendants (by protecting parties from oppressive litigation tactics).

²³³ “*Interest reipublicae ut sit finis litium, and nemo debet bis vexari pro una et eadem causa.*” “It is in the public interest that there should be an end of litigation and no one needs to be vexed twice for one and the same cause.” 16 Halsbury’s Laws of England, at 852 n.1.

²³⁴ Black’s Law Dictionary 1305 (6th ed. 1990).

²³⁵ Klaus P. Berger, *Internationale Wirtschaftsschiedsgerichtsbarkeit* 427 (1992).

²³⁶ Cf. Supreme Court Act 1981, s. 49(2) (England) (“Every court ... shall so exercise its jurisdiction ... [so as] to secure that ... all multiplicity of legal proceedings with respect to [all matters in dispute] is avoided”); New Code of Civil Procedure, Art. 100 (France) (“If the same dispute is referred to two jurisdictions of equal authority, equally competent to rule on the matter, the court last seized must not rule ... if asked to do so by one of the parties ... [or] of its own motion”); Code of Civil Procedure, art. 231 (Japan) (“The parties cannot file another action when the same action is pending in the court”); Code of Civil Procedure, art. 222 (Greece) (“after the commencement of the litispence and during the time it lasts no new proceedings are permitted before any court”); Z.P.O. § 261(3) (Germany) (“during pendency, the subject matter may not be made pending in any other manner”). See also the relevant chapters in *J.J. Fawcett* (ed.), *Declining Jurisdiction in Private International Law* (1995).

2. *Res judicata* as a Rule of International Law

205. It is widely accepted that *res judicata* is also a rule of international law. While some authors refer to it as a rule of customary international law,²³⁷ most others see it as a general principle of law.²³⁸

206. In a number of cases before international courts and arbitral tribunals *res judicata* has been identified as a legally binding principle.²³⁹

207. The leading early case is the *Pious Fund Arbitration* between the US and Mexico.²⁴⁰ In its 1902 award an arbitral tribunal set up under the auspices of the Permanent Court of Arbitration held that an earlier arbitral award, a decision rendered by an umpire in 1875, constituted *res judicata* between the parties in the matter. As a result, Mexico's obligation to make payments to a "Pious Fund of the Californias" could not be disputed again. With regard to *res judicata* in general the arbitral tribunal said that

this rule applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the compromis.²⁴¹

208. In a similarly broad fashion, the arbitrators in the *Trail Smelter Case* stated

That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.²⁴²

209. In his famous dissenting opinion in the *Chorzow Factory Case* before the Permanent Court of International Justice (=PCIJ) Judge Anzilotti referred to *res judicata* as one of the

²³⁷ William S. Dodge, National Courts and International Arbitration: Exhaustion of Remedies and *Res judicata* Under Chapter Eleven of NAFTA, 23 Hastings Int'l & Comp. L. Rev. 357, at 365 (2000).

²³⁸ Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 336 (1953); Sir Hersch Lauterpacht, The Development of International Law by the International Court 19, 325-26 (1958).

²³⁹ See on the early arbitral practice Heinrich Lammasch, Die Rechtskraft internationaler Schiedssprüche (1913).

²⁴⁰ See Karl Lamers, Pious Fund Arbitration, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, VOL. 3, 1032 (1997).

²⁴¹ *Pious Fund of the Californias (U.S. v. Mex.)*, Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902).

²⁴² *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, at 1950 (1941).

“general principles of law recognised by civilised nations”²⁴³ in the sense of Art 38 of the PCIJ Statute, now Art 38 of the Statute of the International Court of Justice (=ICJ).²⁴⁴

210. The ICJ has also repeatedly recognized and applied the principle of *res judicata*. For instance, in the 1960 *Arbitral Award Case*²⁴⁵ the World Court rejected a challenge to an arbitral award rendered in 1906 by the King of Spain in a boundary dispute between Honduras and Nicaragua. Instead, the ICJ considered the award a *res judicata* between the parties. In the *UN Administrative Tribunal Case*, which dealt with the power of the UN General Assembly to establish an administrative tribunal competent to hear staff disputes, the ICJ referred to *res judicata* as a “well-established and generally recognized principle of law.”²⁴⁶

211. In a sense also Article 59 of the Statute of the ICJ, according to which “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case,” can be viewed as an affirmation of the *res judicata* principle.²⁴⁷ Although this provision was mainly intended to exclude the possibility of a Common Law-type doctrine of binding precedent or *stare decisis*,²⁴⁸ it clearly reaffirmed the principle that the parties are bound by a judgment in respect of a particular case.

212. In its most recent practice the ICJ has relied on the *res judicata* principle in a matter-of-course fashion without even stating that it considers this rule a general principle of law. For instance, in the *Request for Interpretation of the Judgment of 11 June 1998 in the Land and*

²⁴³ *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 P.C.I.J. (Ser. A) No. 11, at 27 (Dec. 16) (dissenting opinion of Judge Anzilotti).

²⁴⁴ See already Lord Phillimore in the Advisory Committee of Jurists appointed to draft the ICJ Statute: “the general principles [...] were these which were accepted by all nations in *foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*.” cited in *Iain Scobbie, Res judicata, Precedent and the International Court: A Preliminary Sketch*, 20 *The Australian Yearbook of International Law* 299 (1999), at 299.

²⁴⁵ *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, 1960 I.C.J. Rep., 192 (Nov. 18, 1960). *Arbitral Award Made by H. M. Alfonso III, King of Spain, in the Border dispute Between the Republics of Honduras and Nicaragua*, on 23 December 1906, Pleadings, Oral Arguments, Documents, Vol. I, Annex II, at 18-26.

²⁴⁶ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954) I.C.J. Rep., 47, at 53: The Court said that it is a “well-established and generally recognized principle of law” that “a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute.”

²⁴⁷ *Bin Cheng*, 340, 341.

²⁴⁸ *Mohamed Shahabuddeen, Precedent in the World Court* 99 (1996).

*Maritime Boundary Case between Cameroon and Nigeria*²⁴⁹ and in the *Boundary Dispute between Qatar and Bahrain Case*²⁵⁰ the validity of the *res judicata* principle was taken for granted.²⁵¹

213. Also in more recent arbitral proceedings such as the 1978 *Channel Arbitration*²⁵² between France and the UK concerning the delimitation of the continental shelf, *res judicata* was recognized. The arbitral court considered “it to be well settled that in international proceedings the authority of *res judicata* attaches”²⁵³ to decisions like the earlier arbitral award of 1977 in the same matter.

214. Also the European Court of Justice (=ECJ) has repeatedly relied upon *res judicata* in declaring actions inadmissible in cases that have already been decided by previous judgments although the Court's Rules of Procedure do not expressly refer to *res judicata*.²⁵⁴

215. As *Bin Cheng* put it succinctly: “There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings.”²⁵⁵ Similarly, it was stated that “[t]here is invariably in municipal legal systems a doctrine to the effect that once a matter is judicially determined that matter may not be litigated again by the same parties or parties in the same interest. This doctrine, commonly called *res judicata*, applies equally to international arbitral tribunals and judicial decisions.”²⁵⁶

²⁴⁹ *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (Cameroon v. Nigeria), 1999 ICJ Rep., 31, 39. (March 25, 1999)

²⁵⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits (Qatar v. Bahrain), (Diss. Op. Torres Bernárdez), 2001 ICJ Rep., para. 303. (Mar. 16, 2001)

²⁵¹ Since the conditions for its application were held not to be present in both cases, *res judicata* was not applied.

²⁵² *Delimitation of the Continental Shelf (UK v. France)*, 18 R.I.A.A. 271.

²⁵³ *Id.*, 295.

²⁵⁴ Case 14/64, *Mrs Emilia Gualco (née Barge) v. High Authority of the European Coal and Steel Community* [1965] ECR 51; Cases 172, 226/83, *Hoogovens Groep v. Commission* [1985] ECR. 2831; Cases 358/85, 51/86, *France v. Parliament* [1988] ECR 4846, 4849-50. See also *Michael Reiling*, Streitgegenstand und Einrede der „res judicata“ im Direktklageverfahren vor den Gemeinschaftsgerichten, 13 Europäische Zeitschrift für Wirtschaftsrecht 136 (2001).

²⁵⁵ *Bin Cheng*, 336.

²⁵⁶ *Clive Parry et al. (eds), Encyclopaedic Dictionary of International Law* 341 at 339 (1986).

3. Requirements of International *res judicata*

216. While the existence of *res judicata* as a rule of general international law is uncontroversial, its application may depend upon the circumstances of a case and the conditions governing its application. The conditions for *res judicata* in international law are similar to those required in national legal systems. The doctrine of *res judicata* in international law requires that both the parties and the question in issue be the same. Accordingly, in the *Polish Postal Service in Danzig Case* the PCIJ held that “[t]he doctrine of *res judicata* [applies when] not only the Parties but also the matter in dispute [are] the same.”²⁵⁷ In *re S.S. Newchwang* the arbitral tribunal held that “It is a well established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue.”²⁵⁸ Similarly, in the *Pious Fund Arbitration* the tribunal stated that *res judicata* applied where „there is not only identity of parties to the suit, but also identity of subject-matter.”²⁵⁹

217. Broadly speaking one may identify three preconditions for the doctrine of *res judicata* to apply in international law, namely

proceedings must have been conducted

1. before international courts or arbitral tribunals,
2. between the same parties,
3. concerning the same issues.

a. *Res judicata* Applicable between International Courts and Tribunals

218. *Res judicata* in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal. The international character is broadly understood and includes mixed arbitration between States and private parties. *Res judicata* does not apply, however, with regard to proceedings before national courts, on the

²⁵⁷ *Polish Postal Service in Danzig Case*, 1925 P.C.I.J. (Ser. B) No. 11, at 30 (May 16).

²⁵⁸ *In re S.S. Newchwang (Gr. Brit. v. U.S.)*, 16 Am. J. Int'l L. 323, 324 (1922).

²⁵⁹ *Pious Fund of the Californias (U.S. v. Mex.)*, Hague Ct. Rep. (Scott) 1, at 5 (Perm. Ct. Arb. 1902).

one hand, and international tribunals, on the other hand. Thus, international dispute settlement organs are not considered to be bound by decisions of national courts or tribunals.²⁶⁰ In other words, *res judicata* applies to tribunals operating within the same legal order.

219. That mixed arbitration between private investors and host States can be regarded as international arbitration for purposes of *res judicata* (and *lis pendens*) is clearly evidenced by the approach followed by an ICSID tribunal in the case *SPP v. Egypt*.²⁶¹ There, the ICSID arbitral tribunal did not exercise jurisdiction until an ICC award previously rendered concerning the same dispute had been annulled. It formally stayed its own proceedings awaiting the eventual annulment of the ICC award. Although the ICSID tribunal purported to act on discretionary principles, in effect, it complied precisely with the requirements of the *res judicata* and *lis pendens* doctrine by treating the ICC award – until annulment – as a *res judicata* of the matter.²⁶²

220. In the recent *Boundary Dispute between Qatar and Bahrain Case* the ICJ recognized that a decision of an arbitration panel may be *res judicata* for that Court. The court stated that “[r]es judicata is precisely a notion of procedural law intrinsically linked to the form adopted by the procedure and decision concerned and the jurisdictional character of the organ adopting it [...] [i]ndependently of the name given to it (arbitration, adjudication, enquiry, etc.) [...]”²⁶³

²⁶⁰ *Ian Brownlie*, *Principles of Public International Law* 52 (5th ed. 1998) (“There is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction is concerned [...]”); *Bin Cheng*, at 337, n.6 (“a decision of municipal law does not constitute *res judicata* in international law”).

Also the ICSID Tribunal in *Amco v. Indonesia* put it succinctly, “an international tribunal is not bound to follow the result of a national court.” See *Amco v. Indonesia* (Award, Nov. 20, 1984), 1 ICSID Rep. 413, 460 (1993), sustained in relevant part, *Amco v. Indonesia* (Decision on the Application for Annulment, May 16, 1986), 1 ICSID Rep. 509, 526-27 (1993).

²⁶¹ *SPP v. Egypt*, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131.

²⁶² *SPP v. Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112, at 129, 130.

²⁶³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, (Diss. Op. Torres Bernárdez), 2001 ICJ Rep., para. 303. (Mar. 16, 2001)

b. Identity of Parties

221. “Identity of the parties” is unequivocally stated as a requirement for the application of *res judicata* in almost all of the international precedents. There is rarely any discussion about this prerequisite, which is not surprising since most relevant international cases were either genuine inter-States disputes or concerned the espousal by a State of claims belonging to its national.

1.) The “Economic Approach” to Identity of Legal Persons in International Practice

222. In the case at hand, the question arises whether legally separate entities of a corporate group may be regarded as an identical party or at least sufficiently closely related for the application of the *res judicata* doctrine. There appears to be no directly relevant case law of international courts and tribunals on this issue.

223. Nevertheless, it is important to recognize that international arbitral practice has developed an “economic approach” under which strict legal distinctions, not reflecting the underlying economic realities, may be disregarded.

224. This was formulated in a 1982 ICC arbitral award:

The decisions of [ICC] tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.²⁶⁴

225. In application of that approach, the arbitral tribunal upheld its jurisdiction in proceedings where arbitration clauses were signed by some, but not all companies, of a corporate group of parent and subsidiaries instituting arbitral proceedings. Among others, the tribunal considered the fact that the parent company exercised absolute control over its

²⁶⁴ *Dow Chemical France et al. v. Isover Saint Gobain*, ICC Case No. 4131 (1982), 9 Yearbook of Commercial Arbitration 131 at 136 (1984).

subsidiaries to be a crucial factor in extending the arbitration agreement to the parent which had not participated in it. The tribunal reasoned:

[...] that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the arbitral tribunal should take account when it rules on its own jurisdiction [...].²⁶⁵

226. Arbitral tribunals operating under the auspices of the ICSID have also followed an “economic approach” with regard to separate legal personality vs. economic unity. They generally take a “realistic attitude”²⁶⁶ when identifying the party on the investor’s side. They look for the actual foreign investor and are unimpressed by the fact that the consent agreement only names a subsidiary.

227. In *Amco v. Indonesia*²⁶⁷ the question arose whether a parent company, Amco Asia, could institute ICSID arbitration where the arbitration agreement literally covered only its subsidiary, PT Amco. The ICSID tribunal answered this question in the affirmative and thus upheld its jurisdiction. It stated:

The foreign investor was Amco Asia; PT Amco was but an instrumentality through which Amco Asia was to realize the investment. Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia would be refused the benefit of the clause? Moreover, the Tribunal did find that PT Amco had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one?²⁶⁸

228. A similarly “realistic attitude” was taken in *Klöckner v. Cameroon*.²⁶⁹ There the question arose whether Klöckner, the majority shareholder at the time of consent of a joint venture company called SOCAME, could be substituted for SOCAME with respect to the arbitration agreement between SOCAME and the host State. The ICSID tribunal found that it had jurisdiction also over the foreign majority shareholder although that shareholder was not a party to the agreement containing consent to arbitration. The tribunal stated:

²⁶⁵ *Id.*

²⁶⁶ See *Christoph Schreuer*, *The ICSID Convention: A Commentary* (2001), Art 25, para. 216.

²⁶⁷ *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389.

²⁶⁸ *Id.*, p. 400.

²⁶⁹ *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 9.

This Agreement, although formally signed by the Government and SOCAME, was in fact negotiated between the Government and Klöckner [...] Moreover, it is undeniable that it was manifestly concluded in the interest of Klöckner, at a time when Klöckner was SOCAME's majority shareholder. The Establishment Agreement reflected the contractual relationship between a foreign investor, acting through a local company, and the host country of this foreign investment.²⁷⁰

229. If such an “economic approach” is accepted for jurisdictional purposes this requires that the same standard is also applied for purposes of *lis pendens* and *res judicata*. Otherwise individual companies of a corporate group (constituting a single economic entity) might avail themselves of the possibility to endlessly re-litigate the same dispute under the disguise of separate legal identities.

230. That such a realistic approach is to be adopted for *res judicata* purposes as well is explicitly stated in the *Restatement on Judgments* which provides:

A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.²⁷¹

231. As far as separately incorporated legal persons are concerned international investment law follows the tendency to disregard the corporate veil and to look at the underlying “real” or “economic” relations. In particular, in the field of international investment agreements there is a trend to extend protection to investors regardless of the form of the investments made whether directly or indirectly through subsidiaries or other controlled entities. This is clearly evidenced by a large number of bilateral investment treaties (=BITs) which now regularly protect not only direct investments but all forms of indirect investments including the ownership of shares in companies.²⁷² These BITs enable also parent companies or natural persons owning or controlling subsidiaries to assert international claims.

232. The ICSID Convention follows a similar approach. Its investment dispute settlement is normally open to foreign investors having “the nationality of a Contracting State other than

²⁷⁰ *Id.*, p. 17.

²⁷¹ *American Law Institute* (ed.), *Restatement 2nd Judgments*, § 39.

²⁷² Cf. Art I para 1 (a) (ii) US-Czech BIT.

the State party to the dispute”²⁷³. However, taking into account economic realities the Centre’s dispute settlement is also available to juridical persons having the nationality of the Contracting State party to the dispute, if the parties have agreed that “because of foreign control” it should be treated as a national of another Contracting State.²⁷⁴

233. Many other fields of modern international economic law have adopted a similar “economic or realistic approach” vis-à-vis corporate entities by focusing on the underlying economic realities instead of the formal legal structure of corporate groupings. Another special field where this approach has gained importance also for purposes of establishing jurisdiction over affiliated companies is EC competition law. According to the “*single economic entity*” doctrine developed by the ECJ in the *Dyestuffs Case* “the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.” The Court continued to specify the criteria of “imputability” by saying that

[s]uch may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.²⁷⁵

234. The ECJ refined this concept in the *Continental Can Case* in which it stated that

[t]he circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously, but in essentials follows directives of the parent company.²⁷⁶

235. In the specific case, the ECJ concluded that the subsidiary had acted on the instructions of its parent company.

²⁷³ Art 25 para 2 (a) ICSID Convention.

²⁷⁴ Art 25 para 2 (b) ICSID Convention.

²⁷⁵ Cf. Case 48/69 *ICI v. Commission (Dyestuffs Case)* [1972] ECR 619, para. 133, and Case 52/69 *Geigy v Commission* [1972] ECR 787, para. 44.

²⁷⁶ Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, para. 15.

236. As a consequence of disregarding the separate legal personality of subsidiaries under the “*single economic entity*” doctrine, the ECJ is able to identify their activities as activities of the parent companies which thereby fall under the EC's competition law jurisdiction.

237. As a result, one can clearly identify an increasingly “economic approach” or “realistic attitude” adopted by international arbitral tribunals with regard to standing of parent companies before such tribunals in cases where only the subsidiaries owned and/or controlled by them have formally signed arbitration agreements. It is important that in such situations, where not only the direct investor is given the right to institute proceedings but also the ultimate owner of the direct investor, re-litigation of the same issue is prevented. This can only be accomplished by realizing that the *res judicata* principle applies to related parent and subsidiary companies.

238. Finally, and particularly important for purposes of *res judicata*, there is case-law of international tribunals that demonstrates that essentially identical parties, though maybe legally separate, are prevented from re-litigating the same issues. In *Martin v. Spain*,²⁷⁷ the European Commission on Human Rights held that a claim by 23 Union activists, presented in their personal capacity, which was identical in its object and scope to a previous claim brought before the ILO Committee on Freedom of Association by the trade organization to which the applicants belonged, was precluded by virtue of ex Article 27(1)(b)²⁷⁸ of the European Convention on Human Rights (=ECHR).²⁷⁹ Although, formally speaking the parties were different, the Commission held that they were ‘essentially the same’.²⁸⁰

239. It follows that related parent and subsidiary companies can be regarded as the “same party” for purposes of *res judicata* where a parent company has been allowed to bring a claim for its subsidiary or vice versa. Where a “realistic attitude” is pursued for purposes of jurisdiction this must also be followed for purposes of *res judicata*.

²⁷⁷ European Commission of Human Rights, Application 16358/90, *Martin v. Spain*, Decision on Admissibility of 12 October 1992, available under <http://hudoc.echr.coe.int/Hudoc2doc/hfdec/sift/948.txt>.

²⁷⁸ See text *infra* para. 276.

²⁷⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms,(1950), 213 UNTS 221.

²⁸⁰ According to the European Commission of Human Rights, “dans le présent cas la plainte a été soumise *matériellement par les mêmes requérants*.” “Dès lors, deux instances internationales - le Comité de la liberté syndicale de l'Organisation Internationale du Travail et la Commission - ont été saisies successivement de requêtes ayant *essentiellement* le même contenu et *les mêmes requérants*.” Application 16358/90, *Martin v. Spain*, Decision on Admissibility of 12 October 1992. (Emphasis added).

2.) Privity

240. Further, the doctrine of *res judicata* does not even require strict legal identity of the parties. While identity is, of course, the normal case, it is sufficient that either the parties or their “privies” are the same.²⁸¹ “Privity” is defined as “mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.”²⁸² In the context of litigation this relationship has been specified in the following terms:

Concept of 'privity' pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party.²⁸³

241. A flexible privity concept includes a wide range of closely affiliated business actors. In this context it has been stressed that

courts are likely to find that corporations are bound by arbitration decisions involving corporate alter egos and that arbitration decisions in favor of a principal bar a subsequent suit against the principal's agent if the suit is based on the same transaction.²⁸⁴

242. The Common Law notion of “privity” can be regarded as a specific expression of the general principle that identity is not to be understood as strict legal identity but rather as a sufficient degree of identification or real substantive identity versus formalistic differentiation. This becomes very apparent in the English decision of *Gleeson v. J Wipfel*:

I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the

²⁸¹ Cf. Black's Law Dictionary 1305 (6th ed., 1990) defining *res judicata* as “[a] matter adjudged, a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties *and their privies*, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.” (Emphasis added).

²⁸² Cf. Black's Law Dictionary 626 (5th ed., 1983).

²⁸³ *Id.*

²⁸⁴ According to *G. Richard Shell, Res judicata and Collateral Effects of Commercial Arbitration*, 35 U.C.L.A. L. Rev. 623 (1988), at 647, “[t]he concept of “privity” is extremely flexible under traditional *res judicata* doctrine and remains so when *res judicata* is applied based on a prior arbitration. For example, courts are likely to find that corporations are bound by arbitration decisions involving corporate alter egos and that arbitration decisions in favor of a principal bar a subsequent suit against the principal's agent if the suit is based on the same transaction. There do not appear to be any special privity rules for arbitral preclusion cases.” (footnotes omitted).

dispute, there must be a *sufficient degree of identification* between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase “privity of interest”²⁸⁵

c. Identity of Issues: Identity of Object (*petitum*) and Ground (*causa petendi*)

243. As far as the requirement of an identical issue or subject-matter of litigation is concerned, it has been asserted that *res judicata* applies only if both the “object” (*petitum*) and the “ground” (*causa petendi*) of two claims are the same.²⁸⁶

244. This distinction is also clearly expressed in international judicial practice. In the *Chorzow Factory* case Judge Anzilotti spoke about “three traditional elements for identification, persona, petitum, causa petendi.”²⁸⁷ Similarly, in the *Trail Smelter* Case the arbitral decision referred to “[t]he three traditional elements for identification: parties, object, and cause [...]”²⁸⁸

245. Identical “object” (*petitum*) means that the same type of relief is sought in different proceedings. Identical “ground” (*causa petendi*) means that the same legal arguments are relied upon in different proceedings. Closely linked to these conditions is the issue of identical “facts” since the factual background will be determinative of both the kind of remedies that may be sought and the type of legal arguments that can be made in pursuit of such claims.

²⁸⁵ *Gleeson v. J Wippel & Co. Ltd.* [1977] 3 All ER 54, 60 (Emphasis added):

²⁸⁶ See *Bin Cheng*, 340, stating that “[t]he second element of identification, i.e., question at issue, has sometimes been subdivided into the object (*petitum*) and the grounds (*causa petendi*) of the case.”; See also *Dodge*, 366.

²⁸⁷ *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 P.C.I.J. (Ser. A) No. 11, at 23 (dissenting opinion of Judge Anzilotti).

²⁸⁸ *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1952 (1941).

1.) Identical Object

246. The requirement of an identical “object” refers to the remedies sought in litigation, i.e. whether the same type of relief is sought in different proceedings. If this is the case, subsequent litigation will be barred by *res judicata*.

247. The distinction between the “object” and the “grounds” of a claim is clearly made in international case-law. International tribunals have also been aware of the risk that if they use too restrictive criteria of identity of “object” and “grounds”, the doctrine of *res judicata* would rarely apply: if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of *res judicata*, then litigants could easily evade this by slightly modifying either the relief requested or the grounds relied upon. Dodge speaks in this regard of the possibility of “claim splitting” in order to “avoid the *res judicata* effect of a prior award by seeking a different sort of relief or by raising new grounds in support of the same claim for relief.”²⁸⁹ This would be the case, for instance, if in a typical investment dispute, involving allegations of acts amounting to expropriation, the investor first sought *restitutio in integrum* as relief from the host State and in a later litigation changed the “object” of his case requesting compensation.

248. There are important policy arguments against the possibility of “claim splitting” which would render the purpose of *res judicata*, i.e. the finality of the results of dispute settlement moot.²⁹⁰ In addition, there is case-law by arbitral tribunals to the effect that such claim splitting will not be allowed. They have barred claimants from raising closely related claims that they could have raised in an earlier arbitration.

249. For instance, in the *Delgado* case²⁹¹ before a US-Spanish Claims Commission, a claim for damages against Spain for seizure of property in Cuba was brought and denied by an umpire in 1876. Subsequently another claim was bought by the same applicant this time for

²⁸⁹ Dodge, 366.

²⁹⁰ See *Bin Cheng*, at 344 (“Eadem res, in the maxim bis de eadem re non sit actio, should... be construed as the entire claim without regard to the fact whether the various and separate items therein contained have all been presented or not.”).

²⁹¹ *Delgado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2196 (Span.-U.S. Claims Commission 1881). See also *Danford Knowlton & Co. and Peter V. King & Co.* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2194, 2195 (Span.-U.S. Claims Commission 1881).

the value of the property seized. The defendant State moved to dismiss on the ground of *res judicata* arguing that the “test of identity was not whether the measure of relief demanded, but whether the injury that formed the foundation of the claim, was the same in both cases.” The umpire held that the question of identity depended upon “whether new rights are asserted in [the second] claim.”²⁹² Although he seems to have accepted that the two claims did in fact relate to different grounds he dismissed for *res judicata* holding that

[e]ven if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire.²⁹³

250. An even broader approach was pursued by the same Commission in the *Machado* case²⁹⁴ where in a first case damages arising from the seizure of a house were claimed and in a second one restoration of the house as well as rent and damages for its detention were claimed. The umpire to whom the issue was referred dismissed the second claim on *res judicata* grounds regarding both claims as identical. He said:

that the questions whether this claim No. 129 is a new one, or the same as No. 3, does not depend upon whether the items included be the same in both cases, but that the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being part of an old claim, can not be presented as a new claim under a new number.²⁹⁵

2.) *Identical Ground*

251. Identity of the issue or subject-matter of dispute settlement is also relevant where a claimant makes identical requests in different proceedings based on formally different legal

²⁹² *Delgado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2196, at 2199 (Span.-U.S. Claims Commission 1881).

²⁹³ *Id.*

²⁹⁴ *Machado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2193 (Span.-U.S. Claims Commission 1881).

²⁹⁵ *Id.*, at 2194.

grounds, in other words, where the “object” is identical, but where the “cause” or “ground” appears to be different.

252. Such a situation may arise, for example, where a party seeks compensation for expropriation, in one case, under customary international law, in another, under a BIT, or where a party bases its claim, in one case, on a multilateral agreement, in another, on a bilateral one or on two different BITs such as in the present case. Technically speaking in such a situation the “cause”, “ground” or “*causa petendi*” is non-identical which would seem to exclude application of the *res judicata* principle. It is evident, however, that this is a highly artificial distinction since in all cases mentioned the legal grounds for the compensation sought would be a rule of international law calling for compensation for expropriation whether contained in custom or expressed in a treaty. It is far more appropriate to look at the specific rules and to examine how far they are substantively identical or different. If it is the same rule reflected in different legal instruments this should not cast any doubt on the identity of the “cause” and thus of the subject-matter of the disputes.

253. Under modern international law, it is common that acts and omissions of States (or other international actors) may be subject to more than one treaty instrument, and therefore more than one dispute settlement mechanism. For example, many human rights are protected under more than one human rights convention (both at the global and regional level); and this is also the case with many issues regulated by international economic law and international environmental law. Consequently, adoption of the position that parallel sets of litigation based on substantially identical provisions found in different instruments do not compete with each other, would tend to promote multiplicity of proceedings, and might also result in conflicting decisions concerning the State’s international rights and obligations.

254. There is recent international practice in this regard. An arbitral tribunal under the 1982 UN Convention on the Law of the Sea (“UNCLOS”) in the *Southern Bluefin Tuna Case*²⁹⁶ had to determine whether a dispute about Japanese fishing practices was to be settled under the Convention for the Conservation of Southern Bluefin Tuna 1993 (=CCSBT) or (also) under UNCLOS. Because it regarded the dispute settlement provisions of the CCSBT to

²⁹⁶ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359 (2000).

exclude the application of the mandatory dispute settlement procedures under UNCLOS, the tribunal held that it lacked jurisdiction.

255. In the course of assessing the character of the legal dispute at issue, the Tribunal also pronounced itself on the identity or non-identity of the dispute over fishing practices, which can be viewed under the rules of the CCSBT as well as under UNCLOS, and stated:

[T]he Parties to this dispute ... are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.²⁹⁷

256. Based on the “artificiality” of such a distinction the tribunal regarded the “two” disputes as relating to the same issue or subject-matter and thus to constitute just “one” dispute. The CCSBT contains norms regarding total allowable catch. UNCLOS establishes more general norms regarding fisheries conservation and management. Despite this quite significant difference in the “cause” or legal ground of the claims they were regarded as identical constituting one single dispute.

257. It follows from this precedent that a dispute may be considered a single identical dispute based on identical grounds where claims are based on two fairly different treaties as long as they all relate to the same factual background. *Argumento a minore*, this principle applies even more where two separate treaties contain essentially identical provisions.

3.) Identical Facts

258. The *Southern Bluefin Tuna Case*²⁹⁸ also shows a tendency to focus on the facts or the factual background of claims in order to determine whether disputes are different or identical. This demonstrates that identical “facts” play an important role in actual practice, even where the test of identity of issues remains theoretically limited to identical “object” and identical “ground”.

²⁹⁷ *Id.*, at 1388, para 54.

²⁹⁸ *Id.*

259. This is also evidenced by the above mentioned²⁹⁹ arbitral decision in the *Machado* case³⁰⁰ where two different claims were made, both as a consequence of the seizure of a private house. In dismissing the second claim on *res judicata* grounds because he regarded both claims as identical the umpire found:

that the test is whether both claims are founded on the same injury.³⁰¹

260. Also human rights organs, when they have to decide whether the same application has already been brought in another forum, tend to focus on the identity of the underlying facts that give rise to individual complaints.

261. These cases also support the principle that *res judicata* applies where the same dispute arises under different treaties as long as the different treaties contain similar rules on which the complaints are based.³⁰² This is clearly the case in human rights cases where the same acts are challenged as constituting violations of corresponding provisions under the International Covenant on Civil and Political Rights (=ICCPR)³⁰³ and the ECHR.

262. In *Glaziou v. France* the UN Human Rights Committee noted:

that the author's complaint before the European Commission was based on the same events and facts as the communication that was submitted under the Optional Protocol to the Covenant, and that it raised substantially the same issues; accordingly, the Committee is seized of the "same matter" as the European Commission.³⁰⁴

263. In *Trébutien v. France* the complainant alleged that various measures taken by French authorities constituted a violation of Arts. 9 and 14 of the ICCPR. Since the same measures had already been challenged before the European Commission of Human Rights as infringements of the similarly though not strictly identically worded Art. 5 of the ECHR the case was declared inadmissible by the UN Human Rights Committee which held that:

²⁹⁹ See *supra* para. 250.

³⁰⁰ *Machado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2193 (Span.-U.S. Claims Commission 1881).

³⁰¹ *Id.*, at 2194.

³⁰² See *supra* para. 257.

³⁰³ International Covenant on Civil and Political Rights, GA Res. 2200A (XXI) (1966), 999 UNTS 171.

³⁰⁴ UN Human Rights Commission 452/1991, *Glaziou v. France*, Decision of 18 July 1994, CCPR/C/51/D/452/1991, p. 6, para. 7.2 (Emphasis added).

the 'same matter' [...] must be understood as referring to the facts and events which were at the basis of the author's complaints.³⁰⁵

264. In both cases the UN Human Rights Committee declared the complaints inadmissible because it found that the same issue had already been brought before the European Commission of Human Rights. Similar decisions of inadmissibility have also been rendered by the European Commission and the European Court of Human Rights when they found that the same matter had already been brought before another human rights tribunal.³⁰⁶

4.) Rejection of an Overly Formalistic Approach in Finding Identity of Objects, Grounds and Facts

265. It has been recognized that if too restrictive criteria of identity with regard to the “object”, the “ground”, and “facts” of different cases are used, the doctrine of *res judicata* would rarely apply. This has led international courts and tribunals to refrain from an overly formalistic approach vis-à-vis the question of the identity of issues.

a.) Partial Nullification of an Award Leaves Intact the *res judicata* Effect of the Valid Part

266. An example of a less formalistic and more material view on the concept of “same grounds” derives from the practice of partial annulment and *res judicata* effect of the non-annulled award. The umpire in the review phase of the Orinoco Steamship Case³⁰⁷ held:

[F]ollowing the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the arbitrator are not

³⁰⁵ UN Human Rights Commission 421/1990, *Trébutien v. France*; Decision of 18 July 1994, CCPR/C/51/D/421/1990, p. 7, para. 6.3.

³⁰⁶ See the *Pauger* case discussed *supra* para. 275.

³⁰⁷ *Orinoco S.S. Co. Case (U.S. v. Venez.)*, Hague Ct. Rep. (Scott) 226 (Perm. Ct. Arb. 1902).

questioned; this being ground for pronouncing separately on each of the points at issue.³⁰⁸

267. Therefore, what matters is the substantive aspects of an entire claim. If parts of an arbitral award can have *res judicata* effect, it is the substantive arguments accepted or rejected by a tribunal which may preclude re-litigation and not the formal identity of the entire claim.

268. It has thus been asserted that “[t]he customary international law doctrine of *res judicata* also includes what American lawyers think of as issue preclusion or collateral estoppel.”³⁰⁹

b.) *Res judicata* Effect Goes Beyond the *dispositif* of an Award

269. A related issue also concerning the scope of the *res judicata* effect is the question whether *res judicata* attaches to the entire decision including its reasoning or only to the ruling or *dispositif*.³¹⁰ Practice follows a wide concept, not restricting the preclusive effect to the *dispositif*.

270. In the *Compagnie Generale de l'Orenoque* Case the Franco-Venezuelan Mixed Claims Commission held that

[e]very matter and point distinctly in issue in said cause, and which was directly passed upon and determined in said decree, and which was its grounds and basis, is concluded by said judgment, and the claimants themselves and the claimant government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.³¹¹

271. In the *Pious Fund Arbitration* the tribunal stated:

[A]ll the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each

³⁰⁸ *Id.*, at 231.

³⁰⁹ *Dodge*, 366.

³¹⁰ See *Scobbie*, 303.

³¹¹ *Compagnie Generale de l'Orenoque* (Franco-Venezuelan Mixed Claims Commission 1905), *Jackson H. Ralston & W.T.S. Doyle*, Report of the French-Venezuelan Mixed Claims Commission of 1902, 244, 355 (1906).

other, and [...] they all serve to render precise the meaning and the bearing of the *dispositif* [...] and to determine the points upon which there is *res judicata* and which thereafter can not be put in question.³¹²

272. This view was recently upheld in the *Channel Arbitration*³¹³ which stated that although *res judicata* “attaches in principle only to the provisions of [the decision’s] *dispositif* and not to its reasoning” it was equally clear that “having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*.”³¹⁴

c.) Not Literally Identical, but Substantially Identical Issues are Required for *res judicata*

273. In order to avoid unnecessary re-litigation of already decided disputes it is necessary to look at the underlying nature of a dispute and not at its formal classification. Thus, what may not appear to be literally identical, may be substantially identical.

274. In this respect it was rightly argued that

[t]he doctrine of *res judicata* indicates that if legal claims have already been put in issue and decided by a competent tribunal, that decision is dispositive and the same claim may not be raised again in another tribunal in a *substantially identical* action between the parties.³¹⁵

275. This standard of substantial, instead of strict formal identity of issues is also reflected in relevant case law. *Pauger v. Austria*, a human rights case before the European Commission and then the European Court of Human Rights, raised the question of the admissibility of parallel proceedings because the applicant had already filed a complaint with the UN Human Rights Committee. The European Convention on Human Rights - as an expression of a general principle of *lis pendens* - prevents the Strasbourg organs from hearing a case that is

³¹² *Pious Fund*, Hague Ct. Rep. (Scott) at 5.

³¹³ *Delimitation of the Continental Shelf (UK v. France)*, 18 R.I.A.A. 271.

³¹⁴ *Id.*, at 295.

³¹⁵ *Vaughan Lowe*, *Overlapping Jurisdiction in International Tribunals*, 20 *The Australian Yearbook of International Law* 191 at 202 (1999) (emphasis added).

”substantially the same as a matter that [...] has already been submitted to another procedure of international investigation or settlement [...].”³¹⁶ In its decision on admissibility the European Commission of Human Rights held that:

[...] it is against the letter and spirit of the Convention if the same matter is simultaneously submitted to two international institutions. Article 27 para. 1 (b) (Art. 27-1-b) of the Convention aims at avoiding the plurality of international procedures concerning the same case. In considering this issue, the Commission needs to verify whether the applications to the different institutions have *substantially* the same content.³¹⁷

4. *Lis pendens* as a Rule of International Law

276. There are fewer cases where *lis pendens* has been relevant in international litigation and arbitration than cases involving *res judicata*. This can be explained as a result of the relatively limited number of international fora and of international litigation in general, making it highly unlikely that two international tribunals are simultaneously seized of the same dispute.³¹⁸ Still, it can hardly be disputed that *lis pendens* is also a rule of international law applicable in international proceedings. The widespread use and similarity of the concept of *lis pendens* in the national procedural laws of States of all legal traditions³¹⁹ as well as its inclusion in a number of bi- and multilateral agreements – most important among them in the Brussels Convention³²⁰ – is evidence that *lis pendens* can be regarded as a general principle of law in the sense of Art 38 of the ICJ Statute.

³¹⁶ Art 35 para 2 (b) ECHR (old Art 72 para 2 (b) ECHR).

³¹⁷ European Commission of Human Rights, Application 16717/90, *Pauger v. Austria*, Decision on Admissibility of 9 Jan. 1995, 80 D&R 24 (1995)(emphasis added). In the specific case the application was admissible because the Claimant had raised a violation of the non-discrimination principle before the UN Human Rights Committee and a violation of the right of access to courts, two fundamental rights arising under totally separate Articles both with the ICCPR and the ECHR. Therefore the Commission was correct in holding that: “the applicant did not submit substantially the same matter as raised in his application to the Human Rights Committee of the United Nations. While before [the Human Rights Committee] he complained of discrimination against him, before the Commission he complained about issues related to the proceedings before the Austrian authorities and courts.”

³¹⁸ See already *Caire v. Mexico*, 5 R.I.A.A. 516, 523 (1929).

³¹⁹ See *supra* note 236.

³²⁰ Art. 21 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept. 1968, 29 ILM (1990) 1413. See also Art. 19 Convention on the Enforcement of Judgments in Civil and Commercial Matters (Italy-France), 3 June 1930, 153 L.N.T.S. 135; Art. 10 Convention concerning

277. The existence or application of such a rule was acknowledged in principle in the cases where *lis pendens* claims were made before international courts or tribunals.³²¹

278. The procedural rules of some international courts and dispute settlement institutions express the principle of *lis pendens* by barring proceedings as long as the same claims are pending before other fora. According to Art 35 para 2 (b) ECHR (old Art 27 para 2 (b) ECHR)

The [European] Court [of Human Rights] shall not deal with any application submitted under Article 34 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.

279. Article 2005 para 6 NAFTA, addressing the relationship between NAFTA and GATT Dispute Settlement, similarly states that

Once dispute settlement procedures have been initiated under Article 2007 [NAFTA] or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other [...].

280. As to the standard of identity Article 2005 para 2 NAFTA refers to

grounds that are *substantially equivalent* to those available [...] under this Agreement.

281. It is apparent that in both circumstances the likelihood of the actual occurrence of parallel proceedings was anticipated by the drafters of the treaties. Still, this “codification” of the *lis pendens* rule can be taken as evidence of its more general validity.

282. Other courts and institutions are not subject to express rules. In the absence of specific EC Treaty provisions, the European Court of Justice has nevertheless applied the principle of

the Recognition and Enforcement of Judicial Decisions and Arbitral Awards (Belgium-Switzerland), 29 April 1959, 443 U.N.T.S. 35; Art. 14 Convention concerning the Reciprocal Recognition and Enforcement of Judicial Decisions and other Enforceable Instruments in Civil and Commercial Matters (Belgium-Italy), 6 April 1962, 490 U.N.T.S. 317.

³²¹ See *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1925 P.C.I.J. (Ser. A) No. 6, at 19-20; *Caire v. Mexico*, 5 R.I.A.A. 516, at 523-25 (1929).

lis pendens in its judicial practice.³²² A number of human rights bodies, such as the UN Human Rights Committee, the European Commission of Human Rights and the European Court of Human Rights, have also relied on this principle as a result of specific Treaty language aiming at the avoidance of duplicating proceedings.³²³

283. The existence of an international *lis pendens* rule also follows from the applicability of *res judicata*. As a matter of legal logic it would be inconsistent to permit parallel proceedings between the same parties in the same dispute before different dispute settlement organs up to the point where one of them has decided the case and then prevent the other (“slower”) one from proceeding as a result of *res judicata*.

284. The preconditions for the application of the *lis pendens* rule are generally the same as those of *res judicata*. *Lis pendens* also applies with regard to

1. international courts and tribunals in proceedings between
2. the same parties concerning
3. the same dispute.

Thus, the individual elements of *lis pendens* need not be recounted. In discussing its relevance to the London and Stockholm arbitral award, reference will be made both to *res judicata* and to *lis pendens*.

5. A Chronology of the London and the Stockholm Arbitral Proceedings

285. On 19 August 1999 Mr. Lauder initiated arbitration proceedings against the Czech Republic on the basis of the bilateral investment treaty between the Czech Republic and the US³²⁴ (=London Proceedings). These arbitral proceedings were conducted in accordance with

³²² See Cases 172, 226/83, *Hoogovens Groep v. Commission* [1985] ECR 2831, at 2843, 2346; Cases 358/85, 51/86, *France v. Parliament* [1988] ECR 4821, 4846.

³²³ See European Commission of Human Rights, App. 17512/90, *Formieles v. Spain*, Decision of 6 July 1992 available under <http://hudoc.echr.coe.int/Hudoc1doc/hfdec/sift/867.txt>; see also European Commission of Human Rights, Application 16717/90, *Pauger v. Austria*, Decision on Admissibility of 9 Jan. 1995, 80 D&R 24 (1995).

³²⁴ *Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment*, signed 22 October 1991 (=US-Czech BIT), in: ICSID, Investment Promotion and Protection Treaties, Loose-leaf.

the UNCITRAL Arbitration Rules. Mr. Lauder claimed that various acts and omissions of the Czech Media Council in 1993, 1996 and 1999 constituted violations of the US/Czech BIT.

286. On 3 September 2001, a final arbitration award was rendered in London between Mr. Lauder and the Czech Republic (=London Award). In the award the tribunal held unanimously that the Czech Republic had committed a breach of its obligations under the US/Czech BIT in relation to the 1993 events only; but that this breach did not give rise to liability on the part of the Czech Republic. The London Tribunal also decided that Mr. Lauder's claim for a declaration that the Czech Republic had committed further breaches of the US/Czech BIT in relation to the 1996 Events and the 1999 Events be denied and that all claims for damages be denied.

287. While the London proceedings were still pending, on 22 February 2000, CME, a company incorporated in The Netherlands and controlled by Mr. Lauder, initiated arbitration proceedings against the Czech Republic pursuant to the Netherlands/Czech BIT³²⁵ (=Stockholm Proceedings). CME alleged the same violations and facts as Mr. Lauder in the London proceedings.

288. Ten days after the rendering of the London Award, on 13 September 2001 a Partial Award was adopted by the Stockholm Tribunal. It came to diametrically opposing conclusions from the London Award.

6. *Res judicata* and *lis pendens* as Applied to the London and the Stockholm Arbitral Proceedings

289. The above analysis makes it possible to evaluate the Stockholm award from the perspective of the principle of *res judicata* and *lis pendens*. Therefore, it is necessary to examine the fulfillment of the requirements as set out above, in particular, whether the proceedings were conducted

³²⁵ *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, signed on 29 April 1991(=Netherlands-Czech BIT), in: ICSID, Investment Promotion and Protection Treaties, Loose-leaf..

1. before two international arbitral tribunals,
2. between the same parties,
3. concerning the same issues.

a. Two International Arbitral Tribunals

290. The London and the Stockholm arbitral proceedings took place before international tribunals on the basis of bilateral investment treaties between the Czech Republic on the one hand and the US³²⁶ respectively The Netherlands³²⁷ on the other hand. Both proceedings were conducted according to the UNCITRAL arbitration rules between a private investor and a State party. Both tribunals acted in mixed arbitration of an international character. Therefore both *res judicata* and *lis pendens* are relevant.

b. Identity of Parties

291. Both arbitral proceedings, the one before the London Tribunal and the one before the Stockholm Tribunal, took place between, in essence, the same parties.

292. It is undisputed that the respondent in both cases was the Czech Republic. The formal claimant in the London proceedings was Mr. Lauder, while the Stockholm proceedings were officially instituted by CME.

293. This formal lack of identity was stressed by the London award when it rejected the *lis pendens* argument by holding that

all the other court and arbitration proceedings [including the Stockholm proceedings] involve *different parties* and *different causes of action*.³²⁸

³²⁶ *Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment*, signed 22 October 1991.

³²⁷ *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, signed on 29 April 1991.

³²⁸ London award, p. 35 para.171. (Emphasis added.)

294. It is hard to see why the London Tribunal, having been seized of the case before the Stockholm proceedings were instituted, should have denied its jurisdiction on the basis of *lis pendens*. *Lis pendens* requires a court not to exercise jurisdiction if a matter is already pending in another forum. This was clearly not the case when the London proceedings were instituted. Thus the reference to *lis pendens* in the London award can only be regarded as an obiter dictum. It was, however, highly relevant when the Stockholm proceedings were instituted. It was the Stockholm Tribunal which should have dismissed the case because of *lis pendens* since the London Tribunal was already seized of the same dispute. It did not do so although it recognized that both cases involved “Mr. Lauder in bringing virtually identical claims under two separate Treaties.”³²⁹ It seems that the only possibility for the Stockholm Tribunal to proceed was by disregarding the *lis pendens* principle. And indeed it did not even mention *lis pendens*. Rather, it confined its remarks to the question of “abuse of treaty proceedings” and held that there was no such abuse.

295. The Stockholm award demonstrates a highly formalistic approach towards the question of identical or separate personality of companies which contrasts sharply with practice in international investment law in general and international investment arbitration in particular.³³⁰

296. The formal difference between Mr. Lauder and CME does not exclude the applicability of the *res judicata* and *lis pendens* principle since

1. the real party in interest is the same and
2. strict legal identity of the parties is not required under *res judicata* and *lis pendens*.

1.) Identity of the Real Party in Interest

297. The real party in interest as Claimant is the same in both proceedings. It is always Mr. Lauder as the “ultimate controlling shareholder” of all the companies involved, in particular of CME, the formal claimant in the Stockholm proceedings.

³²⁹ Stockholm award, p. 109, para. 412.

³³⁰ See *supra* paras. 222 *et seq.*

298. The fact that the real party in interest was always Mr. Lauder was acknowledged by himself.³³¹ In the Stockholm proceedings the arbitral tribunal recognized not only that Mr. Lauder is the “ultimate controlling shareholder of CME” but also that

[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action.³³²

299. This economic background is relevant also for purposes of *res judicata*. As was recognized by an ICC arbitral tribunal,³³³ discussed above³³⁴:

[...] irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the arbitral tribunal should take account [...].³³⁵

300. The control actually exercised by Mr. Lauder over CME also becomes apparent in the conduct of the two arbitrations. They were conducted in an almost identical fashion using the services of the same lawyers, raising the same arguments, using the same evidence and requesting the same relief.

301. Given the degree of control exercised by the Claimant in the London proceedings (Mr. Lauder) over the Claimant in the Stockholm proceedings (CME) it is safe to assume that they can be regarded as identical Claimant for purposes of *res judicata*.

302. Further, the very fact that Mr. Lauder was recognized as an investor in the London proceedings, although he had no direct and personal involvement in the investment, demonstrates the validity of the “economic approach” in modern investment arbitration.

³³¹ In the London Proceedings, Mr. Lauder asserted that his injury was the same as the injury to CME Media and the injury to CME and the injury to ČNTS.

³³² Para. 143 on p. 47 of the Stockholm award.

³³³ *Dow Chemical France et al. v. Isover Saint Gobain*, ICC Case No. 4131 (1982), 9 *Yearbook of Commercial Arbitration* 131 (1984).

³³⁴ See *supra* paras. 224, 225.

³³⁵ *Dow Chemical France et al. v. Isover Saint Gobain*, ICC Case No. 4131 (1982), 9 *Yearbook of Commercial Arbitration* 131 at 136 (1984).

2.) Privity

303. Strict legal identity of the parties is not required under the doctrine of *res judicata*. While identity is, of course, the normal case, it is sufficient that either the parties or their privies are the same.³³⁶ This extension of the *res judicata* effect to privies is uncontroversial. That such “privity” can be assumed as between Mr. Lauder and CME is apparent.

304. Mr. Lauder is a controlling shareholder of the Bermuda incorporated CME Enterprises Ltd. which owns, through a chain of fully-owned subsidiaries, also the Dutch company CME Czech Republic B.V. Though legally distinct, these corporate entities have served as vehicles for the investment made by Mr. Lauder in the Czech Republic. As a result of their domination by Mr. Lauder as the “ultimate controlling shareholder” they can be regarded as alter egos of the investor.

305. If one takes into account non-international arbitral practice, with its broad and flexible privity concept,³³⁷ it seems that privity can be safely assumed between the various companies owned and controlled by Mr. Lauder.

c. Identity of Issues

306. As has been shown above,³³⁸ *res judicata* requires that both claims concern the same issue and divides this requirement into the necessity that both the “object” (*petitum*) and the “grounds” (*causa petendi*) of the two claims are identical.

³³⁶ See *supra* para. 240.

³³⁷ See *supra* para. 241.

³³⁸ See *supra* para. 243 *et seq.*

1.) Identical Object

307. The same relief was sought in both arbitrations. In both arbitral proceedings the relief sought by the Claimant was initially directed at reinstatement of the benefit of the investment. Subsequently, in both arbitral proceedings this was changed to damages from the Czech Republic as a result of allegedly suffering loss of that same investment.

308. In the London proceedings the Claimant initially sought restoration of the contractual and legal rights associated with his investments, in particular, to secure the exclusive right of ČNTS, one of the Claimant's subsidiaries to provide broadcasting services in the Czech Republic.³³⁹ This relief was subsequently withdrawn and Claimant requested the tribunal to declare that he was entitled to damages as a result of breaches of the following provisions of the US-Czech BIT³⁴⁰:

- the obligation of fair and equitable treatment of investments,³⁴¹
- the obligation to provide full protection and security to investments,³⁴²
- the obligation to treat investments at least in conformity with principles of international law,³⁴³
- the obligation to not to impair investments by arbitrary and discriminatory measures,³⁴⁴ and
- the obligation not to expropriate investments directly or indirectly through measures tantamount to expropriation.³⁴⁵

309. In the Stockholm proceedings Claimant initially requested *restitutio in integrum*, i.e. the restoration of the broadcasting rights of its Czech subsidiary,³⁴⁶ which was subsequently withdrawn and replaced by a demand for damages from respondent for a violation of the following obligations under the Netherlands-Czech BIT³⁴⁷:

- the obligation of fair and equitable treatment,³⁴⁸
- the obligation to not to impair the operation, management, maintenance, use, enjoyment or disposal of investments by unreasonable or discriminatory measures,³⁴⁹

³³⁹ London award, p. 5 para. 11.

³⁴⁰ Cf. London award, p. 11 para. 42.

³⁴¹ Art II para 2 (a) US-Czech BIT.

³⁴² Art II para 2 (a) US-Czech BIT.

³⁴³ Art II para 2 (a) US-Czech BIT.

³⁴⁴ Art II para 2 (b) US-Czech BIT.

³⁴⁵ Art III US-Czech BIT.

³⁴⁶ Stockholm award, p. 10 para. 25.

³⁴⁷ Stockholm award, p. 11 para. 26.

³⁴⁸ Art 3 para. 1 Netherlands-Czech BIT.

- the obligation of full security and protection,³⁵⁰
- the obligation to treat investments at least in conformity with the rules of international law,³⁵¹ and
- the obligation not to deprive Claimant of its investments by direct or indirect measures.³⁵²

310. It is apparent that the slight variation in the language of the claims used in the two proceedings is only a consequence of the intention to draft the prayer of relief in both cases as closely as possible in accordance with the text of the applicable BITs concerned. In substance, the requests for *restitutio in integrum* and subsequently for compensation for violations of rights under the two applicable BITs are identical.

311. Even if the relief requested were not considered to be fully identical, this does not change the fact that the two arbitral proceedings concerned identical claims. Thus, the one instituted later in time should have been held inadmissible on the grounds of *lis pendens* as long as the London proceedings were still going on or on the grounds of *res judicata* once the London Award had been rendered.

312. Under the identity test employed in the *Machado* case³⁵³ “whether both claims are founded on the same injury”³⁵⁴ the two arbitral proceedings were clearly identical because they both related to the same acts and measures allegedly involving the responsibility of the defendant. That they did indeed arise from the same facts was even expressly acknowledged by the Stockholm Tribunal.³⁵⁵

2.) Identical Grounds

313. In both arbitral proceedings the same legal arguments were relied upon. Formally there are two different BITs which the Claimant invoked in the parallel proceedings. Of course, the

³⁴⁹ Art 3 para. 1 Netherlands-Czech BIT.

³⁵⁰ Art 3 para. 2 Netherlands-Czech BIT.

³⁵¹ Art 3 para. 5 Netherlands-Czech BIT.

³⁵² Art 5 Netherlands-Czech BIT.

³⁵³ *Machado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2193 (Span.-U.S. Claims Commission 1881). See *supra* note 294.

³⁵⁴ *Id.*, at 2194.

³⁵⁵ In para. 143 on p. 47 of the Stockholm award the tribunal recognized that “[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action.”

Claimant had to invoke different BITs in order to persuade the two different arbitral tribunals to exercise jurisdiction.

314. In substance, however, in both proceedings materially identical provisions under the respective BITs, providing the same grounds, were invoked. In both proceedings it was argued that the Czech Republic had breached its obligations to provide fair and equitable treatment and full protection and security; to prohibit arbitrary and discriminatory conduct, and not to expropriate without compensation.³⁵⁶

315. The two BITs in question, the US-Czech and the Netherlands-Czech BIT, in substance contain the same standards of protection relevant to investors. A comparison of the core provisions of both BITs reveals their virtual identity implying that they contain ‘substantially the same’ standard of protection:

316. Both BITs contain similarly broad definitions of what is protected as an “investment” including “shares” and “other interests in companies.”³⁵⁷ Both BITs provide that investments of nationals of either State shall receive the better of national treatment or most-favored-nation treatment.³⁵⁸ Under both BITs expropriations can occur only in accordance with a high level of international law standards: for public purpose/in the public interest, in a non-discriminatory manner, under due process of law, and upon compensation.³⁵⁹ Only with regard to the level of compensation the formulations employed in the two BITs may appear to differ. While the US-Czech BIT uses the language of the Hull-formula demanding “prompt, adequate and effective” compensation,³⁶⁰ the Netherlands-Czech BIT merely speaks of “just compensation.” In specifying these standards, however, also the language of both BITs gets very close again by stating that compensation should be paid “without delay”³⁶¹ / “without undue delay”³⁶², “be freely transferable”³⁶³ / “in any freely convertible currency accepted by the claimants”³⁶⁴, and “be equivalent to the fair market value of the expropriated

³⁵⁶ See the requests for relief in the two proceedings *supra* paras. 308 and 309.

³⁵⁷ Art I para 1 subpara. 1 (a) (ii) US-Czech BIT and Art 1 (a) (ii) Netherlands-Czech BIT.

³⁵⁸ Art II para 1 US-Czech BIT and Art 3 para 2 Netherlands-Czech BIT.

³⁵⁹ Art III para 1 US-Czech BIT and Art 5 Netherlands-Czech BIT.

³⁶⁰ See *Malcolm Shaw*, *International Law* 577 (4th ed., 1997).

³⁶¹ Art III para 1 US-Czech BIT.

³⁶² Art 5 (c) Netherlands-Czech BIT.

³⁶³ Art III para 1 US-Czech BIT.

³⁶⁴ Art 5 (c) Netherlands-Czech BIT.

investment”³⁶⁵ / “shall represent the genuine value of the investments affected”³⁶⁶. Under both BITs nationals of either State have direct access to binding arbitration.³⁶⁷

317. It is useful to compare the specific BIT provisions invoked by Claimant in the two arbitral proceedings in more detail. This will show that in both arbitral proceedings identical legal grounds were raised.

318. In both proceedings a breach of the obligation of fair and equitable treatment of investments, to provide full protection and security to investments, and to treat investments at least in conformity with principles of international law was alleged.³⁶⁸

319. As far as these specific claims are concerned, the US-Czech BIT provides:

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.³⁶⁹

320. The Netherlands-Czech BIT provides in this regard:

Each Contracting Party shall ensure fair and equitable treatment to the investors of the other Contracting Party [...] ³⁷⁰
[...] each Contracting Party shall accord to such investments full security and protection [...] ³⁷¹
If [...] obligations under international law existing at present or established hereafter [...] contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.³⁷²

³⁶⁵ Art III para 1 US-Czech BIT.

³⁶⁶ Art 5 (c) Netherlands-Czech BIT.

³⁶⁷ Art VI US-Czech BIT and Art 8 Netherlands-Czech BIT.

³⁶⁸ See *supra* paras. 308, 309 and 314.

³⁶⁹ Art II para 2 (a) US-Czech BIT.

³⁷⁰ Art 3 para. 1 Netherlands-Czech BIT.

³⁷¹ Art 3 para. 2 Netherlands-Czech BIT.

³⁷² Art 3 para. 5 Netherlands-Czech BIT.

321. In both proceedings a violation of the obligation not to impair investments by arbitrary and discriminatory measures was alleged.³⁷³

322. The US-Czech BIT provides:

Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. [...].³⁷⁴

323. The Netherlands-Czech BIT provides here:

Each Contracting Party [...] shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment, or disposal [of investments].³⁷⁵

324. As has been discussed above also with regard to the expropriation claim, the substantive protection contained in the two BITs although couched in different terms is substantially the same.³⁷⁶

325. The US-Czech BIT provides:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except: for public purpose; in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely useable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.³⁷⁷

326. The Netherlands-Czech BIT provides:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their

³⁷³ See *supra* paras. 308 and 309.

³⁷⁴ Art II para 2 (b) US-Czech BIT.

³⁷⁵ Art 3 para. 1 Netherlands-Czech BIT.

³⁷⁶ See *supra* para. 316.

³⁷⁷ Art III para 1 US-Czech BIT.

investments unless the following conditions are complied with:

- a) the measures are taken in the public interest and under due process of law;
- b) the measures are not discriminatory;
- c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investment affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants and in any freely convertible currency accepted by the claimants.”³⁷⁸

327. Although phrased in slightly different language, the standards of protection afforded by both BITs correspond to the same high level of investment protection afforded by modern treaties in this field. The causes or legal grounds provided by them can thus be regarded as identical.

328. The identity of the issues in the two proceedings is particularly obvious since in both the London and the Stockholm arbitrations, virtually identical written pleadings were filed, the same witnesses submitted virtually the same witness statements, substantially the same arguments were made to the two tribunals by the same counsel, and the parties jointly tried to ensure that the same oral testimony given to each tribunal was available to the other.³⁷⁹

a.) Identical Grounds under Separate Legal Instruments

329. The formal point that the two proceedings were technically brought under different BITs is irrelevant for purposes of ascertaining the identity of the “cause” or “ground” of the two arbitrations. This is supported and reinforced by the ruling in the *Southern Bluefin Tuna Case*³⁸⁰ where an arbitral tribunal refused to regard a fisheries dispute that arose both under CCSBT norms regarding total allowable catch as well as under UNCLOS rules regarding fisheries conservation and management obligations as two separate disputes. The tribunal expressly held:

³⁷⁸ Art 5 Netherlands-Czech BIT.

³⁷⁹ Stockholm award p. 176, para. 620.

³⁸⁰ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359 (2000). See *supra* para. 254.

To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.³⁸¹

330. The *Southern Bluefin Tuna Case* involved two very differently structured treaties, such as UNCLOS and the CCSBT. Because the dispute arose from identical facts and always concerned the permissibility of Japanese fishing practices, the tribunal held that any differences between the claims based on the two different treaties (UNCLOS and CCSBT) could be regarded as negligible. In other words, the claims arising under their respective norms were sufficiently similar so as to render any distinction between them “artificial”.

331. Against this background it would appear to be far more “artificial” to regard claims arising under almost identically worded and substantially identical provisions of two different BITs to constitute distinct legal disputes. Thus, the London proceedings and the Stockholm proceedings arising under the US-Czech BIT and the Netherlands-Czech BIT respectively, both concerning identical facts and both raising the issue of the legality of acts and omissions of the Czech Republic, cannot be considered to be distinct legal disputes.

332. This is further corroborated by the practice of human rights institutions which have consistently held that the same dispute may arise under different treaties as long as the different treaties contain similar rules on which the complaints are based.³⁸²

333. If one takes the *Trébutien Case*³⁸³ as a point of reference, it becomes clear that in the present proceedings before the London and the Stockholm Tribunals the same dispute was brought to arbitration. In the case before the UN Human Rights Committee, it was held that a complaint alleging that certain measures taken by French authorities constituted a violation of Arts. 9 and 14 of the ICCPR was the “same matter” as an earlier complaint brought before the European Commission of Human Rights concerning the same measures challenged as infringements of the similarly, though not strictly identically worded Art. 5 of the ECHR. The

³⁸¹ *Id.*, at 1388, para 54.

³⁸² See UN Human Rights Commission 452/1991, *Glaziou v. France*, Decision of 18 July 1994, CCPR/C/51/D/452/1991, *supra* note 304 and European Commission of Human Rights, Application 16717/90, *Pauger v. Austria*, Decision on Admissibility of 9 Jan. 1995, 80 D&R 24 (1995), *supra* note 316.

³⁸³ UN Human Rights Commission 421/1990, *Trébutien v. France*; Decision of 18 July 1994, CCPR/C/51/D/421/1990, p. 7.

language of these provisions in two separate treaties is not identical, though the substantive content is very similar.

334. Following this rationale, it is clear that claims, arising under almost identically worded and substantially identical provisions the US-Czech BIT and the Netherlands-Czech BIT respectively, such as those brought in the London proceedings and then in the Stockholm proceedings have to be viewed as the same matter or same dispute.

b.) Admission of the Identity of the Issues

335. That the parallel arbitral proceedings in London and Stockholm derived from the same circumstances, concerned the same subject matter, and gave rise to the same cause of action was also acknowledged by the Claimant in the Stockholm proceedings and by the Stockholm Tribunal itself.

336. In its notice of arbitration the Claimant CME stated that Mr. Lauder, “the controlling ultimate shareholder of CME,” had already instituted arbitration proceedings against the Czech Republic on 19 August 1999 (=the London Proceedings) under the US-Czech BIT. Claimant CME expressly acknowledged that

[t]he relevant substantive protections in that treaty are substantially similar to those provided in the Treaty here [i.e. the Netherlands-Czech BIT], and the dispute underlying the arbitration is the same in both instances.³⁸⁴

337. This acknowledgement was reaffirmed in Claimant’s statement of claim wherein CME repeated that

[t]he provisions of that treaty [i.e. the US-Czech BIT] are similar to those of the Treaty underlying this arbitration [i.e. the Netherlands-Czech BIT], and the factual predicate of the claims in that proceeding are virtually identical to the factual predicate of this action.³⁸⁵

³⁸⁴ Notice of Arbitration of Claimant CME Czech Republic B.V., February 22, 2000, para. 9. (Emphasis added.)

³⁸⁵ Statement of Claim of Claimant CME Czech Republic B.V., September 22, 2000, para. 77.

338. In discussing the Claimant’s arguments the Stockholm Tribunal had to be cautious in order to maintain its jurisdiction and thus only admitted that the two proceedings were based on “identical facts.”³⁸⁶ In its decision on costs, however, the Stockholm Tribunal even expressly acknowledged that the

Claimant [i.e. CME] initiated these arbitration proceedings [i.e. the Stockholm proceedings] after having initiated and partly carried through the *Lauder vs/ The Czech Republic UNCITRAL Arbitration Proceedings* which, in essence, deal with the same dispute.³⁸⁷

339. It even took “account of this situation and also of the fact that the claimant and its ultimate shareholder, by initiating two parallel UNCITRAL Treaty Proceedings had [...] *two bites of the apple*.”³⁸⁸

340. Furthermore in the SEC filing for the year 1999, CME Ltd., the Bermudan holding company of claimant CME which is controlled by Mr. Lauder, reported that its wholly owned subsidiary CME had instituted arbitration proceedings on 22 February 2000 and that “[t]he claims asserted by the company (i.e. CME) are substantially similar to those asserted by Mr. Lauder in the arbitration proceedings that he has instituted in his personal capacity against the Czech Republic.”³⁸⁹

c.) Prohibition of Claim-Splitting

341. Even if one were to reach the conclusion that the two claims before the London and the Stockholm Tribunal are not fully identical, the Stockholm proceedings – instituted after the London proceedings – should still be considered inappropriate on *lis pendens* and *res judicata* grounds. This follows from the fact that all the claims raised in the Stockholm arbitration were closely related to those raised in the London proceedings and could have been raised there. Legally this results from the prohibition of claim-splitting for the purpose

³⁸⁶ In para. 143 on p. 47 of the Stockholm award the tribunal recognized that “[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action.”

³⁸⁷ Para. 620 on p. 176 of the Stockholm award (Emphasis added).

³⁸⁸ Para. 621 on p. 177 of the Stockholm award (Emphasis in the original).

³⁸⁹ CENTRAL EUROPEAN MEDIA ENTERPRISES LTD – 10-K – Annual report, Date Filed: 3/15/2000, 6.

of evading the prohibition of re-litigating identical disputes in accordance with *lis pendens* and *res judicata*.

342. Under the established case-law of arbitral tribunals, claim-splitting has been rejected. Following the *Delgado* case,³⁹⁰ discussed above,³⁹¹ it is obvious that even if the Claimant in the Stockholm proceedings had not precisely asked for the same relief as in the London proceedings, he had had the “power to do so” and thus “can not have relief by a new claim” before another tribunal.³⁹²

343. Apart from claim-splitting, for purposes of having “two bites of the apple”, it is necessary to avoid re-litigation of an already decided dispute. This can be achieved by recognizing that *res judicata* applies to “substantially identical actions”³⁹³ between the parties.³⁹⁴ If there are any doubts left as to the precise identity of the issues in the two arbitral proceedings, there can be no question that they were “substantially identical actions.”

3.) Identical Facts

344. The same facts were relevant in both arbitrations. It is incontestable and even acknowledged by the arbitral panels themselves that the London and Stockholm proceedings address the same facts.³⁹⁵ Both are concerned with the events surrounding the regulatory and other involvement of the Czech Media Council in the television broadcasting joint venture undertaken by a Czech company (CET 21) and a series of foreign companies controlled by Mr. Lauder (the Claimant in the London proceedings).

³⁹⁰ *Delgado* Case, 3 John Bassett Moore, International Arbitrations to which the United States Has Been a Party 2196 (Span.-U.S. Claims Commission 1881).

³⁹¹ See *supra* note 291.

³⁹² In *Delgado* the umpire held “[e]ven if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire.” *Id.*, at 2199.

³⁹³ *Lowe*, AusYBIL, 202.

³⁹⁴ See *supra* para. 273.

³⁹⁵ Stockholm award, p. 109, para. 412. Also p. 47, para. 143 of the Stockholm award recognizes that “[t]he factual predicate of the claims in that proceeding [the London Proceedings] are virtually identical to the factual predicate of this action.”

345. In the London proceedings Mr. Lauder claimed that various acts and omissions of the Czech Media Council in 1993, 1996 and 1999 constituted violations of the US/Czech BIT.

346. In the Stockholm proceedings, instituted by CME, a company controlled by Mr. Lauder, the Claimant alleged the same violations and facts as the Claimant in the London proceedings. CME claimed that various acts and omissions of the Czech Media Council in 1993, 1996 and 1999 constituted violations of The Netherlands/Czech BIT.

347. This clearly shows that “both claims are founded on the same injury” in the sense of the *Machado* decision.³⁹⁶ Following the reasoning applied in this and in other arbitral decisions,³⁹⁷ the dispute before the London Tribunal is to be regarded as identical to the dispute brought before the Stockholm Tribunal.

348. Consequently, the pendency of the dispute before the London Tribunal should have prevented the Stockholm Tribunal from hearing this dispute as a result of *lis pendens*. When the London Tribunal had rendered its award, the Stockholm Tribunal should have abstained from deciding the same dispute as a result of *res judicata*.

7. Conclusions: The Importance of *res judicata* and *lis pendens* in the Present Case

349. This case has caused consternation and dismay in the international arbitration community. Two awards in the same dispute rendered almost simultaneously have come to diametrically opposed conclusions. This will seriously jeopardize the confidence of the business community in the reliability and expeditiousness of international arbitration.

350. It is undeniable that lawyers may disagree about the correct legal assessment of legal disputes. This is the underlying premise of the ordinary appellate system in domestic proceedings. It is, however, equally clear that the international arbitral system is based on

³⁹⁶ *Machado Case*, 3 John Bassett Moore, *International Arbitrations to which the United States Has Been a Party* 2193, at 2194 (Span.-U.S. Claims Commission 1881).

³⁹⁷ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359 (2000).

expediency and efficiency, a cornerstone of which is the finality and binding force of arbitral decisions. If matters decided by arbitration are to be open to re-arbitration this would seriously undermine the international arbitration system.

351. It was rightly asserted with particular regard to international arbitration that “inconsistent findings by different tribunals on the same facts deprive the law of its predictability and hence of its ability to provide effective guidance; and hence, they threaten to undermine [...] the Rule of Law.”³⁹⁸

352. It is exactly these policy considerations which are protected by *res judicata* and *lis pendens*, to reduce the risk of multiple proceedings, which may lead to inconsistent or even contradictory outcomes, and to minimise undue burdens imposed upon the parties by virtue of multiple litigation.

353. The correct approach to avoid the contradictory results actually arrived at would have been for the Stockholm Tribunal to respect *lis pendens* before the London Tribunal, the tribunal first seized. Once the London Tribunal had rendered a decision the Stockholm Tribunal should have followed the corollary doctrine of *res judicata* dismissing the proceedings.

354. Parallel proceedings leading to diametrically opposed results as in the instant case can have a seriously damaging effect on the international arbitral process. Trust and confidence in the time- and cost-effective settlement of international business disputes would be seriously eroded, if there was no relief available.

355. Where arbitral tribunals are not in a position to avoid such situations by exercising the appropriate level of self-restraint based on binding general principles of law such as *lis pendens* or *res judicata*, it is upon the courts exercising control over arbitral procedures to afford such protection to international arbitration.

³⁹⁸ *Vaughan Lowe, Res judicata and the Rule of Law in International Arbitration*, 8 *African Journal of International and Comparative Law* 38 at 48 (1996).

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Christoph H. Schreuer

STATEMENT OF QUALIFICATIONS

EDUCATION

- 1979 J.S.D. Yale Law School
- 1976 Universitätsdozent (venia legendi) University of Salzburg
- 1972 Diploma in International Law University of Cambridge
- 1970 L.L.B. University of Cambridge, redesignated LL.M. in 1986
- 1966 Dr. iur. University of Vienna

EMPLOYMENT

- October 2000 - Present **University of Vienna, School of Law, Department of International Law and International Relations:** Professor of Law
- July 1992 - June 2000 **School of Advanced International Studies, The Johns Hopkins University:** Edward B. Burling Professor of International Law and Organization; Director: International Law and Institutions
- September 1970 - Sep. 2000 **University of Salzburg, School of Law, Department of International Law:** Professor of Law (January 1978-Sept. 2000); Head of Department (October 1982 - June 1986); Universitätsdozent (Associate Professor) (June 1976 - January 1978); Universitätsassistent (Assistant Professor) (September 1970 - May 1976)

PUBLICATIONS

Books

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Prepublication in ICSID Review - Foreign Investment Law Journal Vol. 11 (1996) – 15 (2000)

c) Numerous Unpublished Legal Opinions dealing with international investment arbitration

August Reinisch

STATEMENT OF QUALIFICATIONS

EDUCATION

- 1998 Universitätsdozent (venia docendi) University of Vienna
- 1991 Dr. iur. University of Vienna
- 1990 Mag. phil. University of Vienna
- 1989 L.L.M. New York University
- 1988 Mag. iur. University of Vienna

PROFESSIONAL QUALIFICATIONS

- 1994 Diploma in International Law Hague Academy of International Law
- 1990 Admission to the Bar of New York and Connecticut

POSITIONS

2001 - Present	US Government-appointed arbitrator on the In rem Restitution Panel according to the Austrian General Settlement Fund Law
1999 - Present	University of New South Wales, Sydney: Visiting Fellow and Lecturer
1999 - Present	Bologna Center of The Paul H. Nitze School of Advanced International Studies/Johns Hopkins University: Professorial Lecturer
1998 - Present	University of Vienna, School of Law, Department of International Law and International Relations: Professor of International and European Law
1992 - 1993	Austrian Federal Ministry for Foreign Affairs Legal Adviser's Office
1990 - 1998	University of Vienna, School of Law, Department of International Law and International Relations: Assistant Professor

PUBLICATIONS

Books

- US-Exportkontrollrecht in Österreich, 146 pp. (Manz-Verlag, 1991).
- State Responsibility for Debts, 154 pp. (Böhlau-Verlag, 1995).
- with *Gerhard Hafner*, Staatensukzession und Schuldenübernahme beim “Zerfall” der Sowjetunion, 168 pp. (Service-Fachverlag, 1995).
- International Organizations before National Courts, 449 pp. (Cambridge University Press, 2000).

Selected Articles:

- Widening the US Embargo Against Cuba Extraterritorially. A few public international law comments on the “Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996”, in: 7 *European Journal of International Law* 545-562 (1996).
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