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Rationalizing applicable law in investor-State disputes in absence of express choice of law under Article 42 (1) of ICSID Convention – Part II

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In Part I it was argued that the proper law applicable in the investor-State disputes under Article 42 (1) ICSID Convention depends on the substantive grounds of the investor's claim. In support of this, I have outlined three factual scenarios and types of claims with evidence from case law. Part I dealt with host State domestic law and the direct relationship between investor and State. The ICSID case law on the latter supporting the analysis from Part I is as follows:

2.1. Case law examples

In *SOABI v Republic of Senegal (ARB/82/1)* there was a contract between the investor and the Government of Senegal. In para 5.02 of the award the Tribunal directed itself straight to Senegalese law, i.e. host State law, without any consideration of international law. The Tribunal explicitly recognised in its reasoning two connecting factors of the investment to Senegal and its national law – the project was located in the country and Senegalese parties were involved as well. The award may be interpreted as also providing support for the following conclusions:

- Where there is a nexus, especially a contractual one, between the investor and the host State, the relationship and the dispute arising out of it should be exclusively within the realm of national law of the host State.
- Even if there is a choice of law in the nexus instrument, the Tribunal may make use of private international law technique as to determine proper applicable law, which the case seems to demonstrate by the use of connecting factors to direct the project exclusively within the scope of domestic law.

In *Autopista Concesionada de Venezuela v Bolivarian Republic of Venezuela (ARB/00/5)* the Tribunal had to make an assessment of the applicability of international law in a dispute arising out of a concession agreement. It was acknowledged that this situation calls for a different treatment from the one under international law instruments like BITs. The nature of the dispute was contractual and the relationship was recognised as governed by domestic Venezuelan law. The Tribunal reiterated that international law should have corrective and supplementary role but not beyond this extent for that particular dispute (para 102 of the award). However, under Venezuelan domestic law, international law should have primacy over contradicting national legislation. Hence, the position of the Tribunal should not be surprising since the acknowledged role of international law in the dispute is predetermined by the general place of international law within

the system of host State law – international law may in fact correct contradicting domestic law. The Tribunal refused delving into greater importance of international law in this scenario and treated the disputed as a mere contractual claim applying the status of Venezuelan law, including incorporated international law.

3 Scenario 3: basis of the investor's claim is a public international law instrument

3.1. Scenario 3 bears a stark difference to Scenarios 2 and 3. If the investor relies on rights granted by virtue of a bilateral or multilateral international law instrument, then the applicable rules should be evinced from the bulk of international law. The precise scope of this bulk may be determined by reference to the Statute of the International Court of Justice, Article 38, which lays down the array of source of international law. The primary rules governing the relationship between the parties to the dispute would be, however, the particular BIT or MIT (which does not rule out the applicability of customary international law). As subsidiary and complementary rules the tribunal should apply other treaties or customary international law and, if necessary, make use of judicial decisions and doctrine. Furthermore, as the investor seeks to trigger the liability of the State for internationally wrongful acts, this calls for the application of the rules on state responsibility which are rules of public international law (e.g. International Law Commission's Draft Articles on State Responsibility, and relevant case law).

Would there be, however, any relevance of national law of host State in this scenario?

As a matter of fact, the dispute arises out of circumstances primarily related to host State. The rights acquired by the investor are usually those stemming from relations situated within the host State. No matter whether the investor has obtained licenses, permits, authorizations, etc. from the authorities of the host State, or contracted with local natural or corporate persons, or acquired real estate rights, corporate membership, etc., all these rights of the investor, and the respective duties of the host State or third local parties are, usually, based on host State's national law. However, a line of distinction should be drawn. The provisions of national law may be relevant as governing the outlined array of rights and duties. But the purpose of the proceedings brought before the arbitral tribunal constituted under ICSID Convention due to a BIT/MIT claim is to assess the compatibility of State's conduct as a fact against the standards required by particular international law instrument(s). Therefore national law would not be, properly speaking, applicable law. The role of national law would be as a fact that the tribunal should treat and take into account in its consideration and application of the appropriate law. To a great extent, this role resembles the relevance of foreign law in municipal court proceedings or municipal law before international tribunals such as International Court of Justice, European Court of Human Rights, etc.

3.2. Case law examples

In *El Paso Energy International v Argentine Republic (ARB/03/15)* the Tribunal made an extensive pronouncement on the interplay between BIT application, international law and national law. It agreed with other Tribunals, for instance in *Asian Agricultural Products v Sri Lanka (ARB/87/3)*, that the international law instrument granting rights to the investor, serving as basis of its claim, is the *lex specialis* where the determination of applicable law should start from (para 24 of the award). The application of a public international law instrument naturally calls for the application of all relevant rules of international law (e.g. on interpretation of treaties, liability for breach of treaties, etc.), thus rendering international law primary and having a leading role. Therefore, a preliminary issue that should be dealt with prior to establishing a breach of international law is to

what extent State's acts and omissions are compatible with the international standards. The nature of these acts and omissions is governed by national law and relations between the investor and the State, and any third parties, are governed by the domestic law of the host State. This is why the Tribunal concluded that:

“The fact that the BIT and international law govern the issue of Argentina’s responsibility for violation of the treaty does not exclude that the domestic law of Argentina has a role to play too. The Tribunal agrees with the Claimant that this role is to inform the content of those commitments made by Argentina to Claimant that the latter alleges to have been violated. Thus, in order to establish which rights have been recognised by Argentina to the Claimant as a foreign investor, resort will have to be had to Argentina’s law. However, whether a modification or cancellation of such rights, even if legally valid under Argentina’s law, constitutes a violation of a protection guaranteed by the BIT is a matter to be decided solely on the basis of the BIT itself and the other applicable rules of international law.” (para 135 of the award)

Similarly in *Azurix Corp v Argentine Republic (ARB/30/3)* the Tribunal determined that the Argentinean law should necessarily be dealt with in the decision making process for the purposes of inquiring into host State's liability. However, the treaty basis of the claims did not allow further utilization of national law (para 67 of the award).

Is it possible that in this scenario host State law may still function as *law*? The relevant criterion is whether a tribunal should give rise to the legal consequences that a domestic rule of law engenders or would use the rule to be measured against a standard in an international law instrument and thus trigger the consequences envisioned in the international instrument. If such an international law instrument makes a reference to a national rule, a tribunal should treat this reference like the function of conflict rules in private international law. The international standard directs to giving rise of a domestic law rule and thus it renders it applicable – not relevant *as a fact* but applicable *as law*. This analysis seems to find support in *Asian Agricultural Products v Sri Lanka* where (paras 21 and 24 of the award) the Tribunal reasoned that a BIT may incorporate domestic law rules and thus render them source of law supplementary to international law. A BIT, as in that case, may refer to certain rules or standards in host State law, which the tribunal would have to apply directly as the international law instrument requires so.

Conclusion

Article 42 (1) of ICSID Convention should be perceived, as demonstrated by this analysis, as a general source of powers of the arbitral tribunal regarding the pool of rules from which the tribunal may select the particular rules appropriate for application in the concrete factual situation. Which rules would be proper for application is thus premised on the factual circumstances (and the cause of action) and are not *a priori* determined by the ambit of the provision of the Convention. The case law examples demonstrate a differentiated approach of Tribunals and one of the criteria for such diversity may exactly be the cause of action relied upon by the investor. Neither domestic law nor international law provide for conclusive result as to proper applicable law determination. It is important to note the distinction between Scenarios 1 and 2, on one hand, and Scenario 3, on the other. If international law is applied on equal basis with national law in Scenarios 1 and 2, this would in fact “internationalise” investor-State relations, especially contracts, while such relations by their nature are primarily absorbed into a domestic law system. The true “internationalisation” is in Scenario 3, which is engendered by the treaty basis of the claim and the basis of the protected rights.

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This entry was posted on Monday, April 29th, 2013 at 9:00 am and is filed under [Applicable Law](#), [BIT](#), [ICSID Convention](#), [Investment](#), [Investment agreements](#), [Investment Arbitration](#)

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