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THE BLURRING OF THE LINE BETWEEN CONTRACT-BASED AND TREATY-BASED INVESTMENT ARBITRATION

by Laurence Boisson de Chazournes

Traditionally, a distinction has been made between contract-based and treaty-based investment arbitration. However, as with the impassable wall separating Pyramus from Thisbe, there are cracks enabling the two to mix. Among the warning signs is the question of the law applicable in its various facets to the substance of the dispute.

I. APPLICABLE LAW: WHERE IS THE LINE?

One of the perforations of the boundary between contract-based and treaty-based investment arbitration relates to the law applicable to the merits. In both types of arbitration, tribunals tend to intertwine domestic and international law. This approach, however, raises questions, particularly when tribunals do not consider the choice of law clauses provided by investment agreements.

In contract-based investment arbitration, various scenarios can be found regarding the applicable law. Yet, in this plurality, there is a propensity to consider both sets of norms. This is particularly the case where investment contracts do not contain a choice of law provision. This happens frequently. For instance, in its first 20 years of its existence, only half of the cases that were brought under the International Centre for Settlement of Investment Disputes (ICSID) Convention on the basis of an investment contract involved an applicable law clause.¹ Under Article 42(1) of the ICSID Convention, arbitral tribunals were thus required to apply the law of the State party to the dispute and “such rules of international law as may be applicable.”² International law wields a dual role in such circumstances, that is, it may be “complementary (in the case of a ‘lacuna’ in the law of the State), or corrective,

¹ A.R. PARRA, THE HISTORY OF ICSID 178 (Oxford University Press (2012)).
should the State's law not conform on all points to the principles of international law.\(^3\) Parties may also provide for such a role directly through a choice of law clause. Indeed, the provision on the applicable law may allow for recourse to international law, if necessary, and not merely domestic law alone. This was the case in AGIP S.p.A. v. People's Republic of the Congo, where the parties had agreed that “Congolese law, supplemented where necessary by any principle of international law, shall apply.”\(^4\)

That said, even where the parties have agreed to the sole application of national law, international law may still apply. This is so when States incorporate international law as part of their domestic law, which is the case in a significant number of national legal systems.\(^5\) Even so, international law is germane to the extent that it is permitted by the fundamental laws of States or their constitutional provisions. Examples include, \textit{inter alia}, the laws of Argentina,\(^6\) Cameroon,\(^7\) France,\(^8\) Switzerland,\(^9\) and the US.\(^10\)

In some cases, arbitral tribunals went beyond the parties' agreement on the sole application of national law and resorted to international law in the same way as in the absence of an agreement, \textit{i.e.}, in a supplementary or corrective manner. For example,

\(^3\) See, \textit{e.g.}, Klöckner Industrie-Anlagen GmbH, et al. v. United Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, \textit{ad hoc} Committee Decision, ¶ 122 (May 3, 1985) (emphases in original); Amco Asia Corp., et al. v. Republic of Indonesia, ICSID Case No. ARB/81/1, \textit{ad hoc} Committee Decision, ¶¶ 514-15 (May 16, 1986); Amco Asia v. Indonesia, ICSID Case No. ARB/81/1, Award in Resubmitted Proceeding, ¶ 580 (May 31, 1990).


\(^5\) See \textit{André Nollkaemper}, \textit{National Courts and the Int'l Rule of Law} 73-74 (Oxford University Press (2008)).

\(^6\) \textit{Constitution of the Argentine Nation}, art. 75(22); see \textit{also} BG Group Plc. v. Republic of Argentina, UNCITRAL, Award, ¶ 97 (Dec. 24, 2007).

\(^7\) \textit{Constitution of the Republic of Cameroon}, art. 45.

\(^8\) \textit{Constitution of France} (1958), art. 55.


\(^10\) \textit{U.S. Const.}, art. VI(2).
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in Autopista Concesionada de Venezuela CA v. Venezuela, despite the parties’ incorporation of Venezuelan law into the Concession Agreement, the Tribunal held:

[It is] a well-accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law in the same manner as the application of the host state law failing an agreement (under the second sentence of the same treaty provision).

Other tribunals have followed similar lines of reasoning, stressing the regulatory role of international law. In other words, in contract-based investment arbitration, there appears to be a “general reluctance to abandon international law.”

In addition, the choice of domestic law alone does not preclude the application of transnational public policy. This category refers to the principles and values of international public policy as to which a broad consensus has emerged in the international community. These principles always remain applicable, even where the parties have agreed on national law, as illustrated by World Duty Free v. Kenya. In that case, the Tribunal held that claims based on contracts of corruption or on contracts obtained by corruption could not be upheld “as a matter of ordre public international and public policy under the contract’s applicable laws.” Bribery, as the

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12 Id. ¶ 207.
Tribunal explained, “is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.”

This brief overview on contract-based investment arbitration is indicative of the tendency to intertwine national and international law. This intermingling is not unique to this type of arbitration; it is also found in treaty-based investment arbitration.

Many investment treaties, whether bilateral or multilateral, contain a choice of law clause providing for the application of international law, including the provisions of the said agreement, as well as the law of a contracting party which is a party to the dispute. In other words, the choice of law provision refers both to national and international law. Other agreements, in particular multilateral treaties, include an exclusive reference to international law. For example, Article 26(6) of the Energy Charter Treaty provides that “[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.” Nevertheless, this does not mean that domestic law is totally excluded.

That said, in most cases, investment treaties do not contain a choice of law clause. As a result, the default rule contained in Article 42(1) of the ICSID

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17 World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157, n.19 (Oct. 4, 2006).

18 See, e.g., Agreement between the Swiss Confederation and the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, Nov. 6, 1992, art. 10(7); Agreement between the Belgo-Luxembourg Economic Union and the Republic of Burundi Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 12, 1993, art. 8(5); see also Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR, Jan. 17, 1994, art. 9(5).


20 See, e.g., Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments, June 15, 2001, art. 8; Agreement between the Swiss Confederation and the Republic of Cuba concerning the Reciprocal Promotion and Protection of Investments, May 26, 1996, art. 10.
Convention applies, providing that the law of the State party to the dispute governs, as well as “such rules of international law as may be applicable.” Yet, some arbitral tribunals have held that relying on a treaty to bring its claims implicitly indicated that international law applied. Conversely, treaties that provide for the exclusive application of international law do not mean that national law is excluded. Indeed, while the types of investment protected by a treaty falls within its scope, the content and extent of each category are defined by the domestic law of the host State that is a party to the dispute. In other words:

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.

It follows from the above that in treaty-based investment arbitration as well, the applicable law consists of a combination of national and international law. The distinction is blurred, whether the arbitration is contract-based or treaty-based.

II. ACCOUNTABILITY AND TRANSPARENCY: IS THERE A LINE?

Another common point is the trend towards investor accountability and greater transparency that permeates both investment contracts and investment treaties. At the outset, it should be recalled that, from the formation of ICSID, the disputes envisaged were essentially claims involving breaches of investment contracts. This relative balance between investors’ and States’ rights and obligations changed when

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21 See, e.g., Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶ 87 (Apr. 12, 2002); ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶ 290 (Oct. 2, 2006).


24 A. R. PARRA, supra note 3, at 132.
treaty claims emerged in the early 1990s. At that time and thereafter, the balance of rights and obligations shifted towards investor protection.

Interestingly, this balance is undergoing a new evolution. Investment treaties increasingly impose obligations on investors and now contain provisions allowing States to bring counterclaims. These new obligations often consist of the requirement to respect the law of the host State, as well as public order and morality. In some cases, these obligations go further and include respect for human rights, the obligation to conduct environmental and social impact assessments, and the requirement to comply with soft law standards such as those of corporate social responsibility.

On their side, investment contracts are likewise redefining this balance by increasingly including clauses to ensure compliance with national law and corporate social responsibility standards, as well as the obligation to carry out environmental and social impact assessments. One such example is the concession contract concluded between Liberia and Firestone Liberia, which contains a clause stipulating that:

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extcept as explicitly provided in this Agreement, Firestone Liberia Inc. shall be subject to Law as in effect from time to
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To the line between contract-based and treaty-based investment arbitration

time, including with respect to labor, environmental health and safety, customs and tax matters, and shall conduct itself in a manner consistent with Liberia's obligations under international treaties and agreements in so far as those have the effect of Law in Liberia.\(^{30}\)

Although this rebalancing is still in its infancy, it will undoubtedly affect investment arbitration, whether it is based on a contract or treaty.

In terms of transparency, a similar trend is emerging, affecting both investment treaties and contracts. On the one hand, treaty obligations are becoming more stringent. Substantive obligations are incorporated to provide individuals with the necessary information. In practice, this includes public enquiries and the conduct of environmental and social impact assessments. At the same time, investment contracts face a comparable evolution. New statutes are being adopted at the domestic level, imposing greater transparency. For instance, the Tanzania Extractive Industries (Transparency and Accountability) Act of 2015 requires that “all concessions, contracts, and licenses relating to extractive industry companies” be published.\(^{31}\) Similarly, the Mexican Hydrocarbons Law of 2014 requires public authorities to publish, \textit{inter alia}, (1) the conditions and rules for bidding processes which have been used to award exploration and extraction contracts; (2) the number of exploration and extraction contracts currently in force; and (3) their terms and conditions.

Likewise, new soft law standards have been developed with a view to improve transparency. This is the case of the Extractive Industries Transparency Initiative Standard, implemented by 51 States. It requires greater transparency from the oil,


gas, and mining industries “in the context of respect for contracts and laws.”*32 It calls on States to publish in a timely and accurate manner “information on key aspects of their natural resource management, including how licences are allocated, how much tax, royalties and social contributions companies are paying.”*33 Companies are not left out: they are required to make comprehensive disclosures about material payments made to Governments.

As we have just seen, this desire for greater transparency and investor accountability transcends the dividing line between investment contracts and investment treaties. The recent proposals to amend the ICSID Arbitration Rules to ensure greater transparency in arbitral proceedings exemplify this. They make no distinction according to the type of arbitration.34 Ultimately, there seems to be a “publicization” of investment law to the extent that investment contracts follow a parallel evolution to investment treaties.

PROF. LAURENCE BOISSON DE CHAZOURNES is a professor in international law at the Faculty of Law of the University of Geneva. She is the Director of the Geneva LL.M. in International Dispute Settlement (MIDS) and Co-Director of the Center for International Dispute Settlement (CIDS). She is a member of the Global High-Level Panel on Water and Peace and an Associate Member of the Institute of International Law. In the field of dispute settlement Laurence Boisson de Chazournes has acted as Counsel before the International Court of Justice (ICJ) and other dispute settlement fora, has served as chairperson of WTO arbitration panels on pre-shipment inspections and as an arbitrator for ICSID and other arbitration fora (inter alia, PCA, ICC). Moreover, she is a member of the Permanent Court of Arbitration (PCA), a member of the WTO indicative list of governmental and non-governmental panelists and an arbitrator of the Court of Arbitration for Sport (CAS). In 2018, she was a member of the CAS ad hoc Division at the Olympic Winter

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Games in PyeongChang (Rep. of Korea). She is also a member of the Hong Kong International Arbitration Center, of the list of Arbitrators of the World Intellectual Property Organization (WIPO) as well as of the list of Conciliators of the International Centre for Settlement of Investment Disputes (ICSID). Laurence was Co-Chair of the 2013 ASIL Annual Meeting, is Counsellor to the ASIL Executive Council and a member of the AJIL Board of Editors.
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