

Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction

DIEGO P. FERNÁNDEZ ARROYO* AND MAKANE MOÏSE MBENGUE**

Public international law and private international law have traditionally been perceived as being distinct and unrelated. The practice of international courts and tribunals shows that in reality both fields are interdependent, complementary and mutually supportive. The present contribution highlights how the International Court of Justice and tribunals dealing with investment arbitration and commercial arbitration have developed a pragmatic body of case-law that has allowed public international law and private international law to nurture each other.

| | |
|---|-----|
| INTRODUCTION | 799 |
| I. DEFINING THE KEY CONCEPTS..... | 800 |
| II. THE INTERACTION BEFORE THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL COURT OF JUSTICE | 803 |
| A. Scenario One: The Adoption of Private International Law Rules to Resolve Public International Law Disputes | 804 |
| B. Scenario Two: The Interpretation of Private International Law Treaties or the Construction of Private International Law Concepts as a Precondition to the Resolution of Public International Law Matters.. | 805 |
| C. Scenario Three: The Consideration of Domestic Private International Law Rules to Resolve Public International Law Matters..... | 808 |
| D. Scenario Four: The Resolution of Public International Law Matters Arising Out of States' Application of Private International Law | 813 |

| | | |
|------|---|---------|
| 798 | <i>COLUMBIA JOURNAL OF TRANSNATIONAL LAW</i> | [56:797 |
| III. | THE INTERACTION IN INTERNATIONAL COMMERCIAL ARBITRATION | 815 |
| | A. Scenario One: The Consideration and Application of Public International Law to Resolve Public International Law Issues Before International Commercial Arbitral Tribunals..... | 815 |
| | 1. The Invocation of Public International Law as a Means to Escape Commercial Arbitration Obligations | 815 |
| | 2. Sovereign Immunity Defenses before International Commercial Arbitration Tribunals..... | 817 |
| | 3. Domestic Law Defenses Before International Commercial Arbitration Tribunals | 820 |
| | B. Scenario Two: Public International Law Limiting or Guiding the Application of Private International Law .. | 821 |
| IV. | THE INTERACTION IN HYBRID FORMS OF DISPUTE RESOLUTION | 824 |
| | A. Investor-State Arbitration | 824 |
| | B. Establishing Jurisdiction | 825 |
| | C. Determining Applicable Law at the Merits Stage | 827 |
| | 1. Compound Choice of Law Clauses | 827 |
| | 2. The Role of the UNIDROIT Principles of International Commercial Contracts..... | 833 |
| | 3. Sovereign Immunity | 845 |
| | 4. Conclusion..... | 847 |
| V. | THE INTERACTION IN A SINGULAR HYBRID JUDICIAL SETTING: THE IRAN-U.S. CLAIMS TRIBUNAL..... | 848 |
| | A. The Impact of the Tribunal's Nature on the Interaction Between Private and Public International Law | 848 |
| | B. Determining Applicable Law..... | 850 |
| | C. Conclusion | 853 |
| | CONCLUSION | 853 |

INTRODUCTION

Traditionally, scholars and practitioners have drawn a sharp distinction between public and private international law. Reinforced by centuries of legal education and practice, the divide between these two disciplines seems so great that they are generally regarded as distinct, mutually exclusive areas of law.¹ The problem with this division, however, is that it has never truly reflected reality. The relationship between public and private international law is far more nuanced than the traditional distinctions would suggest.

Asserting a strict divide between public and private international law masks a necessary confluence between the two disciplines and has left both public and private international law scholars and practitioners blind to the numerous ways in which they interact. The artificial divide has restricted our ability to draw on legal theories, arguments and techniques developed in one strain of law to resolve analogous issues in the other.²

Most of the literature seeking to bridge the divide between public and private international law has focused on the historical and theoretical links that exist between the two disciplines.³ Of course,

* Sciences Po Law School, Paris.

** University of Geneva, Faculty of Law and Sciences Po Law School, Paris.

The authors are grateful to Mr. Jason Mitchenson for his invaluable assistance in the preparation of the present contribution.

1. Philip Brown, *Private Versus Public International Law*, 36 AM. J. INT'L. L. 448 (1942); John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952); Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L. J. 149, 149 (1989). See also leading public and private international law texts which treat the two subjects as completely distinct including PIERRE MAYER & VINCENT HEUZÉ, *DROIT INTERNATIONAL PRIVÉ* (11th ed. 2014); PIERRE-MARIE DUPUY & YANN KERBRAT, *DROIT INTERNATIONAL PUBLIC* (12th ed. 2014); JAMES FAWCETT ET AL., *CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW* (14th ed. 2008); JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8th ed. 2012).

2. LUCY REED, *MIXED PRIVATE AND PUBLIC INTERNATIONAL LAW SOLUTIONS TO INTERNATIONAL CRISES*, 306 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 177, 201 (2003); B.A. WORTLEY, *THE INTERACTION OF PUBLIC AND PRIVATE INTERNATIONAL LAW TODAY*, 85 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 238, 257 (1954); Alex Mills, *The Private History of International Law*, 55 INT'L & COMP. L.Q. 1, 46 (2006).

3. See, e.g., ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* (2009); HANS VAN LOON, *THE GLOBAL HORIZON OF PRIVATE INTERNATIONAL LAW*, i380 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 25–27 (2015); Fernández Arroyo, *Réflexions Autour du Besoin*

much can be gained from both historical and theoretical analysis. In particular, scholars have shown that public and private international law emerged as part of a single international law of nations.⁴ However, a review of the literature reveals a lack of black-letter law evidence of the interaction between public and private international law.

The purpose of this Article, then, is to fill the void: to offer black-letter law evidence of the interaction between public and private international law in cases that have come before international courts and tribunals. This Article progresses as follows: Part II defines key concepts; Part III details decisions of the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ); Part IV details awards from international commercial arbitral tribunals; and Parts V and VI detail awards from hybrid forms of dispute resolution, such as investor-State arbitration and the Iran-United States Claims Tribunal. By analyzing the decisions and awards of international courts and tribunals, we hope to add to the growing body of literature calling for an end to the strict divide between public and private international law that has plagued both scholarship and practice.

I. DEFINING THE KEY CONCEPTS

The asserted divide between public and private international law suggests that the two occupy different, mutually exclusive domains. On the one hand, public international law comprises the legally binding rules and principles governing States' interactions.⁵ On

Réciproque entre le Droit International Privé et le Droit International Public, in LE 90^E ANNIVERSAIRE DE BOUTROS BOUTROS-GHALI: HOMMAGE DU CURATORIUM À SON PRÉSIDENT (2012); Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006); Nils Jansen & Ralf Michaels, *Private Law and the State—Comparative Perceptions and Historical Dimensions*, 71 RABELS Z. 345 (2007); Muir Watt, *New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help?*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 271–84 (Mark Van Hoecke ed., 2004); Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477 (2008); FERNÁNDEZ ARROYO & LIMA MARQUES, EDS., DERECHO INTERNACIONAL PRIVADO Y DERECHO INTERNACIONAL PÚBLICO: UN ENCUENTRO NECESARIO (2011).

4. Mills, *supra* note 3, at 26–73.

5. See, e.g., The Case of the S.S. “Lotus” (Fr. v. Turk), Judgement, 1927 P.C.I.J. (ser A), No. 10, (Sept. 7) ¶ 44 (“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independ-

the other, private international law concerns the civil and commercial interactions of private actors—who might hail from different States but who are subject to domestic law regarding jurisdiction, the applicable law, and the enforcement of judgments.⁶ While public international law is commonly regarded as truly international, private international law is generally considered to be international only in name.

Distinctions along these lines no longer reflect, and perhaps never reflected, reality.⁷ Changes in the relations among States, individuals, and multinational corporations have led scholars and practitioners to reconsider the traditional boundaries of each discipline. For example, non-State actors now exert considerable influence in the development of public international law.⁸ International economic law and international investment law have become central features of public international law.⁹ The growing corpus of international human rights law demonstrates a (re)discovery of individuals as subjects of public international law.¹⁰ These developments challenge the

ence of States cannot therefore be presumed.”); *see also*. ANDREAS F. LOWENFELD, PUBLIC LAW IN THE INTERNATIONAL ARENA: CONFLICT OF LAWS, INTERNATIONAL LAW AND SOME SUGGESTIONS FOR THEIR INTERACTION, 163 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1979); WORTLEY, *supra* note 2.

6. MAYER & HEUZÉ, *supra* note 1; FAWCETT ET. AL., *supra* note 1; Stephanie De Dycker, *Private International Law Disputes before the International Court of Justice*, 2 J. Int’l Disp. Settlement 475, 476 (2010).

7. Arroyo, *supra* note 3; Fernández Arroyo, *El derecho internacional privado en el diván – Tribulaciones de un ser complejo*, in LIBRO HOMENAJE A ROBERTO RUIZ DÍAZ LABRANO 17 (2013).

8. Non-State actors cover a broad range of entities, from intergovernmental organizations, non-governmental organizations, multinational corporations and more recently individuals: MATH NOORTMANN, AUGUST REINISCH & CEDRIC RYNGAERT, NON-STATE ACTORS IN INTERNATIONAL LAW 1–2 (2015); Ralph G. Steinhardt, *The Privatization of Public Law*, 25 GEO. WASH. J. INT’L L. & ECON. 523, 544 (1991). *See also* the recent position of an ICSID Tribunal according to which: “A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals . . . it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.” *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award (8 Dec. 2016) ¶¶ 1195–96.

9. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

10. *See, e.g.*, Ahmadou Sadio Diallo (Guinea v Dem. Rep. Congo), Preliminary Objection, 2007 I.C.J. 924 (May 24); Cançado Trindade, *The Historical Recovery of the Human Person as a Subject of the Law of Nations*, 1 CAMBRIDGE J. INT’L & COMP. L. 3 (2012); Cançado Trindade, *The Emancipation of the Individual from his Own State: the Historical Recovery of the Human Person as Subject of the Law of Nations*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER (2007).

traditional conception of public international law as concerned only with States' interests.¹¹

Private international law has undergone relevant changes as well. Recently, scholars and practitioners have alluded to the “internationalization” of private international law. Private international law is increasingly referenced in international arbitrations; arbitral tribunals are beginning to develop truly transnational principles, rules, and methodologies of private international law that are completely devoid of connections with the State.¹² States regularly conclude treaties on private international law¹³ or otherwise harmonize their domestic laws relevant to private international disputes.¹⁴ Most notably, States in the European Union have largely relinquished their legislative power with respect to private international law in favor of developing uniform solutions.¹⁵ Much of what we describe as domestic private international law now has its origins outside the domestic sphere of States. Indeed, private international law, like public international law, may now play a regulatory function.¹⁶

In this context it is clear that broader functional definitions of “public” and “private” international law are needed. Our definitions, moving forward, must recognize public and private international law as part of a larger juridical system concerned with the regulation of international relations, more generally.

11. See for example, the position expressed by Judge Bennouna in his Declaration in *Frontier Dispute (Burkina Faso/Niger)*: ‘The exercise of sovereignty has thus become inseparable from responsibility towards the population’ *Frontier Dispute (Burkina Faso/Niger)*, Judgment, 2013 I.C.J. 1042 (April 16) ¶ 95.

12. EMMANUEL GAILLARD, *ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL*, 329 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 49 (2007).

13. KATHARINA BOELE-WOELKI, UNIFYING AND HARMONIZING SUBSTANTIVE LAW AND THE ROLE OF CONFLICT OF LAWS, 340 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 271 (2009).

14. Arroyo, *supra* note 3.

15. To be sure, domestic private international law is still significant—although residually—for several questions. Erik Jayme, *Die künftige Bedeutung der nationalen IPR-Kodifikationen*, 37 *Praxis des Internationalen Privatund Verfahrensrechts* 2, 179 (2017).

16. MUIR WATT & FERNÁNDEZ ARROYO, PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE (2014); William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 *DUKE J. OF COMP. & INT'L L.* 371 (2007); Robert Wai, *Transnational Lifftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 *COLUM. J. OF TRANSNAT'L L.* 209 (2002); Muir Watt, *Integration and Diversity: The Conflict of Laws as a Regulatory Tool*, in *THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW* 107 (2006).

II. THE INTERACTION BEFORE THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL COURT OF JUSTICE

This Part traces the interaction between public and private international law in the decisions of the PCIJ and the ICJ (together, “the Court”). The Court is a public international law institution: pursuant to Article 34 of the ICJ Statute, only States may be parties in cases before the Court.¹⁷ However, the Court’s past cases show that the Court has been required to examine issues of private international law in order to properly discharge its public international law function.¹⁸

The decisions analyzed below demonstrate that there are essentially four different scenarios in which public and private international law may interact before the Court. The first arises when the Court is confronted with a lacuna in public international law, capable of being filled by reference to private international law. In these types of cases, the Court borrows private international law rules to resolve analogous public international law issues. The second arises when the Court is required, as a prerequisite to resolving a public international law issue, to interpret a private international law treaty or construe a private international law concept. The third arises when public international law rights and obligations flow directly from States’ domestic laws regarding private international disputes. The fourth arises when the Court is required to determine whether a State’s exercise of its domestic laws regarding private international disputes has infringed public international law.

17. The Corfu Channel Case (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 5, ¶ 25 (Apr. 9) (“But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty”); Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Merits, 1926 P.C.I.J. (ser. A) No. 7 at ¶ 52 (May 25) (“[f]rom the standpoint of International Law and of the Court which is its organ...”); LaGrand (Ger. v. U.S.), Judgement, 2001 ICJ Rep. 466 at ¶ 486; Nottebohm (Liechtenstein v. Guatemala, Judgement, 1955 I.C.J. Rep. 4, ¶ 420-421 (Apr. 6). See also ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 57 (2013); ANDREAS ZIMMERMAN ET AL., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 731 (2d ed. 2012).

18. Mills, *supra* note 2; Th.M. de Boer, *Living Apart Together: the relationship between public and private international law*, 57 NETH. INT’L L. REV. 183–207 (2001); C.G. WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW (Brill Nijhoff 2004).

A. Scenario One: The Adoption of Private International Law Rules to Resolve Public International Law Disputes

Arguably, the most notable interaction between public and private international law occurred in the *Serbian and Brazilian Loans* cases.¹⁹ The PCIJ had been charged with determining whether the service of pre-WWI Serbian and Brazilian bonds issued in France should be affected on the basis of the French paper franc or the gold franc. Each case turned on the same question of which law was applicable to the loan contracts and to the currency in which payment of the debts was to be made. There was no relevant treaty law in either case.

In determining the applicable law, the PCIJ was required to define the role and importance of private international law in the context of public international law disputes. Most notably, it held:

Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character or true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law.²⁰

Evidently, the PCIJ considered that private international law forms part of the domestic law of States. However, it also recognized that certain private international law rules may be elevated to the status of public international law rules and may thus govern the relations between States.

Throughout its decision, the PCIJ treated public and private international law as if linked, using States' municipal laws and practice to develop its own choice-of-law rules.²¹ For example, the PCIJ

19. *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, Judgment, 1929 P.C.I.J. (ser. A) No. 20 (July 12); see also *Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.)*, 1929 P.C.I.J. (ser. A) No. 21 (July 12).

20. *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, Judgment, 1929 P.C.I.J. (ser. A) No. 20, ¶ 86.(July 12).

21. *Id.* ¶¶ 85–87.

recognized a distinction between the mode of payment and the substance of the debt—a distinction familiar to many State courts in the application of their private international law rules. Applying the private international law principle of *dépeçage*, which permits the application of two applicable laws, the PCIJ held that this distinction meant that the substance of the debt was governed by Serbian law but French law applied to the currency in which payment was to be made. Similarly, the Court recognized the legal presumption familiar to State courts that a contracting State, not contracting under public international law, submits to its own law.²² In sum, the PCIJ considered private international law to determine the “general principles of law recognized by civilized nations,” a source of public international law.²³

The *Serbian and Brazilian Loans* cases demonstrate that the Court views public and private international law as complements. Often public international law scholars and practitioners assume that if there is no relevant customary norm or treaty provision, there is simply no public international law on the subject.²⁴ This assumption ignores the close link between public and private international law.²⁵ When faced with a lacuna in public international law, private international law should serve as guidance.

B. Scenario Two: The Interpretation of Private International Law Treaties or the Construction of Private International Law

22. Of course, this only a presumption as States may submit to foreign law: MAURO MEGLIANI, *SOVEREIGN DEBT: GENESIS—RESTRUCTURING—LITIGATION* 224–225 (2015); VAUGHAN BLACK, *FOREIGN CURRENCY CLAIMS IN THE CONFLICT OF LAWS* [pincite required] (2010); CAROLINE KLEINER, *LA MONNAIE DANS LES RELATIONS PRIVÉES INTERNATIONALES* 32–33 (2010). *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, Judgment, 1929 P.C.I.J. (ser. A) No. 20, ¶ 52 (July 12) (“The bonds are bearer bonds signed at Belgrade by the representatives of the Serbian Government. It follows from the very nature of bearer bonds that, in respect of all holders, the substance of the debt is necessarily the same and that the identity of the holder and the place where he obtained it are without relevancy. Only the individuality of the borrower is fixed: in this case it is a sovereign State, which cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own.”).

23. Under Article 38(1)(c) of its Statute (previously Article 38(3) of the PCIJ Statute), the Court is permitted to draw upon the “general principles of law recognized by civilized nations” as a source of public international law. *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, Judgment, 1929 P.C.I.J. (ser. A) No. 20 ¶ 41 (July 12).

24. The contention that under international law everything which is not prohibited is permitted was given some countenance in *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, ¶¶ 44 and 60 (Sept. 7).

25. Wortley, *supra* note 2, at 298.

Concepts as a Precondition to the Resolution of Public International Law Matters

The Court has previously interpreted private international law treaties in order to resolve public international law matters. The interaction between public and private international law in these types of cases is evident, and the Court's decisions have the potential to affect the development and application of both public and private international law. As the Court in the *Serbian Loans* case suggested, treaties can move traditionally private international law issues into public international law's regulatory scope.

In the *Boll* case,²⁶ the ICJ was required to interpret the scope of the Hague Guardianship Convention (the "Convention"), drafted by the Hague Convention on Private International Law in 1902. The Netherlands pled that Sweden had violated its international family law obligations with respect to a Dutch national, who had been born to a Dutch father and Swedish mother. Ultimately, the ICJ held that the Convention, a private international law instrument, did not cover Sweden's conduct.²⁷

In a separate opinion Judge Lauterpacht suggested that the private international law concept of *ordre public* should apply, as a general principle of law complementing the treaty regime.²⁸ Though the drafters of the Convention had deliberately rejected his interpretation, Judge Lauterpacht considered the protection of children an obvious part of *ordre public*. He argued:

[I]n the sphere of private international law, the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally – or rather, universally – recognized. . . the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law. If that is so, then it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court. That circumstance also provides an answer to the question as to the nature and content of the conception of public policy by reference to which must be judged

26. Guardianship of an Infant (Neth. v. Swed.), Judgment, 1958 I.C.J. Rep. 55 (Nov. 28).

27. *Id.* ¶ 71; De Dycker, *supra* note 6, at 486.

28. Guardianship of an Infant (Neth. v. Swed.), Judgment, 1958 I.C.J. Rep. 55, ¶¶ 92–94 (Nov. 28) (separate opinion by Lauterpacht, J.).

the propriety of the Swedish legislation in the matter. Clearly, it is not the Swedish notion of *ordre public* which can provide the exclusive standard in this connection. The answer is that, the notion of *ordre public* – of public policy – being a general legal conception, its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 of the Statute, namely, by reference to the practice and the experience of the municipal law of civilized nations in that field.²⁹

Though Judge Lauterpacht did not prevail on the point, recent decisions have adopted his sentiment regarding *ordre public*—incorporating the private international law concept into public international law.³⁰

The *Boll* case shows how easily public and private international law can come into contact.³¹ It also demonstrates that the Court has not hesitated in interpreting the scope of private international law conventions when necessary. Indeed, some judges, like Judge Lauterpacht, have argued for a more robust relationship between public and private international law.³²

Moreover, there is a trend towards the internationalization of private international law. This is particularly evident in Europe,

29. *Id.*

30. Certain recent decisions of international courts have noticed that trend of making the concept of *ordre public* a concept of public international law. *See, e.g.*, World Duty Free Company Limited v. Rep. of Kenya, Award, ICSID Case No. ARB/00/7, Award, ¶¶ 138–139 (Oct. 4, 2004) (“The concept of public policy (“*ordre public*”) is rooted in most, if not all, legal systems . . .” In this respect, a number of legislatures and courts have decided that a narrow concept of public policy should apply to foreign awards. This narrow concept is often referred to as “international public policy” (“*ordre public international*”) “The term ‘international public policy’, however, is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.”) *See* Pierre Lalive, *Ordre public transnational (ou réellement international) et arbitrage international*, 3 REVUE DE L’ARBITRAGE 329 (1986).

31. A similar situation arose more recently in 2009, when the ICJ was called upon to settle a dispute between Belgium and Switzerland. The case, however, was discontinued on Belgium’s request and as a result was removed from the ICJ’s case list in 2011. We do not know whether the ICJ would have assumed jurisdiction or what it would have decided on the merits. Had it assumed jurisdiction, the case would have required the ICJ to interpret yet another private international law instrument. As in *Boll*, the result of such a decision would have affected the rights and obligations of public and private actors and the development and application of both public and private international law. *See* Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belg. v Switz.), Application, 2009 I.C.J. Rep. No. 145 (Dec. 2009).

32. De Dycker, *supra* note 6, at 486.

where private international law is largely governed by supranational and international instruments.³³ As more States enter private international law treaties in an effort to reduce jurisdictional conflicts, it is likely that we will see a number of cases similar to the *Boll* case. The recent *Belgium v. Switzerland* case, submitted to the ICJ in 2009 but resolved by the parties before the ICJ had assumed jurisdiction, might be the first in a line of contemporary cases. At the very least, *Belgium v. Switzerland* demonstrates that States still perceive the ICJ as an institution at the intersection of public and private international law.³⁴

C. Scenario Three: The Consideration of Domestic Private International Law Rules to Resolve Public International Law Matters

The Court has also considered private international law when public international law rights and obligations flow directly from a State's domestic law. This is not to say that the Court has, in these cases, applied domestic law as public international law. Rather, the Court has used domestic law as if it were a fact relevant to the resolution of its dispute.³⁵

Even though private international law does not operate as a source of public international law in these cases, it can still have decisive influence.³⁶ This arises, for example, whenever a State exercises diplomatic protection on behalf of an injured person. Because States can only avail the rights of their own nationals, the Court has to investigate the State's nationality laws—largely a matter of private international law—to determine whether the injured person is a national of the rights-asserting State. The Court has delivered three notable judgments in this area of law; each provides evidence of the interaction between public and private international law and reinforces the Court's position at the juncture between these two disciplines.

33. See generally, THE EXTERNAL DIMENSION OF EU PRIVATE INTERNATIONAL LAW AFTER OPINION 1/13 (Pietro Franzina ed., 2016). Of course, this is not only the case in Europe. See, e.g., Fernández Arroyo, *Main Characteristics of the New Private International Law of the Argentinian Republic*, 80 RABELS Z. 130, 135–138 (2016).

34. De Dycker, *supra* note 6, at 477 and 486.

35. German Interests in Polish Upper Silesia (Germ. v. Pol.), Judgment, 1925 P.C.I.J. (ser. A) No. 6 ¶ 52 (May. 25) (“From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”).

36. De Dycker, *supra* note 6, at 491.

In the *Nottebohm* case,³⁷ the ICJ had to determine whether Liechtenstein could exercise diplomatic protection on behalf of one of its nationals, Friedrich Nottebohm. Nottebohm was a German national by birth but had left Germany for Guatemala in 1905, taking up residence in Guatemala and making it the center of his business activities. To avoid being considered an enemy national if Guatemala were to side with the Allies, Nottebohm sought and obtained Liechtenstein nationality and relinquished his German nationality in 1939. Still, when Guatemala declared war on Germany, Nottebohm was arrested and transferred to the United States. When he tried to return to Guatemala, he was refused entry and his property in Guatemala was expropriated. In an attempt to avail Nottebohm's rights, Liechtenstein instituted proceedings against Guatemala before the ICJ. Guatemala countered that Nottebohm was not actually a Liechtenstein national and that the dispute was improperly brought.³⁸

The ICJ drew a clear distinction between States' sovereign power to frame their own nationality laws and States' right to exercise diplomatic protection on behalf of its nationals. Though the ICJ lacked jurisdiction over the former, the latter fell within the ambit of public international law.³⁹ Of course, the relevance of the latter would, as a preliminary matter, depend on the former—here, whether Nottebohm had complied with Liechtenstein's nationality laws and was properly, as a matter of domestic law, a Liechtenstein national.

The ICJ did not apply domestic law to resolve the *Nottebohm* case. Rather, it considered Liechtenstein's nationality laws and Nottebohm's conduct as facts, the existence of which were necessary to decide the public international law issue. The ICJ concluded that Nottebohm had fulfilled the nationality criteria laid down by Liechtenstein⁴⁰ and thus proceeded to analyze whether Nottebohm's nationality was "real and effective" for public international law purposes.⁴¹

After analyzing Nottebohm's connection with Liechtenstein in detail, the ICJ held that Nottebohm—inarguably a Liechtenstein national—did not have Liechtenstein nationality for the purposes of diplomatic protection. The connection between Nottebohm and Liechtenstein was not effective, so Liechtenstein could not exercise

37. *Nottebohm (Liech. v. Guat.)*, Second Phase, 1955 I.C.J. Rep. 18, at 4 (Apr. 6).

38. Counter-Memorial of Guatemala, *Nottebohm (Liech. v. Guat.)*. Pleadings, 1955 I.C.J. 184, ¶¶ 11–41 (Apr. 20, 1944).

39. *Id.* ¶ 24.

40. *Id.* ¶ 21.

41. *Id.*

diplomatic protection on his behalf.⁴² Interestingly, the ICJ appeared to find inspiration for its effective nationality test in the practice and experience of State courts and tribunals in cases concerning dual nationality.⁴³ In this regard, the ICJ held:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties . . . Conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.⁴⁴

The ICJ's characterization of nationality and its effect vis-à-vis other States in the context of exercising diplomatic protection are based on the characterization of the same concept given by State courts and tribunals in circumstances where they are required to determine applicable law where nationality is a connecting factor.⁴⁵ However, it should be noted that the Court's use of private international law in this manner is different from the way in which it was used in the *Serbian and Brazilian Loans* cases. In those cases, the ICJ applied private international law rules regarding choice of law to determine the exact same issue in public international law—that was, choice of law between States.

In this case, the ICJ's use of private international law was different because the factual circumstances supporting the analogy were different. Indeed, the ICJ used the concept of effective nationality, as applied between State courts and tribunals in the context of determining applicable law, to determine whether diplomatic protection could be exercised. In the *Nottebohm* case, the ICJ applied the concept in circumstances where there was no conflict of nationality since Nottebohm had lost his German citizenship. In this sense, private international law appears solely to provide inspiration for the ICJ's adoption of the effective nationality test in public international law.

42. *Id.* ¶ 25 (“No settled abode, no prolonged residence in that country at the time of his application for naturalization . . . No intention of settling there was shown. . . There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein.”)

43. *Id.* ¶¶ 22–23.

44. *Id.* ¶ 23.

45. *Id.* ¶¶ 20–25. Where the court reviews the general practice of States courts and tribunals and scholarly writings.

Indeed, the ICJ has confirmed that it is not restricted to borrowing concepts of private international law “lock, stock and barrel” but rather may use such concepts as inspiration for the effective resolution of public international law matters.⁴⁶

Another nationality issue arose in the ICJ’s *Barcelona Traction* case,⁴⁷ albeit in relation to corporate identity. In that case, Belgium sought to exercise diplomatic protection on behalf of its investors in the Barcelona Traction, Light and Power Company, a utility company operating in Spain, incorporated in Canada, and owned primarily by Belgians. The ICJ held that only the State under whose laws a company is incorporated, and not any State whose shareholders have been affected, could bring a claim under public international law.⁴⁸ Finding that the company was properly incorporated under Canadian rather than Belgian law, the ICJ refused Belgium’s application.⁴⁹

The ICJ revisited the relationship between domestic nationality and diplomatic protection in its recent *Diallo* case. In that case,⁵⁰ the Republic of Guinea instituted proceedings against the Democratic Republic of Congo (“DRC”) on behalf of Ahmadou Sadio Diallo, a businessman who had resided in the DRC for over thirty years. Diallo had incorporated two companies in the DRC pursuant to Congolese law. He held 100% of the shares in one company and 40% in the other. In the 1980s, Diallo and his companies sued several Congolese public institutions to recover money they were owed by the government. Congolese authorities arrested and detained Diallo in 1988⁵¹ and then arrested, detained, expelled, and expropriated prop-

46. International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128, ¶ 148 (separate opinion by McNair, J.). Cited by Rosalyn Higgins, *The International Court of Justice and Private International Law Thoughts*, in THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW 1310 (2009) (“The way in which international law borrows from its source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules... In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.”).

47. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Second Phase, 1970 I.C.J. Rep. 3, ¶ 50 (Feb. 5)

48. *Id.* ¶ 70.

49. *Id.*

50. Case Concerning Ahmadou Sadio Diallo (Guinea v Dem. Rep. Congo), Preliminary Objections, 2007 ICJ Rep. No. 924, (May 24).

51. The claims regarding this earlier arrest and detention were found inadmissible, as they were raised late and not sufficiently connected to the claims made in the application

erty belonging to Diallo in 1995.⁵²

Guinea sought to exercise diplomatic protection regarding the violation of Diallo's human rights and regarding the injuries Diallo suffered as a shareholder.⁵³ The DRC did not contest the first exercise but did contest the second; the DRC, relying on *Barcelona Traction*, argued that States cannot exercise diplomatic protection on behalf of corporations incorporated abroad, even if their nationals are majority shareholders. The ICJ agreed with the DRC's arguments, confirming the reasoning of *Nottebohm* and *Barcelona Traction*.⁵⁴

Though the DRC did not contest Guinea's standing to avail Diallo's human rights, this exercise of diplomatic protection warrants attention. In explaining why the exercise was proper, the ICJ pronounced that public international law had shifted, so as to regulate State conduct regarding individuals:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.⁵⁵

The claims regarding Diallo's human rights, including his personal rights as *associé* of the two companies, were admissible.⁵⁶

Diallo, and the general approach of the ICJ, has the potential to affect the content and scope of public and private international law. The logic of *Diallo* might permit States to advance similar claims when another State's exercise of its private international law rules deprives their nationals of property. It is not difficult to imagine scenarios in which a State's decision not to assume jurisdiction in accordance with its domestic private international law rules or a decision not to recognize a decision in contravention of a State's *ordre public* would affect the rights of foreign nationals.⁵⁷

instituting the proceedings.

52. See *id.* ¶¶ 15–20.

53. Diallo, 2007 ICJ Rep. No. 924 ¶¶ 31 and 77.

54. *Id.* at ¶¶ 74, 84–95.

55. *Id.* at ¶ 39.

56. This includes Diallo's right to property over his *parts sociales* in the companies. *Id.* ¶¶ 39, 65.

57. See Lalive, *supra* note 30. French source available at https://www.translex.org/125600/_lalive-pierre-ordre-public-transnational-et-arbitrage-international-revdarb-1986-at-329-et-seq/ [<https://perma.cc/WNQ9-FE6F>].

D. Scenario Four: The Resolution of Public International Law Matters Arising Out of States' Application of Private International Law

The Court has also been required to resolve public international law matters arising out of a State's application of its private international law. This arises most prominently in cases regarding jurisdictional immunities. Jurisdictional immunities limit the permissible exercise of jurisdiction and the recognition and enforcement of judgments by domestic courts under private international law. The subject falls at the intersection of public and private international law.⁵⁸

In its *Jurisdictional Immunities* case,⁵⁹ the ICJ was required to determine whether Italy was liable under public international law for failing to respect the jurisdictional immunity of Germany. Pursuant to Italian private international law rules, Italian courts had reviewed civil claims against Germany regarding violations of international humanitarian law during WWII. Italian courts had also recognized Greek judgments concerning similar civil claims.⁶⁰

After a detailed analysis of relevant State practice, the ICJ concluded, "customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting armed conflict."⁶¹ Italy had violated its obligation to respect the jurisdictional immunity that Germany enjoyed under public international law by allowing and recognizing claims against Germany in Italian courts.⁶²

The case arose out of purely private international law relations between States regarding the exercise of jurisdiction and the recognition and enforcement of foreign judgments. The ICJ had to determine the scope and content of a public international law principle affecting the scope and content of Italy's private international law. In other words, public international law placed limits on Italian

58. Higgins, *supra* note 46, at 1310.

59. *Jurisdictional Immunities of the State (Ger. v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Rep. 143, ¶ 78 (Feb. 3).

60. *See id.* ¶¶ 27-36.

61. *Id.*

62. For a critical appraisal of this solution, see Andrea Bianchi, *Gazing at the Crystal Ball (Again): State Immunity and Jus Cogens beyond Germany v. Italy*, 4 J. INT'L DISP. SETTLEMENT 457, 457 (2013); Burkhard Hess, *Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf*, 32 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 201 (2012).

private international law.

The *Jurisdictional Immunities* judgment has been contentious; the relationship between public and private international law in this area is yet unsettled. In late 2014, the Italian Constitutional Court struck down the Italian legislation implementing the judgment.⁶³ The Constitutional Court held that legislation cannot, consistent with the Constitution, preclude Italian courts from assuming jurisdiction in cases involving *jus cogens* violations. Such preclusion would prevent victims from obtaining access to justice,⁶⁴ which is a fundamental and non-derogable right protected by the Constitution. States cannot invoke their jurisdictional immunities to escape liability for international crimes.⁶⁵

The ICJ and the Italian Constitutional Court are evidently in conflict.⁶⁶ This conflict evidences a continuing discussion regarding how public and private international law should interact to regulate, among other issues, sovereign immunity. On the one hand, the *Jurisdictional Immunities* judgment suggests that public international law plays a limiting role, shaping the development and application of pri-

63. Corte Cost., 22 ottobre 2014, n. 238, Racc. uff. corte. cost. 2014 (It.).

64. The legislation in question was Law No 5/2013. Article 3 of Law No 5/2013 stated that Italian judges must comply with the ICJ judgment:

“[W]here the International Court of Justice, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting a specific conduct of another State to civil jurisdiction, the judge hearing the case, *ex officio* and even where he has already passed a decision which is not final but has the effect of *res judicata* with regard to the existence of jurisdiction, shall ascertain the lack of jurisdiction in every stage and instance of the proceeding . . . Decisions constituting *res judicata* contrary to the above mentioned ICJ judgments, even where the latter have been passed subsequently, can be reconsidered not only in the cases provided by Article 395 of the *Italian Code of Civil Procedure* [‘*Revocazione*’], but also due to lack of civil jurisdiction . . .”

(Translated in Fulvio Maria Palombino, *Italy’s Compliance with ICJ Decisions vs Constitutional Guarantees: Does the “Counter-Limits” Doctrine Matter?*, 22 ITALIAN Y.B. INT’L L. 187, 197 (2012)).

65. Corte Cost., 22 ottobre 2014, n. 238, Racc. uff. corte. cost. 2014, 3.4 (It.). Similar comments were made by Judge Cançado Trindade in his dissent in *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening) Judgment, 2012 I.C.J. Rep. 143, ¶ 179 (Feb 3) (separate opinion by Trindade, J.) (“No State can, nor was ever allowed, to invoke sovereignty to enslave and/or to exterminate human beings, and then to avoid the legal consequences by standing behind the shield of State immunity. There is no immunity for grave violations of human rights and of international humanitarian law, for war crimes and crimes against humanity. Immunity was never conceived for such iniquity. To insist on pursuing a strictly inter-State approach in the relationships of responsibility leads to manifest injustice.”).

66. See Micaela Frulli, *Time Will Tell Who Just Fell and Who’s Been Left Behind: On the Clash between the International Court of Justice and the Italian Constitutional Court*, 14 J. INT’L CRIM. JUST. 587, 587 (2016).

vate international law in accordance with customary international law. On the other, the decision of the Italian Constitutional Court, a form of State practice relevant to identification of customary international law, could play a role in changing the applicability of State immunity in cases arising out of international crimes. In this sense, private international law, as informed by constitutional rules, has the power to shape the development and application of public international law.

III. THE INTERACTION IN INTERNATIONAL COMMERCIAL ARBITRATION

This Part traces and characterizes the interaction between public and private international law in awards rendered by international commercial arbitral tribunals.⁶⁷ It identifies two circumstances in which the interaction occurs: First, when one of the parties is a State or State entity, public international law issues may arise regarding the State or State entity's status. Second, when a tribunal's application of private international law, as such, would contravene public international law, that tribunal might limit or otherwise modify its application.

A. *Scenario One: The Consideration and Application of Public International Law to Resolve Public International Law Issues Before International Commercial Arbitral Tribunals*

1. The Invocation of Public International Law as a Means to Escape Commercial Arbitration Obligations

States and State entities occasionally invoke public international law to escape their contractual obligations to arbitrate or to frustrate enforcement proceedings. For example, in *ICC case 6476 of*

67. Tracing and characterizing the interaction between public and private international law in international commercial arbitration is much more difficult than analyzing the judgments of the ICJ. Firstly, whilst the judgments of the ICJ are made public as a matter of course, commercial arbitral awards are generally confidential, notwithstanding the trends towards transparency. This significantly limits the number of arbitral awards that may be analyzed in order to determine the extent of the interaction between public and private international law in commercial arbitration and precludes us from developing a complete picture. Secondly, unlike the ICJ, there is much more diversity among arbitral tribunals in terms of arbitrators, parties, and issues. Thus, it becomes more difficult to characterize the interaction between public and private international law in a concrete way because arbitral tribunals necessarily characterize and resolve issues differently.

1992,⁶⁸ the respondent, a largely-unrecognized State at the time, pleaded its own illegitimacy under public international law as grounds for not enforcing commercial contracts, including an arbitration agreement, it concluded with the applicant:

[A]n international tribunal must decline to exercise jurisdiction over a dispute involving [the respondent] in the light of the superior interest of the international community in refusing to acknowledge in any form whatsoever the existence of [the respondent] as a State [under public international law].⁶⁹

In rejecting the respondent's submission, the Tribunal considered and applied numerous concepts of public international law. The Tribunal held that the principle of good faith, a general principle of law, prohibited the respondent from relying on its disputed status to avoid its previous undertaking to arbitrate under its contracts.⁷⁰ The respondent's position was tantamount to a "unilateral rescission or withdrawal of the arbitration undertaking, a course of conduct . . . generally rejected by the international community as in flat contradiction with the fundamental principle of good faith."⁷¹ Moreover, the Tribunal reviewed public international law decisions and literature to determine that "the non-recognition of foreign States or foreign governments is generally considered as irrelevant" for identifying legal rights and responsibilities.⁷²

Finally, the Tribunal assessed whether it was bound by General Assembly resolutions, Security Council resolutions, or *jus cogens* norms to decline jurisdiction over the dispute. The respondent had argued that the *jus cogens* prohibition of apartheid prevented the arbitrators, "organs of the international community" bound to uphold principles of public international law, from assuming jurisdiction and thus recognizing the respondent.⁷³ The Tribunal found no basis for declining jurisdiction.

68. Case No. 6476 of 1992 (unpublished award) (ICC Int'l Ct. Arb.) and Case No. 6474 of 1992 25 Y.B Comm. Arb. 279 (ICC Int'l Ct. Arb.) cited in HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION, 289 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 172–76 (2001).

69. *Id.*

70. *Id.* at 173.

71. *Id.*

72. *Id.*

73. Case No. 6476 of 1992 (unpublished award) (ICC Int'l Ct. Arb.) and Case No. 6474 of 1992, 25 Y.B Comm. Arb. 279 (ICC Int'l Ct. Arb.) cited in GRIGERA NAÓN, *supra* note 68, at 174–175.

In *ICC case 7748 of 1995*,⁷⁴ the Tribunal had to determine whether the respondent-State was the successor of a State that had previously signed a contract containing the disputed arbitration clause. It additionally had to address the respondent-State's argument that under the "applicable doctrine of public international law," private rights and obligations of an "unliquidated character" cannot pass to a successor-State.⁷⁵ The Tribunal itself noted that "public international law is relevant to most, if not all, the elements necessary to decide this Issue."⁷⁶ The Tribunal did not hesitate to hear, and render its decision based on, testimony from public international law experts regarding the relevant rules and authorities.⁷⁷

Another situation arose in *ICC case 1512 of 1990*.⁷⁸ In that case, the respondent-State pleaded that a war between itself and the applicant constituted *force majeure* and precluded the Tribunal's assumption of jurisdiction under the arbitration agreement. The Tribunal examined public international law to determine that the hostilities between the two States did not create a state of war. It therefore rejected the respondent's submission and assumed jurisdiction in accordance with the arbitration agreement.

Each of the aforementioned awards demonstrates how tribunals can face mixed public-private international law disputes. When public international law issues do exist, the awards suggest that tribunals will not hesitate to investigate and apply public international law rules and principles. The awards also make it clear that issues relating to public international law will not always be decided by public international law institutions. Rather, there are circumstances in which public international law issues are so intertwined with private international law—and the interests of non-State actors incapable of invoking the ICJ's contentious jurisdiction—that they necessarily will be resolved by international commercial arbitral tribunals.

2. Sovereign Immunity Defenses before International Commercial Arbitration Tribunals

Public international law issues also arise when a State or State

74. Case No. 7748 of 1995 (unpublished partial award) (ICC Int'l Ct. Arb.) cited in GRIGERA NAÓN, *supra* note 68, at 175.

75. GRIGERA NAÓN, *supra* note 68, at 176.

76. *Id.*

77. *Id.* at 177.

78. Case No. 1512 of 1990, (unpublished partial award) (ICC Int'l Ct. Arb.) cited in GRIGERA NAÓN, *supra* note 68, at 177.

entity raises a sovereign immunity defense to challenge the jurisdiction of the tribunal.⁷⁹ Sovereign immunity is based on the principle of comity and the fundamental equality of States under customary international law. As there is no international convention in force,⁸⁰ or uniform rules regulating sovereign immunity *in toto*, its content and effect depends on each jurisdiction.⁸¹ Though States once enjoyed absolute immunity from the jurisdiction of foreign courts, including from recognition and enforcement of judgments and awards,⁸² the increased involvement of sovereign entities in transnational commerce has eroded sovereign immunity.⁸³

In many jurisdictions, absolute immunity has been replaced by restrictive immunity, which permits courts to assume jurisdiction, grant interim measures, and enforce judgments and awards against State parties in certain circumstances.⁸⁴ Restrictive immunity usually

79. DHISADEE CHAMLONGRASDR, *FOREIGN STATE IMMUNITY AND ARBITRATION* 79 (2007); HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* (3d ed., 2015).

80. The current state and the conditions for the entering into force of the UN Convention on Jurisdictional Immunities of States and their Property, G.A. Res. 59/38 (Dec. 14, 2004) may be consulted on U.N. TREATY SERVICE, UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: STATUS (2018) https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=III-13&chapter=3&lang=en [<https://perma.cc/KGK7-44H3>].

81. While sovereign immunity is considered to be part of customary international law, there is no consensus on, or Convention in place dealing with, all aspects of sovereign immunity. Thus, domestic rules on sovereign immunity still vary significantly. For a comprehensive analysis of the sources of State immunity, *see* Fox & Webb, *supra* note 79, at Part II, 101–338.

82. Some jurisdictions, most notably China, still accord absolute immunity to sovereign defendants. *Democratic Republic of the Congo, et. al., v. FG Associates LLC*, [2010] 14 H.K.C.F.A.R. 95, ¶ 260 (C.F.I.), per Chan PJ, Ribeiro PJ and Mason NPJ: “China has consistently adhered to the doctrine that a state and its property enjoy absolute immunity from jurisdiction and from execution. It has never subscribed to the theory of restrictive immunity...”

83. Tai-Heng Cheng & Ivo Entchev, *State Incapacity and Sovereign Immunity in International Arbitration*, 26 SING. ACAD. L. J. 942, 956 (2014).

84. The doctrine of restrictive immunity is reflected in international conventions such as the European Convention on State Immunity, *entered into force* Nov. 6, 1976, E.T.S. No. 074, and the International Law Commission Draft Articles on Jurisdictional Immunity, U.N. Doc. A/46/10 (1991) *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n 13, prepared by the International Law Commission, as well as in most national codifications. *See* *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529 at 555E–556C (Lord Denning, J.) (outlining the general acceptance of the doctrine of restrictive immunity in other jurisdictions):

In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. . . This transformation has changed the rules of international law relating to

distinguishes between sovereign acts (*acta jure imperii*) and commercial acts (*acta jure gestionis*) to determine if a State or State entity is entitled to claim immunity.⁸⁵ Most jurisdictions provide immunity for sovereign, but not commercial acts.⁸⁶

When States or State entities have invoked sovereign immunity, tribunals have, in fact, referenced both public and private international law. In *Société de Grands Travaux de Marseille (France) v. East Pakistan Industrial Development Corp*⁸⁷ and *Westland Helicopters Ltd v. Arab Organization for Industrialization ('AOI')*,⁸⁸ the Tribunals analyzed public international law and Swiss private international law to determine that restrictive, rather than absolute, immunity applied. Because the underlying transactions in the arbitration were commercial in nature, the Tribunals were empowered to exercise jurisdiction. Similarly, the Tribunal in *SPP v. The Arab Re-*

sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. . . In 1951 Sir Hersch Lauterpacht showed that, even at that date, many European countries had abandoned the doctrine of absolute immunity and adopted that of restrictive immunity. . . Since that date there have been important conversions to the same view. . . Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the courts of Belgium, Holland, the German Federal Republic, the United States of America and others have abandoned absolute immunity and granted only restrictive immunity...)

For some of those other jurisdictions *see, e.g.,* *Zodiak Int'l Products Inc. v. Polish People's Rep.* (1977) 81 D.L.R. 3d 656 (Can.); *Kaffraria Property Co (Pty) Inc. v. Rep. of Zambia* [1980] 2 S.A. 709 (S. Afr.); *A.M. Qureshi v. U.S.S.R.* (1981) 33 PLD (SC) 377 (Pak.); *Claim against the Empire of Iran*, Bundesverfassungsgericht [BVerGF] [German Constitutional Court] Apr. 30, 1963, 16 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 27, 45 I.L.R. 57.

85. In *Claim against the Empire of Iran*, BVerGF Apr. 30, 1963, 16 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 27, 45 I.L.R. 57, 80 the Federal Constitutional Court of the Federal Republic of Germany held: "As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law." *See also* the English State Immunity Act 1978 which states that, "a State is immune from the jurisdiction of the courts of the United Kingdom subject to the exceptions set out in the legislation." Those exceptions included situations where the State had submitted to the jurisdiction and where the proceedings related to a commercial transaction or a contract to be performed wholly or partly in the forum State. State Immunity Act 1978, c.33 §§ 1–23 (Eng.).

86. Julia B. Brooke, *The International Law Association Draft Convention on Foreign Sovereign Immunity: A Comparative Approach*, 23 VA. J. INT'L L. 635, 635 (1983).

87. Case No. 1803 of 1972, 5 Y.B. Comm. Arb. 177 (ICC Int'l Ct. Arb.).

88. CHAMLONGRASDR, *supra* note 79, at 80.

*public of Egypt*⁸⁹ relied on public and Egyptian private international law to determine that the respondent-State could not rely on sovereign immunity to avoid its contractual obligation to arbitrate.⁹⁰ There, too, the underlying transaction was commercial in nature.

3. Domestic Law Defenses Before International Commercial Arbitration Tribunals

Issues of public international law also arise before international commercial arbitral tribunals when respondent-States or State entities raise domestic law defenses to challenge the tribunal's jurisdiction. In the *Italian Company v. African State-Owned Entity* ICC arbitration,⁹¹ the Tribunal employed public international law to reject the respondent-State entity's claim of primacy of its domestic law. In this case, the Tribunal was asked to rule on the validity of an arbitration agreement entered into by a State entity and a private commercial party. The State entity had argued that the arbitration agreement was invalid because it conflicted with its domestic Code of Civil Procedure, which prohibited arbitration of disputes arising out of State contracts. The Tribunal suggested that the State entity's argument ran afoul of the principle of good faith:

[I]nternational public policy would be strongly opposed to the idea that a public entity, when dealing with a foreign party, could openly, knowingly and willingly enter into an arbitration agreement, on which its co-contractor would rely, only to claim subsequently, whether during the arbitral proceedings or on enforcement of the award, that its own undertaking was void.

Similar comments were made in *Benteler v. State of Belgium*,⁹² where the Tribunal concluded that Belgium could not rely on its national law to avoid an obligation to arbitrate. The Tribunal noted that it was common for tribunals to apply principles of public international law, in particular the principle of good faith, in order to reject assertions of State immunity in such circumstances.

These awards demonstrate that tribunals use a combination of

89. *Id.* at 80–81.

90. *Id.*

91. *Italian Company v African State-Owned Entity* (1973) REVUE DE L'ARBITRAGE 122 at 145; see also Yves Derains, Cour d'arbitrage de la chambre de commerce internationale : Chronique des sentences arbitrales, 109 JOURNAL DU DROIT INTERNATIONAL 971 (1982).

92. *Benteler v State of Belgium*, ad hoc award (1983), REVUE DE L'ARBITRAGE 339.

public and private international law to address sovereign immunity and domestic law defenses when a State or State entity agreed to arbitrate but later seeks to avoid its legal obligation to do so.

B. Scenario Two: Public International Law Limiting or Guiding the Application of Private International Law

International commercial arbitration awards show that when a straightforward application of private international law would conflict with public international law, tribunals permit public international law to limit private international law. As such, public international law rests atop the dispute resolution process, regulating the way in which tribunals may exercise their powers. Scholars and practitioners who consider international commercial arbitration to fall exclusively within the ambit of private international law may overlook this.

Tribunals are rarely confronted with discernible public international law issues that require them to directly consider and apply public international law. Rather, analysis of available awards suggests that the role of public international law in international commercial arbitration is often far more subtle and is intricately intertwined with private international law. This is illustrated, as an example, by cases that present complex choice of law issues, where public international law may place significant restrictions on a tribunal's power.⁹³

In some cases, tribunals must determine whether a domestic mandatory rule should be given extraterritorial effect to govern aspects of a dispute in international arbitration, thus becoming an "overriding" mandatory rule or *loi de police*.⁹⁴ Generally, a domestic

93. GEORGE A. BERMAN, ARBITRATION AND PRIVATE INTERNATIONAL LAW: GENERAL COURSE ON PRIVATE INTERNATIONAL LAW, 381 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 310–25 (2015); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARBITRATION INT'L 274, 274–75 (1986); Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?* 10 BERKELEY J. INT'L L. 59, 63 (1992); RADICATI DI BROZOLO, ARBITRAGE COMMERCIAL INTERNATIONAL ET LOIS DE POLICE: CONSIDÉRATIONS SUR LES CONFLITS DE JURIDICTIONS DANS LE COMMERCE INTERNATIONAL, 315 COLLECTED COURSES, HAGUE ACADEMY OF INTERNATIONAL LAW (2005); Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319 (1996); JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 420 (2003); CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001); MANDATORY RULES IN INTERNATIONAL ARBITRATION (GEORGE BERMAN & LOUKAS MISTELIS eds., 2011).

94. On *lois de police* generally, see Horatia Muir-Watt & Luca Radicati di Brozolo,

mandatory rule may only be considered a *loi de police* if the goals or objectives underlying the rule are so important to the issues at stake that they outweigh any other considerations that may lead to the application of other laws.⁹⁵ Tribunals follow a two-step process when assessing the extraterritorial application of domestic mandatory rules.⁹⁶ First, a tribunal will examine the rule in the context of the forum enacting it—i.e. will check whether the rule would be applicable if the dispute was wholly domestic. Second, a tribunal will examine whether the rule can apply in the international context. It is at this second step that a tribunal will consider whether public international law would conflict with the potential *loi de police*.

Public international law may place restrictions on the tribunal's ability to apply or ignore a potential *loi de police*, as well as on the parties' ability to choose their applicable law.⁹⁷ In this sense, public international law has both a negative and positive effect; it can not only provide limitations on the consideration or application of *lois de police* but can also provide a duty to apply *lois de police*. The former includes, *inter alia*, circumstances in which giving effect to a *loi de police* would result in a violation of international human rights law. The latter includes circumstances in which parties have sought, by choosing arbitration and selecting a particular law, to fraudulently evade otherwise applicable mandatory law.⁹⁸ Thus, public interna-

Party Autonomy and Mandatory Rules in a Global World, 4 GLOBAL JURIST 1 (2004).

95. Within the context of the European Union, the 2008 Regulation on the law applicable to contractual obligations gives the following definition:

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Commission Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177/6) art. 9(1).

96. For an excellent example of how this two-step process is applied, see ICC Award 7528 of 1993, XXII Yearbook Commercial Arbitration 125. See also GRIGERA NAÓN, *supra* note 68, at 293–333 for an analysis of this process with reference to the following cases: ICC Award 6320 (1992); ICC Award 9333 (1998); ICC Award 5622 (1988); ICC Award 9298 (1998); ICC Award 7047 (1994); ICC Award 8113 (1996); ICC Award 9886 (1999); ICC Award 7539 (1995); ICC Award 7181 (1992); ICC Award 8404 (1998); ICC Award 10246 (2000); ICC Award 9163 (2001); ICC Award 7528 (1993). See also Baniassadi, *supra* note 93, at 68–71.

97. DI BROZOLO, *supra* note 93, at 464. See also EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 847–57 (1999); LEW, MISTELIS & KROLL, *supra* note 93, at 420–425; Mayer, *supra* note 93, at 275; Naón, *supra* note 68, at 200–206.

98. Preliminary ICC Award 5505 of 1987 cited in GRIGERA NAÓN, *supra* note 68, at

tional law may restrict the tribunal's choice of law process by: (1) limiting the application of a *loi de police* because it contravenes public international law; (2) obliging the tribunal to apply a *loi de police* because not doing so would contravene public international law; or (3) permitting the application of a *loi de police* because the necessary conditions for its application are met and it does not contravene public international law.

Tribunals do not hesitate to apply *lois de police* or to use public international law to limit identification of *lois de police*.⁹⁹ To illustrate, in *ICC Case 6320*, the Tribunal had to determine whether the U.S. RICO statute, which relates to racketeering and the payment of treble damages, was a *loi de police*.¹⁰⁰ Though the applicable law was Brazilian law, the Tribunal stated that this did not in principle preclude application of U.S. law. Ultimately, the Tribunal determined that RICO could not control the case because application of RICO would exceed the United States's prescriptive jurisdiction. This, as the Tribunal recognized, was a public international law limitation:

[E]ven if a particular state does claim the mandatory extraterritorial application of its laws, that—by itself—is not sufficient to lead to the mandatory application of such laws in international arbitration. Otherwise, those states that make extensive use of such claims and thereby show less recognition of the sovereignty of other states embedded in the principle of territoriality could attain a privileged position in relation to other states.¹⁰¹

This statement coincides with the growing tendency in public international law to limit States' promulgation of exorbitant or overreaching private international law rules.¹⁰²

205:

Except in those situations in which compliance with mandatory rules is required, the parties are generally free to choose by way of express stipulation the law applicable to their relationship...In this case, the arbitrator finds that the parties have a reasonable interest in the application of English law...There is further no indication that the choice of English substantive law was made to escape some mandatory provisions of the law of the Netherlands (country of Respondent) or Mozambique (country of Claimant).

99. Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11 ARB. INT'L 137, 137–150 (1995); Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?*, 18 AM. REV. OF INT'L. ARB. 103, 103–119 (2007).

100. *ICC Award 6320* (1992) cited in GRIGERA NAÓN, *supra* note 68, at 297.

101. *Id.* at 302.

102. GRIGERA NAÓN, *supra* note 68, at 344.

From the example of *lois de police*, it is evident that public international law has a strong influence on the development and application of private international law. Though many scholars and practitioners treat international commercial arbitration as if disconnected from public international law,¹⁰³ in certain circumstances commercial arbitral bodies must consider and apply public international law rules and principles to discharge their judicial function. In other words, public international law issues will not always come before public international law institutions, and private international law matters will not always be decided on domestic law alone.

IV. THE INTERACTION IN HYBRID FORMS OF DISPUTE RESOLUTION

The interaction between public and private international law finds its most fertile ground in hybrid forms of international dispute resolution, or in international dispute resolution mechanisms that cannot be rationalized as falling cleanly in either public or private international law.¹⁰⁴ This Part investigates investor-State arbitral tribunals and the Iran-U.S. Claims Tribunal.

A. *Investor-State Arbitration*

Investor-State arbitration combines public and private international law, as a matter of substance, onto the procedural skeleton of international commercial arbitration.¹⁰⁵ In doing so, it has wedded two professions, one coming from the world of inter-State disputes and the other from private commercial arbitration.¹⁰⁶ On the one hand, those from a public international law background tend to emphasize the public nature of the dispute resolution process.¹⁰⁷ They

103. This is particularly evident by the way in which most textbooks on commercial arbitration are written. With some exceptions, little attention is given to the role and importance of public international law in practice.

104. ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 6 (2012).

105. JOSE ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT*, 344 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 193, 259 (2009).

106. See Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are They Today? The Lalive Lecture 2012*, 28 *ARB. INT'L* 577, 578 (2012).

107. Cf. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 *EUR. J. OF INT'L LAW*, 121, 145–50 (2006); Wintershall Aktiengesellschaft v. Argentine Rep., ICSID Case No. ARB/04/14, Final Award, ¶ 160(2) (2008) where the Tribunal noted that investor-State arbitration “. . . combines a public law

preference State interests¹⁰⁸ and highlight the legal constraints on both States and investors. On the other hand, those from private commercial arbitration tend to stress the private nature of the dispute resolution process in resolving commercial disputes between two parties based on the principle of party autonomy.

The fact that investor-State arbitration and commercial arbitration involve similar dispute resolution procedures has led many to see them as two sides of the same coin. This is not wholly accurate. Though commercial arbitration can involve consideration of public international law, investor-State arbitration sits at the apex of the confluence between public and private international law. Public international law is particularly relevant in the contexts of establishing jurisdiction, determining the applicable law, and demonstrating sovereign immunity.¹⁰⁹

B. Establishing jurisdiction

Investor-State arbitration, like international commercial arbitration, is based on the agreement of the parties. The investor and the State may sign an arbitration clause, following the traditional method of consent in international commercial arbitrations. Arbitration clauses arising out of direct agreement have been the basis of numerous investor-State arbitrations.¹¹⁰ More recently, investors have used bilateral investment treaties (“BITs”) or multilateral treaties, which establish the terms and conditions for private investment by nationals and companies of one State in another State, to establish jurisdiction.

BITs and multilateral treaties do not, of themselves, establish jurisdiction. Rather, they are an offer by States to eligible investors

system of State liability with private arbitration.”

108. This seems to be the rationale of the Article 8(27)(4) of the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), which includes among the eligibility requirements to the Tribunal created by the Agreement to “have demonstrated expertise in public international law.”

109. Jan Paulsson, *Arbitration without Privity*, 10 ICSID R. - FOREIGN INVESTMENT L. J. 232 (1995).

110. See, e.g., Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. YEAR BOOK OF INT’L. LAW 123, 128 (1980); Adriano Gardella SpA v. Government of the Ivory Coast, Case No. ARB/74/1, 1 ICSID Rep. 287 (1977); Kaiser Bauxite v. Government of Jamaica, Case No. ARB/74/3, 1 ICSID Rep. 301 (1975); Klockner v. the Republic of Cameroon, Case No. ARB/81/2, 2 ICSID Rep. 10 (1983); SOABI v. State of Senegal, Case No. ARB/82/1, 2 ICSID Rep. 179 (1984); Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia, Case No. ARB/83/2, 2 ICSID Rep. 347 (1986).

offering access to arbitration. Nationals of another State party to the treaty can accept this offer simply by commencing arbitration proceedings. In many investor-State arbitrations, States will raise jurisdictional objections that the tribunal must deal with before proceeding to the merits. Tribunals decide the applicable law to issues of jurisdiction, typically pursuant to a mix of public and private international law.

In *Amco v. Indonesia*,¹¹¹ jurisdiction was established by virtue of an investment application accepted by the Government of Indonesia. In the Tribunal's opinion, the proper method for determining whether consent to arbitration had been given was to interpret the investment application in the spirit of the ICSID Convention and Indonesia's private international law. The Tribunal determined the intent of the parties "from the normal expectations of the parties" but also from "the aim and the spirit of the Washington Convention as well as of the Indonesian legislation and behaviour."¹¹²

In *SPP(ME) v. Egypt*¹¹³ the Tribunal held that both public and private international law were relevant for establishing jurisdiction. In that case, jurisdiction was based on a provision of Egyptian legislation, which purported to constitute consent to ICSID arbitration. The issue was whether the legislation in question created an international obligation to arbitrate under the ICSID Convention. In determining this issue, the Tribunal rejected the contention that consent to arbitrate should be interpreted solely in accordance with either the rules of treaty interpretation or Egypt's private international law. Rather, the Tribunal found both relevant and applied the Vienna Convention on the Law of Treaties,¹¹⁴ as directed by public international law, and rules of Egyptian statutory interpretation, as directed by private international law.

These awards suggest that questions of jurisdiction are governed by their own system of mixed public and private international law.

111. *Amco v. Rep. of Indonesia*, Case No. ARB/81/1, 1 ICSID Rep. 398 (1983).

112. *Id.*

113. *SPP(ME) v. Arab Republic of Egypt*, Case No. ARB/84/3, 3 ICSID Rep. 142 (1988).

114. The tribunal treated the Egyptian legislation as if it were a unilateral declaration. The Vienna Convention applies, at least in this case, *mutatis mutandis* to unilateral declarations.

C. Determining Applicable Law at the Merits Stage

By far, the most interaction between public and private international law occurs in the tribunal's determination of the applicable law governing the merits.¹¹⁵ These interactions arise in two scenarios: when tribunals have to determine the applicable law under commonly-found "compound choice of law clauses" and when tribunals may have cause to consider the *UNIDROIT Principles of International Commercial Contracts*.

1. Compound Choice of Law Clauses

Choice of law determinations may be made in a variety of ways, the simplest of which arises when the agreement governing the dispute, whether a BIT, MIT, or arbitration agreement, contains a choice of law clause.¹¹⁶ Some of these clauses refer exclusively to public international law,¹¹⁷ while others refer to the domestic law of the State.¹¹⁸ In the majority of cases, the choice of law rules refer to both.¹¹⁹ These are compound choice of law clauses.

In some cases, the parties have made no determination as to applicable law. In this scenario, tribunals look to various other sources in determining what law governs the merits of the dispute, most prominently the ICSID Convention.¹²⁰

115. While it may seem that the tribunal's basis of jurisdiction would determine the law applicable to it, tribunals have consistently held that the law governing the merits is independent of the law governing jurisdictional issues. *Cf.* CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶ 41 (July 17, 2003); *cf.* Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. OF DISP. RESOL. 1 (2014).

116. *See, e.g.*, International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42, Oct. 14, 1966; *see also* International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, art. 54, Sept. 27, 1978.

117. *See, e.g.*, North American Free Trade Agreement, art. 1131, Dec. 8, 1993, H.R. Doc. No. 103-159, 32 I.L.M. 289 (1993).

118. *See, e.g.*, MINE v Republic of Guinea, Case No. ARB/84/4, 4 ICSID Rep. 94 (1988).

119. *See, e.g.*, International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42(1), Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S.; Texaco Overseas Petroleum v. Libyan Arab Republic, 17 ILM 1, 404 (1978); Libyan American Oil Co (LIAMCO) v. Libyan Arab Republic, 62 ILR 140, 172 (1977).

120. Paul Peters, *Dispute Settlement Arrangements in Investment Treaties*, 22 NETH. YEARBOOK OF INT'L. LAW 91, 91 (1991); Ibrahim F.I. Shihata & Antonio R. Parra, *The*

Article 42(1) of the ICSID Convention directs the tribunal to refer first to the parties' agreement on the applicable law.¹²¹ In absence of an agreement, tribunals are bound to apply public international law and the State's domestic law.

Article 42(1) gestures toward a meeting point for public and private international law, acting in a similar way to the compound choice of law clauses contained in many BITs. In their application of Article 42(1), many tribunals have found that the private international law of the State and public international law lead to the same result.¹²² However, the awards demonstrate that there are competing theories as to the relationship between public and private international law in the application of Article 42(1). One theory is reflected in the doctrine of supplementation and correction.

Historically, tribunals have endorsed the doctrine of supplementation and correction, which provides that public international law fills lacunae in domestic law and corrects the application of domestic law when it is inconsistent with public international law.¹²³ In this sense, public international law plays an ancillary role. The ancillary nature of this role was highlighted by the ad-hoc committee in *Klöckner v Cameroon*:¹²⁴

Experience of the International Centre for Settlement of Investment Disputes, 14 ICSID REV. 299, 336 (1999); *Antoine Goetz v Republic of Burundi*, Case No. ARB/95/3,6 ICSID Rep. 5, 94 (1999).

121. See, e.g., International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42, Oct. 14, 1966.

122. *Adriano Gardella SpA v. The Government of the Ivory Coast*, Case No. ARB/74/1,1 ICSID Rep. 287 (1977); *Benvenuti & Bonfant v. People's Republic of Congo*, Case No. ARB/77/2, 1 ICSID Rep. 330, 357 (1980); CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 624–25 (2d ed. 2009); Ibrahim F.I. Shihata & Antonio R. Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID REV. 183, 191 (1994); Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. OF INT'L L. 151, 194 (2003).

123. *Amco v. Rep. of Indon.*, ICSID Case No. ARB 81/1, 1 ICSID Rep. 509, 518 (1986); *Liberian Eastern Timber Corporation (LETCO) v. Rep. of Liber.*, ICSID Case No. ARB/83/2, 2 ICSID Rep. 347, 658 (1986); *Compania de Desarrollo de Santa Elena, S.A. (CDSE) v. Rep. of Costa Rica*, ICSID Case No. ARB/96/1, 15 ICSID Rev. 180, 191 (2000); see also ARON BROCHES, *THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES*, 136 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1972, 392 (1972).

124. *Klöckner Industrie-Analgen GmbH, Klöckner Belge, SA and Klöckner Handelsmaatschppij BV v. Rep. of Cameroon and Société Camerounaise des Engrais SA*, Case No. ARB/81/2, 2 ICSID Rep. 95, 122 (1985).

[T]he 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.

Under this theory, though public international law “corrects” domestic law, consideration of public international law is expressly secondary and limited.

There are scholars and tribunals who suggest that, despite the doctrine of supplementation and correction, public international law has in practice always had more than an ancillary role. In the resubmitted case of *Amco v. Indonesia*¹²⁵ the second Tribunal provided that public international law is “fully applicable” and that classification of its role as “‘only’ ‘supplemental and corrective’ seems a distinction without a difference.”¹²⁶ Similar remarks were made in *CDSE v. Costa Rica*,¹²⁷ in which the Tribunal provided that arbitrations based on compound clauses were, in effect, governed by public international law. These decisions suggest that tribunals were paying lip-service to domestic law and were giving public international law a larger role than mere supplementation and correction.

Scholars and practitioners go even further.¹²⁸ Most notably, Gaillard and Banifatemi argue that the doctrine of supplementation and correction should be abandoned and that public international law should be directly accessible to the tribunal without initial scrutiny of the State’s domestic law. In their opinion, the extent of the interaction between public international law and domestic law should be discretionary.¹²⁹

In the 2002 *Wena Hotels v. Egypt* decision, the Tribunal adopted the Gaillard and Banifatemi position, expressing an entirely

125. *Amco v. Rep. of Indon.*, ICSID Case No. ARB/81/1, Resubmitted Case: Award, 1 ICSID Rep. 569, 580 (1986).

126. *Id.*

127. *Compania de Desarrollo de Santa Elena, S.A. (CDSE) v. Rep. of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 15 ICSID Rep. 153, 170 (2000).

128. Prosper Weil, *The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a Ménage À Trois*, 15 ICSID REV. 401, 409 (2000) (“The reference to the domestic law of the host State, even if designed only to ascertain whether it is, or is not, compatible with international law, is indeed a pointless exercise. . . .”); Emmanuel Gaillard & Yas Banifatemi, *The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REV. 375 (2003).

129. Gaillard & Banifatemi, *supra* note 128, at 403–11.

new approach to choice of law under Article 42(1).¹³⁰ The underlying investment treaty provided that States expropriating investors' property must be "prompt, adequate and effective" in providing compensation, and that the compensation must "amount to the market value of the investment expropriated immediately before the expropriation."¹³¹ The Tribunal had to determine whether public international law or a State's domestic law governed the calculation of interest payable on the compensation. The Tribunal determined that Egyptian law conflicted with the terms of the investment treaty and applied the concept of compound interest, which it claimed to have derived from public international law.¹³² An ad hoc committee reviewing the Tribunal's award upheld it, stating:

This discussion brings into light the various views expressed as to the role of international law in the context of Article 42(1) . . . Some of these views have in common the fact that they are aimed at restricting the role of international law and highlighting that of the law of the host State. Conversely, the view that calls for a broad application of international law aims at restricting the role of the law of the host State. There seems not to be a single answer as to which of these approaches is the correct one. The circumstances of each case may justify one or another solution . . . [T]he use of the word 'may' in the second sentence of this provision indicates that the Convention does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that this has the effect to confer on to *the Tribunal a certain margin and power for interpretation*.

What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too *international law can be applied by itself* if the appropriate rule is found in this other ambit.¹³³

130. *Wena Hotels Ltd. v. Arab Rep. of Egypt*, ICSID Case No. ARB/98/4 (2002).

131. Agreement for the Promotion and Protection of Investments, Egypt-U.K., June 11, 1975, 14 I.L.M. 1470.

132. *Wena Hotels Ltd.*, ICSID Case No. ARB/98/4.

133. *Wena Hotels Ltd.*, ICSID Case No. ARB/98/4, ¶¶ 38–40 (2002) (emphasis added).

The decision in *Wena Hotels v. Egypt* is a striking departure from prior decisions supporting the doctrine of supplementation and correction.¹³⁴ It removes public international law from its ancillary role, molding it into an equally applicable source of law. Under this approach, a tribunal may apply a rule of public international law, without any need to identify either a lacuna or an inadequacy in the law of the State.¹³⁵

Though the doctrine of supplementation and correction has not been formally abandoned, the *Wena Hotels* approach appears to be gaining traction. A string of recent decisions has endorsed the equal-application approach, holding that tribunals may directly apply public international law rules without first having to find an inconsistency in the State's domestic law.¹³⁶ For example, the Tribunal in *Tokios Tokelés v. Ukraine* verbatim quoted *Wena Hotels*'s propositions that "[t]he law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit."¹³⁷ The Tribunal in *El Paso Energy International Co v Argentine Republic*¹³⁸ endorsed the same passage, holding that:

[I]n order to establish which rights have been recognized 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.

BITs often utilize compound choice of law clauses similar to Article

134. Gaillard & Banifatemi, *supra* note 128, at 406.

135. *Wena Hotels Ltd.*, ICSID Case No. ARB/98/4 ; Gaillard & Banifatemi, *supra* note 128, at 407.

136. See, e.g., *El Paso Energy Int'l Co. v. Argentine Rep.*, ICSID Case No. ARB/03/15, ¶¶ 132–41 (2011); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, ¶¶ 140–43 (2007); *Sempra Energy Int'l v. Argentine Rep.*, ICSID Case No. ARB/02/16, ¶ 236–38 (2007); *Azurix Corp v. Argentine Rep.*, ICSID ARB/01/12, ¶¶ 66–67 (2006); *CMS Gas Transmission Co. v. Rep. of Argentina*, ICSID Case No. ARB/01/9, ¶¶ 116–17 (2005).

137. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, ¶ 140 (2007).

138. *El Paso Energy Int'l Co. v. Argentine Rep.*, ICSID Case No. ARB/03/15, ¶ 135 (2011). The Tribunal endorsed comments in *Wena Hotels* and supported its conclusion by reference to the academic opinion of Prosper Weil. *Id.* ¶¶ 132–34; see also Weil, *supra* note 128.

42(1).¹³⁹ Arbitral practice demonstrates that tribunals' interpretations of these BIT clauses parallels the interpretation adopted in *Wena Hotels*. Tribunals place each legal question in its proper context and make issue-by-issue decisions on the applicable law. For example, in *Fedax v. Venezuela*,¹⁴⁰ the Tribunal held that:

[T]he various sources of the applicable law referred to in Article 9(5) of the Agreement [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.

The *Fedax* Tribunal applied the agreement provisions and general principles to find that the purchase of promissory notes constituted an investment for the purpose of the dispute. Likewise, the obligation to honor the promissory notes arose directly from the BIT and was regulated by the BIT and general principles. The same Tribunal found that the promissory notes were governed by the Venezuelan Commercial Code and Law on Public Credit.¹⁴¹

Similarly, in *Maffezini v. Spain*,¹⁴² the Tribunal applied public international law to certain issues and domestic law to others. In *Maffezini*, the Tribunal applied public international law relating to State responsibility to determine whether Spain was responsible for the actions of its State entity. The same Tribunal applied the Spanish Civil Code and Commercial Code to determine whether a contract had been concluded between the investor and State entity. Interestingly, the Tribunal navigated Spanish legislation, a European Community directive, the BIT, and customary international law to determine if Spain had lawfully required the investor to produce an environmental impact assessment.¹⁴³

Cumulatively, these cases show that public international law

139. See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments, Arg.-Neth., Oct. 1, 1992, 2242 U.N.T.S. 205.

140. *Fedax N.V. v. Rep. of Venezuela*, ICSID Case No. ARB/96/3, ¶ 30 (1998).

141. *Id.* ¶¶ 29–30.

142. *Maffezini v. Kingdom of Spain*, Case No. ARB/97/7, 5 ICSID Rep. 419 (2000); see also *Antoine Goetz v. Republic of Burundi*, Case No. ARB/95/3, 6 ICSID Rep. 3 (1999).

143. *Maffezini*, Case No. ARB/97/7, ¶¶ 50–57, 77.

is stepping out of the shadow of domestic law and becoming an equally applicable source of law in investor-State disputes. As this trend continues, it is likely that other cases will adopt the more liberal approach found in *Wena Hotels*.¹⁴⁴ This will allow tribunals to apply the rules, whether international or domestic, which are most appropriate and which would most likely achieve just dispute resolution.

2. The Role of the UNIDROIT Principles of International Commercial Contracts

In the context of determining applicable law it is also worth reviewing awards in which tribunals have considered the *UNIDROIT Principles of International Commercial Contracts* (UNIDROIT Principles). A review of available awards demonstrates that on a number of occasions tribunals have made reference to the UNIDROIT Principles in their determination of applicable law.¹⁴⁵ There is, however, significantly varied practice in this regard, most likely stemming from the ambiguous status of the UNIDROIT Principles and their role in investor-State disputes. In this vein, the Tribunal in *Joseph Lemire v. Ukraine*¹⁴⁶ noted:

It is impossible to place the UNIDROIT Principles – a private codification of civil law, approved by an inter-governmental institution – within the traditional sources of law. The UNIDROIT Principles are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law. . . .

The UNIDROIT Principles were developed as a non-legislative codification or restatement of transnational contract law, and are a combination of generally acknowledged principles of contract law and best practice rules.¹⁴⁷ They are generally considered to form part of the *lex mercatoria* but many of the rules may be considered generally accepted principles of law, thus forming a source of public interna-

144. *Wena Hotels*, ICSID Case No. ARB/98/4.

145. Jarrod Hepburn, *The UNIDROIT Principles of International Commercial Contracts and Investment Treaty Arbitration: A Limited Relationship*, 64 INT'L & COMP. L. Q. 905, 905–06 (2015).

146. *Joseph Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 109 (2010).

147. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, Preamble (2010); Ralf Michaels, *The UNIDROIT Principles as Global Background Law*, 19 UNIFORM L. REV. 643 (2014).

tional law under Article 38(1)(c) of the Statute of the International Court of Justice.¹⁴⁸ The function of the UNIDROIT Principles is explained in the Preamble:

These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.¹⁴⁹

The Preamble obviously envisaged that the UNIDROIT Principles could be used for a wide variety of purposes and by a wide variety of dispute resolution services. While the UNIDROIT Principles are commonly regarded as apt for application in international commercial arbitration, more recently, references to the UNIDROIT Principles have been made in the context of investor-State arbitration.¹⁵⁰ The awards demonstrate that the UNIDROIT Principles have been applied or referenced by investor-State tribunals in a number of different ways—including, as the directly applicable law to the dispute,¹⁵¹ as a source of public international law,¹⁵² as a corroboration of public international law,¹⁵³ and as a corroboration of domestic law.¹⁵⁴

148. See generally GUIDITTA CORDERO-MOSS, *INTERNATIONAL COMMERCIAL CONTRACTS* 27–36, 41–57 (2014), ch. 2 & 4.

149. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS*, Preamble (2010).

150. Charles N. Brower & Jeremy K. Sharpe, *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, 45 VA. J. INT'L L. 199, 210–11 (2004).

151. Joseph Lemire v. Ukraine, ICSID Case No. ARB/06/18 (2011).

152. Petrobart v. Kyrgyz Rep., SCC Arbitration No. 126/2003 (2005).

153. Eureka v. Poland, Ad Hoc UNCITRAL Arbitration (2005); Gemplus & Talsud v. Mex., ICSID Case No. ARB(AF)/04/3 (2010); El Paso Energy v. Arg., ICSID Case No. ARB/03/15 (2011).

154. AIG Capital Partners & CJSC Tema Real Estate v. Kazakhstan, ICSID Case No. ARB/01/6 (2003); African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République Démocratique du Congo, ICSID Case No. ARB/05/21 (2008); Sax v. City of Saint Petersburg, Ad Hoc UNCITRAL Arbitration

For example, in *Lemire v. Ukraine*,¹⁵⁵ the Tribunal held that the parties had implicitly chosen the UNIDROIT Principles as the rules of law to govern the substance of the dispute. *Lemire* was an ICSID arbitration resulting in two separate cases: *Lemire I*¹⁵⁶ and *Lemire II*.¹⁵⁷ In *Lemire II* the claims were based on the USA-Ukraine BIT and the award handed down in *Lemire I*. Whilst the two cases are interesting for a number of reasons, for our purposes we are concerned only with how the UNIDROIT Principles were determined to be the applicable law.

In *Lemire I*, the parties negotiated a settlement agreement and thus the case did not proceed to the merits stage. Rather, as is commonly done, the agreement was incorporated into the final award issued by the Tribunal. The award also included a section titled ‘Principles of Interpretation and Implementation of the Agreement’ which reproduced (with only slight linguistic modification) the UNIDROIT Principles. In this context, the UNIDROIT Principles were incorporated as terms of the settlement agreement between the parties. In addition, the settlement agreement included an explicit choice of law provision holding that the agreement was to be governed by the applicable law as determined by Article 54(1) of the ICSID Additional Facility Rules.¹⁵⁸

Article 54(1) of the ICSID Additional Facility Rules required that the Tribunal apply a “law” as determined by the conflict of law rules that the Tribunal considers appropriate and “rules of international law” that the Tribunal considers applicable.¹⁵⁹ Analyzing the question of applicable law, the Tribunal held that it would not be appropriate to apply either Ukrainian or U.S. law. Rather, the Tribunal held that the parties had incorporated the UNIDROIT Principles into the terms of the settlement agreement. The Tribunal held that:

The Settlement Agreement contains an extensive

(2012); Mohamed Abdulmohsen Al-Kharafi & Sons v. Libya, Ad Hoc Arbitration in Accord with Unified Agreement for the Investment of Arab Capital in the Arab States (Mar. 22, 2013); Suez, Sociedad General de Aguas de Barcelona & Vivendi Universal v. Argentina & AWG Group v. Argentina (2010) ICSID Case No. ARB/03/19 and Ad Hoc UNCITRAL Arbitration.

155. Joseph Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (2011).

156. Joseph Lemire v. Ukraine, ICSID Case No. ARB(AF)/98/1, Award (2000).

157. Joseph Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (2011).

158. Joseph Lemire v. Ukraine, ICSID Case No. ARB(AF)/98/1, Award, ¶ 30 (2000).

159. International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, art. 54, Sept. 27, 1978.

chapter called “Principles of Interpretation and Implementation of the Agreement,” which includes Clauses 20 through 26. These Clauses were reproduced, with very light linguistic adjustments, from the 1994 UNIDROIT Principles . . .¹⁶⁰

When negotiating the Settlement Agreement, the parties evidently gave thought to the issue of applicable law, and were apparently unable to reach an agreement to apply either Ukrainian or US law. In this situation, what the parties did was to incorporate extensive parts of the UNIDROIT Principles into their agreement, and to include a clause which authorizes the Tribunal either to select a municipal legal system, or to apply the rules of law the Tribunal considers appropriate. Given the parties’ implied negative choice of any municipal legal system, the Tribunal finds the most appropriate decisions is to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles.¹⁶¹

It appears that the UNIDROIT Principles, in certain circumstances, may also be considered as a source of public international law. In *Petrobart v. Kyrgyz Republic*,¹⁶² the Tribunal referenced the UNIDROIT Principles as a source of public international law because of their status as generally recognized principles of law. In that case, the Tribunal was required to determine whether the Kyrgyz Republic had violated its treaty obligation under the Energy Charter Treaty. Accordingly, because of the nature of the claim, the Tribunal held that the applicable law was the treaty and relevant principles of public international law.¹⁶³ In determining the amount of interest payable, the Tribunal held that Article 7.4.9 of the UNIDROIT Principles¹⁶⁴ was an appropriate source of public international law by

160. Joseph Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 108 (2011).

161. *Id.* ¶ 111.

162. *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003 (2005).

163. *Id.* at 80–86.

164. Article 7.4.9 (interest for failure to pay money) of the UNIDROIT Principles states:

(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused. (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment the place for payment, or where no such rate exists that place, then the same rate in the State of the currency of pay-

which to calculate the amount of interest payable.¹⁶⁵

Petrobart demonstrates that the UNIDROIT Principles may be considered as sufficient proof of general principles of law, and as such, directly applicable as a source of public international law. As pointed out above, general principles of law may be considered a source of public international law under Article 38(1)(c) of the Statute of the International Court of Justice. According to the prevailing theory, general principles of law are derived from features common to multiple domestic legal systems.¹⁶⁶ It is important to note however, that the UNIDROIT Principles are not only a collection of general principles, but also contain rules considered to be best practices, thus not all UNIDROIT Principles are capable of being applied as a source of public international law.¹⁶⁷ It is therefore necessary to distinguish the rules that express generally recognized principles from those that do not. It may be reasonable to conclude that most (but not all) of the principles established in the UNIDROIT Principle would qualify as general principles of law that could be applied as a source of public international law in investor-State arbitration.¹⁶⁸

ment. In the absence of such a rate either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment. (3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010).

165. *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003 at 88–89 (2005). Some examples of general principles of international law include *pacta sunt servanda*, *res judicata*, and good faith.

166. SCHREUER, *supra* note 122 at 191–270.

167. The *UNIDROIT Principles of International Commercial Contracts* (2010) introduction reads:

For the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the UNIDROIT Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010).

168. CORDERO-MOSS, *supra* note 148, at 43–51:

The [UNIDROIT Principles] may contain principles and rules that do not reflect generally acknowledged standards, but represent what the restatements' authors considered to be the best rule. Hence, they may not be used as evidence of the general acknowledgement of the principles contained therein; however, they could become evidence if they are used consistently and widely in practice.' In this vein, it could be argued that Article 7.4.9 does not represent a generally accepted principle of law with regard to the calculation of interest because a comparative analysis of legal systems demonstrates that there is a significant difference in methodologies used by different legal systems.

The most common and legally defensible way in which the UNIDROIT Principles are used by tribunals is as a means of corroborating the content of public international law principles. A number of cases demonstrate that tribunals will not hesitate to draw on the UNIDROIT Principles to assist in their determination of the content and method of application of public international law principles. The most instructive example of this is the award in *El Paso v. Argentina*,¹⁶⁹ where the Tribunal was required to determine whether Argentina had breached its obligations under the USA-Argentina BIT.¹⁷⁰

In *El Paso*, the Tribunal held that the applicable law was the BIT supplemented by public international law and Argentinean law. In this case, the Tribunal made reference to the UNIDROIT Principles in order to corroborate general principles of law used to interpret specific provisions of the USA-Argentina BIT—in particular, the interpretation of “Article XI: Admissibility of the State’s Defense.” After discussing the International Law Commission Articles on Responsibility of States for International Wrongful Acts (ILC Articles) and the general principles of law on the preclusion of wrongfulness, the Tribunal cited the UNIDROIT Principles as corroborating evidence of its content and status.¹⁷¹ In this regard the Tribunal held:

So far, this Tribunal has limited itself to examining the question of whether the above-mentioned precept is a rule of general international law, applicable between the Parties to the BIT and, hence, a rule which may be used to interpret Article XI of the latter. It has reached an affirmative conclusion on this point. One could also ask whether the rule exists as a “general principle of law recognized by civilized nations” in the sense of Article 38 (1)(c) of the Statute of the ICJ. Volumes have been written on the subject of “general principles.” Some authors consider that the latter must meet requirements similar to those applied to customary rules (general practice and *opinio juris*), which suggests that in reality this category is not an autonomous one. The mainstream view seems to be, however, that “general principles” are rules largely applied in *foro domestico*, in private or public, substantive or procedural matters, provided that, after ad-

169. *El Paso Energy v. Argentine Rep.*, ICSID Case No. ARB/03/15 (2011).

170. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993), 31 I.L.M 124.

171. *El Paso Energy v. Argentine*, ICSID Case No. ARB/03/15, Award, ¶¶ 613–26 (2011).

aptation, they are suitable for application on the level of public international law.¹⁷²

That there is a general principle on the preclusion of wrongfulness in certain situations can hardly be doubted, as is confirmed by the UNIDROIT Principles on International Commercial Contracts, a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems. Article 6(2)(2) of these Principles, dealing with “hardship,” provides that events causing hardship must be “beyond the control of the disadvantaged Party.” Article 7(1)(6) on “exemption clauses” prescribes that a party may not claim exemption from liability “if it would be grossly unfair to [exempt it] having regard to the purpose of the contract.” Finally, Article 7(1)(7), relating to “force majeure” (*vis maior*) excuses non-performance of a contract “. . . if that Party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences.” Exemption from liability for non-performance or other forms of relief are therefore excluded under the UNIDROIT Principles if the Party claiming it was “in control” of the situation or if it would be “grossly unfair” to allow for such exemption.¹⁷³

In this sense, the Tribunal used the UNIDROIT Principles to corroborate the content and status of the international legal principle on the preclusion of wrongfulness spelled out in the ILC Articles. While the ILC Articles were used as the primary source of such a general principle, the UNIDROIT Principles were helpful in corroborating the existence of similar principles in national legal systems so that it could be applied as a generally accepted principle of law. Similar methodologies have been used in a number of other cases including *Eureko v. Poland*¹⁷⁴ and *Gemplus v. Mexico*.¹⁷⁵

172. *Id.* ¶¶ 621–22.

173. *Id.* ¶ 623.

174. *Eureko B.V. v. Poland*, Partial Award, (Ad Hoc UNCITRAL Arb. Aug. 19, 2005).

175. *Gemplus & Talsud v. Mexico*, ICSID Case Nos. ARB(AF)/03/3 and ARB(AF)/04/3, Award (June 16, 2010).

For example, in *Eureko* the ad hoc UNCITRAL Tribunal used Article 7.1.3 of the UNIDROIT Principles to corroborate their understanding of the exception of non-performance. The Tribunal held:

The Tribunal must now determine whether the [Respondent] can rely on the Article 1 waiver because it has allegedly not performed its own obligations under the First Addendum. In other words, is the exception of non-performance applicable, as Claimant contends? Without deciding whether the exception of non-performance is a maxim of interpretation or a rule of international law, the Tribunal is of the view that the exception cannot assist Claimant because it essentially applies to cases of simultaneous or conditional performance. For example, Article 7.1.3 of the UNIDROIT principles of International Commercial Contracts provides that, “Where the parties are to perform simultaneously, either party may withhold performance” if the other party is not willing and able to perform.¹⁷⁶

In this sense, the Tribunal’s opinion as to the content and application of the exception was corroborated by the UNIDROIT Principles.

Likewise, in *Gemplus*, the Tribunal used the UNIDROIT Principles to corroborate public international law on the “certainty of harm principle” contained in the ILC Articles. In that case the Tribunal was required to determine whether, under the France-Mexico BIT¹⁷⁷ and Argentina-Mexico BIT,¹⁷⁸ Mexico had unlawfully expropriated the claimant’s investments. According to the nature of this dispute, the Tribunal applied public international law as the law applicable to the dispute. After determining that Mexico had breached its expropriation obligations under both BITs, the Tribunal analyzed the issue of compensation for damages. In regard to lost profits, the Tribunal again discussed the ILC Articles. The Tribunal held:

In this ILC Commentary [on the issue of lost profits] there is an emphasis on “certainty” to be established evidentially by a claimant in all cases; but it is clear from other legal materials there cited that the concept

176. *Eureko B.V. v. Poland*, Partial Award, ¶¶ 176–8 (Ad Hoc UNCITRAL Arb. Aug. 19, 2005).

177. Agreement on the Reciprocal Promotion and Protection of Investments, Fr.-Mex., Nov. 12, 1998, 249 Journal Officiel de la République Française 17062.

178. Agreement for the Reciprocal Promotion and Protection of Investments, Arg.-Mex., Nov. 13, 1996, 2033 U.N.T.S. 293.

of certainty is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case.¹⁷⁹

In deciding the evidentiary standard for awarding lost profits under public international law, the Tribunal cited ILC Article 142 for the principle that there must be a relative and reasonable level of certainty about future income streams. To support and corroborate this principle, the Tribunal cited the UNIDROIT Principles:

It may be noted that Article 7.4.3(1) of the UNIDROIT Principles requires a “reasonable degree of certainty” for establishing compensation for future harm, thereby further confirming that the requirement for certainty in proving a claimant’s claim for compensation is relative and not incompatible with an award of compensation for loss of opportunity, nor is the latter necessarily linked to an arbitrator’s power to decide *ex aequo et bono*.¹⁸⁰

The Tribunal also noted that the UNIDROIT Principles could be viewed as corroborating the general proposition that lost profit is an accepted and well-established component in assessing compensation under public international law.¹⁸¹ After providing an example from English case law, the Tribunal justified its reference to the UNIDROIT Principles stating:

It would be possible to illustrate these general principles from several other national legal systems (both common law and civilian); but it is unnecessary to do so here because, first, such principles are broadly restated in the UNIDROIT Principles; and, second, the Tribunal is in no doubt that similar principles form part of international law, as expressed in the ILC Articles.¹⁸²

Notably, the Tribunal used the UNIDROIT Principles as a substitute for a comparative analysis of other domestic legal systems to corroborate general principles of law that formed a part of public international law as expressed by the ILC Articles.

Lastly, a number of awards demonstrate that the UNIDROIT Principles are often used by tribunals to corroborate the content and

179. Gemplus, S.A., SLP S.A., Gemplus Industrial S.A. & Talsud S.A. v. Mexico, ICSID Case Nos. ARB(AF)/03/3 and ARB(AF)/04/3, Award, ¶ 13.82 (June 16, 2010).

180. *Id.* ¶ 13.88.

181. *Id.* ¶ 13.88–90.

182. *Id.* ¶ 13.89.

method of application of national law.¹⁸³ The most instructive example is the case of *AIG v. Kazakhstan*,¹⁸⁴ where the Tribunal was required to determine whether Kazakhstan had expropriated AIG's investment in a real estate development project under the USA-Kazakhstan BIT.¹⁸⁵ Using the conflict of law rules contained in Article 42(1) of the ICSID Convention, the Tribunal held that the applicable law was Kazakh law, to be read with and controlled by the BIT and general principles of public international law.¹⁸⁶

In determining the issue of mitigating damage, the Tribunal held that the claimant was entitled to refuse to accept an offer for an alternative piece of land for the real estate development project.¹⁸⁷ In their decision, the Tribunal used the UNIDROIT Principles to corroborate Kazakh law regarding the mitigation of damages. The Tribunal declared:

(1) Mitigation of damages, as a principle, is applicable in a wide range of situations. It has been adopted in common law and in civil law countries, as well as in International Conventions and other international instruments—as for instance in Article 77 of the Vienna Convention and Article 7.4.8 of the UNIDROIT Principles for International Commercial Contracts. It is frequently applied by international arbitral tribunals when dealing with issues of international law. In commercial trade relations, it is said that a purchaser “. . . must take measures that are reasonable in the circumstances to mitigate the loss . . . “ (Vienna Convention, Article 77): as when for example a seller fails to deliver materials contracted to be sold, and the buyer neglects to purchase substitute materials available in the market, the shutdown losses that the purchaser could have prevented would not be recoverable.¹⁸⁸

In this sense, the Tribunal used the UNIDROIT Principles to corrob-

183. Radicati di Brozolo, *Non-National Rules and Conflict of Laws. Reflections in Light of the UNIDROIT and Hague Principles*, 48 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 841, 842–43 (2012); Michaels, *supra* note 147, at 648.

184. *AIG Capital Partners, Inc. & CJSC Tema Real Estate v. Kazakhstan*, ICSID Case No. ARB/01/6, Award (Oct. 7, 2003).

185. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Kazak., May 19, 1992, S. EXEC. REPT. 103-11 (1993).

186. *AIG Capital Partner & CJSC Tema Real Estate v. Kazakhstan*, ICSID Case No. ARB/01/6, Award, ¶ 10.1.4 (Oct. 7, 2003).

187. *Id.* ¶ 10.6.

188. *Id.* ¶ 10.6.4.

orate the content of the duty to mitigate under Kazakh law. A similar methodology was used in *African Holding v. Democratic Republic of Congo (DRC)*¹⁸⁹ where the Tribunal was required to determine whether the DRC had breached its obligations under the USA-DRC BIT.¹⁹⁰ In this case, the UNIDROIT Principles played a significant role, corroborating general principles of Congolese contract law. First, the Tribunal used the UNIDROIT Principles to corroborate Congolese law on the formation of contracts. In this regard, the Tribunal held:

[C]ontracts do not necessarily need to be made in writing following Congolese legislation or international law. In fact, Article 1.2 of the UNIDROIT Principles of International Commercial Contracts expressly provides that a contract must not be concluded in or evidenced by writing and that it may be proved by all possible means, including by a witness.¹⁹¹

We reach the same conclusion when assessing the matter in accordance with UNIDROIT Principles mentioned above, more particularly pursuant to Article 2.1.1, a contract can also be concluded from the conduct of the parties which is showing sufficiently their agreement. This is the case in the present matter even if no written text were made.¹⁹²

In this context, the Tribunal referred to the UNIDROIT Principles to support the conclusion of an expert witness giving evidence regarding the content of Congolese contract law. Similarly, the Tribunal used the UNIDROIT Principles with regard to determining the issue of non-performance of the contract.

Reference should also be made to the decisions of *Carl Sax v City of Saint Petersburg*¹⁹³ and *Al-Kharafi v Libya*,¹⁹⁴ which similarly

189. *African Holding Company of America, Inc. & Société Africaine de Construction au Congo S.A.R.L. v. La République Démocratique du Congo*, ICSID Case No. ARB/05/21, Award (July 29, 2008).

190. Treaty Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Zaire, Aug. 3, 1984, S. Treaty Doc. No. 99-17 (1986).

191. *African Holding Company of America, Inc. & Société Africaine de Construction au Congo S.A.R.L. v. La République Démocratique du Congo*, ICSID Case No. ARB/05/21, Award, ¶ 32 (July 29, 2008)

192. *Id.* ¶35.

193. *Sax v. City of Saint Petersburg*, Award (Ad Hoc UNCITRAL Arbitration, Mar. 30, 2012).

194. *Mohamed Abdulmohsen Al-Kharafi & Sons v. Libya*, Award (Ad Hoc Arbitration Mar. 22, 2013).

support the use of UNIDROIT Principles as corroborating the content of domestic law. In *Carl Sax*, the Tribunal used Article 7.4.9¹⁹⁵ of the UNIDROIT Principles on the calculation of interest to corroborate the principle found in Article 395 of the Russian Civil Code, states that the application of interest is to be determined according to the jurisdiction where the prevailing party resides.¹⁹⁶ Likewise, in *Al-Kharafi*, the Tribunal used the UNIDROIT Principles to corroborate provisions found in Libyan law on the issue of compensation for lost profits. The Tribunal held that Article 224 of the Libyan Civil Code (confirmed by Libyan case law) creates a right to compensation for lost profits.¹⁹⁷ To support this conclusion, the Tribunal referred to Article 7.4.2¹⁹⁸ of the UNIDROIT Principles on full compensation and Article 7.4.3¹⁹⁹ on the certainty of harm principle.

As the Tribunal in *Joseph Lemire v Ukraine*²⁰⁰ noted, the UNIDROIT Principles do not fall within the traditional sources of law. They are neither public nor private. Yet, this does not stop them from being applied in the context of investment arbitration. As we have seen above, references to the UNIDROIT Principles are varied, and they may be applied in a number of ways—including, as the directly applicable law to the dispute, as a source of public international law, as a corroboration of public international law, and as a corroboration of domestic law. They are, in short, a manifestation of transnational law.

195. *Id.* at 209.

196. *Sax v. City of Saint Petersburg*, Award, ¶ 810 (Ad Hoc UNCITRAL Arbitration, Mar. 30, 2012).

197. *Mohamed Abdulmohsen Al-Kharafi & Sons v. Libya*, Award, at 369–74 (Ad Hoc Arbitration, Mar. 22, 2013).

198. Article 7.4.2 (full compensation):

The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010).

199. Article 7.4.3 (certainty of harm):

(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the stability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is the discretion of the court.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010).

200. *Joseph Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 108–9 (Jan. 14, 2010).

3. Sovereign Immunity

Just as in international commercial arbitration, questions of sovereign immunity may also arise in the context of investor-State arbitration because of the State's status under public international law. However, tribunals rarely address questions of sovereign immunity, as consent to arbitration through BITs, MITs, or other arbitration agreements bars States from pleading sovereign immunity to escape their contractual obligation to arbitrate.²⁰¹ Rather, consent to arbitration bars States from pleading sovereign immunity to escape their contractual obligation to arbitrate. However, questions of sovereign immunity do continue to arise in the context of domestic court proceedings where the non-State party seeks the assistance of a domestic court to support the arbitral proceedings.

Just like in the context of commercial arbitration, States retain immunity from interim measures unless they have made a special reservation or have given express consent for domestic courts to exercise such power in support of the arbitration.²⁰² For example, in *ETO Euro Telecom Intl NV v. Republic of Bolivia*,²⁰³ the English Court of Appeals held that pursuant to the Sovereign Immunity Act of 1978, Bolivia could not be held to have waived its sovereign immunity from an assets freezing order by entering into a BIT containing an ICSID arbitration clause. The court held that, because the ICSID Convention requires that ICSID arbitration is the exclusive forum to seek a remedy for the dispute, and because the ICSID Convention and Rules permit the tribunal to issue interim measures, the arbitration clause in the BIT was not sufficient to waive sovereign immunity.²⁰⁴ The court held that the Sovereign Immunity Act of 1978 required "written consent of the State" in order for the court to issue an injunction against a State party.²⁰⁵

Issues of sovereign immunity most commonly arise in the context of enforcement proceedings in domestic courts. The ability to execute an award against the assets of a State party is wholly determined by the law of the State where enforcement is sought.²⁰⁶ As

201. SCHREUER, *supra* note 122, at 1153; *see also* G.R. Delaume, *Foreign Sovereign Immunity: Impact on Arbitration*, 38 *ARB. J.* 34, 38 (1983).

202. LEW, MISTELIS & KROLL, *supra* note 93, at 775; SCHREUER, *supra* note 122, at 1153.

203. *ETI Euro Telecom Intl NV v. Republic of Bolivia* [2008] EWCA Civ 880, [2009] WLR 665.

204. *Id.* ¶¶ 110–114.

205. *Id.* ¶ 112.

206. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art.

such, courts will look to domestic law for rules relating to sovereign immunity.²⁰⁷ The awards and decisions of State courts demonstrate the general position that investors may execute an award against commercial assets of a State if they are able to locate such assets. In this context, two investor-State execution proceedings are instructive. Both cases demonstrate that non-State parties will generally face considerable hurdles in attempting to execute against State assets.

In the first case, *LETCO v. Liberia*,²⁰⁸ LETCO brought an action in the US District Court for the Southern District of New York to enforce an Award it obtained against Liberia in an ICSID arbitration. The court granted an order for the enforcement of LETCO's award against Liberia. Shortly thereafter, a writ of execution was issued in LETCO's favor, attaching various registration fees and taxes owed to the government of Liberia. Liberia appealed the execution order, arguing that those fees and taxes were sovereign assets immune from execution under the U.S. Foreign Sovereign Immunities Act (FSIA). The court agreed and quashed the execution order. However, it gave LETCO leave to seek execution against commercial assets of the government of Liberia under the commercial exception to sovereign immunity in the FSIA.²⁰⁹ LETCO then obtained execution orders attaching bank accounts of the Embassy of Liberia in Washington. However, the U.S. District Court for the District of Columbia quashed those orders, finding that the accounts were immune from attachment under the FSIA. The court reasoned that even though the accounts contained funds used for both sovereign and commercial activities, the use of certain embassy funds for commercial activities incidental to embassy operations did not deprive the entire bank account of its sovereign character.²¹⁰

The second case, *AIG v. Kazakhstan*,²¹¹ concerned a similar

3, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

207. SCHREUER, *supra* note 148, at 1152–53. This is true of ICSID arbitration, as Article 55 of the ICSID Convention states that the rules of recognition and execution in Article 54 do not override the laws relating to sovereign immunity in the State where execution is sought. International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42(1), Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S.

208. *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986).

209. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11, 1330, 1332, 1391(f), 1441(d) (2012).

210. *Liberian Eastern Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606 (D.D.C. 1987).

211. *AIG Capital Partners, Inc. & CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/06, ICSID Rep. 11, 118 (2007).

situation in which AIG sought execution against assets of Kazakhstan in England. In that case, AIG obtained interim third-party debt and charging orders against the assets of the National Bank of Kazakhstan held by various London Banks. The National Bank of Kazakhstan intervened in the attachment proceedings, seeking discharge of the orders based on sovereign immunity. The English High Court agreed, discharging the orders based on section 14(4) of the U.K. State Immunity Act of 1987 under which the property of a State's central bank is not to be regarded as in use for or intended to be used for a commercial purpose. The court concluded that although the National Bank of Kazakhstan possessed the assets, they were the property of the Republic of Kazakhstan and thus were immune from enforcement.²¹²

4. Conclusion

The fact that investor-State arbitration and commercial arbitration involve similar dispute resolution procedures has led many to see them as two sides of the same coin. However, the influence of public international law qualifies such a characterization. Although there are authors who continue to express their view that investor-State arbitration falls under one ambit of law more than the other, most contemporary literature tends to acknowledge that as a dispute resolution process it cannot adequately be explained as a purely public or private international law phenomena.²¹³ Arguably, the awards analyzed above position investor-State arbitration as a hybrid form of dispute resolution, finding its foundations in both public and private international law. The fact that investment claims may involve contract-based claims, treaty-based claims or both means that in many cases tribunals will be faced with rules of interpretation that may find their source in public, transnational, or domestic law to determine whether or not they ought to assume jurisdiction. In a similar vein, the now common practice of concluding compound choice of law clauses means that in most cases tribunals will be required to apply public international law in conjunction with the domestic law of the State. Lastly, as we have seen, questions of sovereign immunity will always present similar problems because domestic law will always inform the scope of the obligation to execute investment awards. It follows that those practicing in investor-State arbitration will, very often, face mixed public-private problems, which require a rather

212. *Id.* ¶ 94.

213. Julie Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L. L. 367, 407 (2014).

comprehensive expertise.

V. THE INTERACTION IN A SINGULAR HYBRID JUDICIAL SETTING: THE IRAN-U.S. CLAIMS TRIBUNAL

A. *The Impact of the Tribunal's Nature on the Interaction Between Private and Public International Law*

The Iran-U.S. Claims Tribunal is a hybrid form of dispute resolution that has many similarities to investor-State arbitration.²¹⁴ The Tribunal was created in 1981 as one element of the settlement process resulting from the fifteen-month hostage crisis between the United States of America and the Islamic Republic of Iran.²¹⁵ It was formed by the two Governments to help resolve a wide variety of claims by each Government against the other, as well as claims by individuals against the opposing Government. Article II(1) and (2) of the Tribunal's constitutive treaty (Claims Settlement Declaration) lay out the Tribunal's jurisdiction:

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim . . .
2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.²¹⁶

The question of the Tribunal's nature—whether it is a public or private international law body—has generated substantial debate not on-

214. This paper acknowledges that there is still, to this day, considerable debate as to the exact nature of the Tribunal. For the purpose of this paper, the Tribunal is classified as hybrid in nature because it has the ability to hear both public and private international law issues and apply both public and private international law.

215. John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278, 279 (1989).

216. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the United States of America and the Government of the Islamic Republic of Iran of Jan 19, 1981, 1 Iran-U.S. Cl. Trib. Rep. 9 (1983).

ly among scholars but also among members of the Tribunal.²¹⁷ One might simply conclude that the Tribunal, established by two sovereigns on the basis of an international treaty in the form of the Claims Settlement Declaration, is a creation of public international law. Such a view would be supported by the jurisdiction of the Tribunal to hear inter-State claims between the two Governments. However, it would ignore the fact that the Tribunal also has jurisdiction to hear the private claims of individuals against opposing Governments.²¹⁸ The ability of the Tribunal to hear both public and private matters has led many scholars, and the Tribunal itself, to conclude that it is of a hybrid nature. In *Case A/18*²¹⁹ the Tribunal characterized itself in the following way:

While the Tribunal is clearly an international tribunal established by treaty and while some of its cases involve disputes between the two Governments and involve the interpretation and application of public international law, most disputes (including all those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and may involve primarily issues of municipal law and general principles of law. In such cases it is the rights of the claimant, not of his national that are to be determined by the Tribunal . . .

Although this Tribunal is not an organ of a third State, it is also not, as noted above, a tribunal where claims are espoused by a State at its discretion and decided solely by reference to public international law.²²⁰

This characterization clearly demonstrates that the Tribunal sees itself as a hybrid form of dispute resolution, often required to apply both public and private international law to resolve matters that come before it. While decisions such as *Case A/18* demonstrate that both public and private international law have a role to play in the resolution of disputes before the Tribunal, there is considerable difficulty in characterizing how this interaction occurs. This difficulty typically arises because the Tribunal often does not provide comprehensive

217. MOHSEN MOHEBI, THE INTERNATIONAL LAW CHARACTER OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL xxiii (1999).

218. *Id.*

219. Jurisdiction Over Claims of Persons With Dual Nationality, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984).

220. *Id.* at 261.

reasons for its choice of law determinations.²²¹ This Part will focus on the exceptions—that is, those awards that provide reasons for choice of law decisions—in an effort to deduce the Tribunal’s general practice in this area.

B. Determining Applicable Law

Article V of the Claims Settlement Declaration provides the Tribunal with broad discretion as to choice of law. It states that the Tribunal must:

[D]ecide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.²²²

Unfortunately, Article V provides little guidance as to the role public and private international law should play in cases that come before the Tribunal. The reason for such a broad choice of law clause boils down to political necessity. When the Claims Settlement Declaration was negotiated in 1980, the United States and Iran could not agree on what system of law or conflict of law rules should govern the claims, thus the negotiators thought it best to leave the adoption of choice of law rules to the discretion of the Tribunal.²²³ In *CMI International Inc. v. Iran*,²²⁴ the Tribunal held that:

It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal . . . [T]he Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws, “taking into account relevant usages of the trade, contract provisions and changed circumstances”, as

221. Crook, *supra* note 215, at 287.

222. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the United States of America and the Government of the Islamic Republic of Iran of Jan 19, 1981, 1 Iran-U.S. Cl. Trib. Rep. 9 (1983).

223. Crook, *supra* note 215, at 281.

224. *CMI International, Inc. v. Ministry of Roads and Transportation and The Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 263 (1983).

Article V directs. With respect to the assessment of damages, the Tribunal considers its main task to be determining what are the losses suffered by the Claimant and to award compensation therefore . . .²²⁵

The freedom afforded to the Tribunal under Article V has led to a diverse practice in the context of determining applicable law. However, in searching for the applicable law, the Tribunal has, to a large extent, been influenced by the nature of the dispute before it. Thus, in cases concerning issues arising out of public international law, the Tribunal has applied relevant rules of public international law in the determination of such claims.²²⁶ For example, in *Amoco International Finance Corporation v. Iran*,²²⁷ the Tribunal held that customary public international law was applicable to determine the issue of whether just compensation was required for property taken. Likewise, the Tribunal has applied principles of customary public international law to other public international law issues such as the determination of interest,²²⁸ attribution,²²⁹ and the effective nationality of dual nationals.²³⁰

However, the Tribunal's practice in relation to determinations of applicable law in private claims is more complex. Because of the political context in which it exists, the Tribunal has generally attempted to base its choice of law determinations on politically neutral factors such as the contract between the parties or on general principles of law common to the parties.²³¹ By and large, the majority of private claims have been decided entirely or substantively on the basis of the parties' contract. However, in the absence of a contract between the parties, or where the contract did not provide sufficient or satisfactory rules for the determination of the dispute, the Tribunal has regularly identified and applied general principles of substantive

225. *Id.* at 267–68.

226. *Oil Field of Texas, Inc. v. Iran*, 1 Iran-U.S. Cl. Trib. Rep. 347, 361 (1982).

227. *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 223, 246–48 (1987); similar determinations of applicable law were made in: *Shahin Shaine Ebrahimi v. Iran*, 30 Iran-U.S. Cl. Trib. Rep. 174 (1994); *Nat'l Iranian Oil Co.*, 10 Iran-U.S. Cl. Trib. Rep. 180, 184–187 (1986).

228. *McCullough and Company, Inc. v. Ministry of Post, Telegraph and Telephone*, 11 Iran-U.S. Cl. Trib. Rep. 3, 26–31 (1986); *Sylvania Technical Systems Inc v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 298, 320–322 (1985).

229. *Sea-Land Service, Inc. v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 149 (1984); *Rankin v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 135 (1986).

230. *Jurisdiction Over Claims of Persons With Dual Nationality*, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984).

231. *Crook*, *supra* note 215, at 280.

law or general principles of private international law to determine the substantive law.²³²

Generally, the Tribunal has refrained from applying the private international law of a State because of its reluctance to place one party's domestic law above the other's.²³³ Likewise, because of the broad scope of Article V and because the Tribunal is of an international character, it is not bound by any national choice of law or even *lex fori*.²³⁴ Rather, often the Tribunal has applied general principles of private international law leading to the application of a State's domestic law. The practice of the Tribunal was summarized by Judge Lagergren, the Claim Tribunal's first President, who stated that:

[S]ince the Tribunal possesses the character of an international tribunal, governed by public international law, it does not apply any national (for instance Dutch) conflict of law rules, but instead applies general principles of conflict of law.²³⁵

For example, in *Harnischfeger Corp. v. Ministry of Roads and Transportation*,²³⁶ the Tribunal applied general principles of private international law to conclude that the United States Uniform Commercial Code was the applicable law. The Tribunal held:

The agreement . . . makes no reference to governing law; however, under general choice of law principles, the law of the United States, the jurisdiction with the most significant connection with the transaction and the parties, must be taken to govern in this specific case . . . The United States law applicable to this commercial transaction is the Uniform Commercial Code. . .²³⁷

Similarly, in *Economy Forms Corp. v. Iran*,²³⁸ the Tribunal held that the application of general principles of private international law led to the application of the IOWA Uniform Commercial Code as the

232. *Id.*

233. *Mobil Oil Iran, Inc. v. Iran*, 16 Iran-U.S. Cl. Trib. Rep. 3, 27 (1987) (finding that it did not consider it appropriate that the Agreement be governed by the laws of one party).

234. MOHEBI, *supra* note 217, at 120.

235. *Id.*

236. *Harnischfeger Corp v. Ministry of Roads and Transportation*, 7 Iran-U.S. Cl. Trib. Rep. 90 (1984).

237. *Id.* at 99; see also *Queens Office Tower Assocs. v. Iran Nat'l Airline Corp.*, 2 Iran-U.S. Cl. Trib. Rep. 247, 250 (1983).

238. *Economy Forms Corp v. Iran*, 3 Iran-U.S. Cl. Trib. Rep. 42 (1984).

applicable law. The Tribunal explained that the U.S. law applied because “the center of gravity of [the] business dealings was the United States, that being the test under general principle of conflict of law.”²³⁹ In doing so, the Tribunal acknowledged the “closest connection” or “centre of gravity” as a generally accepted principle of private international law and one disconnected from the domestic law of either party.

C. Conclusion

To this day, the exact nature of the Tribunal is disputed. However, an analysis of the relevant awards delivered by the Tribunal demonstrates that it has jurisdiction to adjudicate both public and private claims and apply both public and private international law. In this sense, it has been said that the Tribunal “somehow exists and operates on the borderline of public and private international law, sometimes falling in the domain of one and sometimes in that of the other.”²⁴⁰ We would argue that it is better characterized as a hybrid form of dispute resolution acting at the confluence of public and private international law.

CONCLUSION

There is nothing revolutionary in the idea of abandoning the simple dichotomy between public and private international law.²⁴¹ Modern international relations and commerce are characterized by a complex and sometimes disordered web of relations between States, individuals, international organizations, and multinational corporations.²⁴² However, while there is a considerable amount of literature calling for the divide between public and private international law to be removed (mainly based on historical data), there is, most notably, a lack of concrete practical evidence to support such claims. This Article seeks to fill that void, reinvigorating the push for a more nuanced understanding of the interaction between public and private international law—particularly, in the context of international dispute

239. *Id.* at 48.

240. Aida B. Avanesian, *The New York Convention and Denationalised Arbitral Awards (With Emphasis on the Iran-United States Claims Tribunal)*, 8 *J. Int. Arb.* 5, 8 (1991).

241. DOUGLAS, *supra* note 104, at 7.

242. *Id.*

resolution.

Taken cumulatively, the decisions and awards analyzed above demonstrate that public and private international law are intricately linked, working together to provide a legal framework to regulate the international activity of both public and private actors. The ways in which public and private international law interact depends on a variety of factors. However, what is clear is that we are witnessing, now more than ever, a confluence of public and private international law before international courts and tribunals. As international courts and tribunals continue to be confronted with disputes that require mixed public/private international law answers, the theoretical divide between these two disciplines will continue to erode.