CHAPTER 12
Customary Principles Regarding Public Contracts Concluded With Foreigners
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1. Introduction

This Chapter intends to identify a body of customary principles applicable to public contracts concluded with foreigners regardless of the legal framework(s) under which such contracts are concluded or regulated (WTO law, BITs, NAFTA, EU law, etc.). This internationalization of public contracting is mainly ensured through customary international law (1.1.) but due attention shall also be paid to related concepts such as lex mercatoria or ordre public transnational that are more familiar to the private international law arena (1.2.).

1.1. Internationalizing Through Customary International Law

a) Preliminary Remarks

The legal nature of “Public Contracts Concluded with Foreigners” – usually referred to as “State contracts” in the international law literature – has been the subject of a longstanding doctrinal dispute among legal scholars. Far from being purely theoretical, the stance on whether such contracts are rooted in public international law, private international law, the lex contractus or transnational law may have significant implications for the determination of the law – or more broadly the rules – applicable to the contract. (1) However, beyond this diversity of approaches, the law and practice of State contracts has shown that several processes ensure at least a “corrective” application of customary international law regardless of the doctrinal apprehension of such contracts. Indeed, the issue at stake is not only the application of customary rules in abstracto to State contracts (for instance if such a customary rule is invoked within the framework of a diplomatic protection claim exercised by the State of nationality of the private contracting party) but above all their applicability

(1) For an overview see J.O. Voss, The Impact of Investment Treaties on Contracts between Host States and Foreign Investors, 25 et seq. (2011).
in concreto in dispute settlement mechanisms between the State and the foreign private contracting party.

b) Processes Ensuring the Application of Customary International Law in State Contract Disputes

Direct Application of International Law

State Contracts as Acts of a Public International Law Nature

Despite the authoritative dictum of the PCIJ in the Serbian and Brazilian Loans cases recognizing that “[a]ny 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,” (2) a part of the doctrine considers that State contracts are—objectively, by their very nature and regardless of the lex contractus chosen by the parties—public international law acts. Under this perspective, such contracts are rooted in the international legal order, which constitutes the legal basis of their validity or, in other words, their “ordre juridique de base” or “Grundlegung.” (3) This view was adopted in Texaco/Calasieatic, the sole arbitrator René-Jean Dupuy stating that “the legal order from which the binding nature of the contract derives is international law itself.” (4) To this extent, as pointed out in Revere Cooper, “such contracts, while not made between governments and therefore wholly international, are basically international” (5) or “international in nature.” (6) Under this angle, State contracts are by default regulated by international law. In this respect, the arbitral tribunal in the Eurotunnel case noted that although the Concession Agreement is not a treaty, it is an agreement governed by international law, an “international contract,” and that international law principles of interpretation are to be applied. (7)

However, two important caveats need to be kept in mind. First, a significant distinction exists between “the legal order from which the binding nature of the contract derives” and “the law governing the contract” (or the “proper law of the contract”) that can be chosen by the parties. Since general international law recognizes the principle of party autonomy, parties may—subjectively—choose any applicable law to govern the State contract even though the arbitral tribunal—objectively—acknowledges its international law nature. (8) Second, and more importantly, no general consensus has been reached on the international law nature of such contracts. Some tribunals do not hesitate to take the view that individuals and private corporations do not possess international legal personality and, consequently, that State contracts do not belong to the category of international agreements that are solely concluded between recognized subjects of international law. (9)

Choice-of-Law Clause Referring to International Law

The direct application of customary international law in disputes relating to State contracts usually results from a choice-of-law clause referring to international law. In most cases, such a clause is found in the contract itself (more specifically in the clause granting jurisdiction to the arbitral tribunal) and generally provides for an application of both general principles of international law and the domestic law of the host State where the contract is to be performed. (10) Absent such a clause in the State contract, an arbitral tribunal may still apply international law through the choice-of-law clause contained in the investment treaty by which the jurisdiction of the tribunal has been accepted. (11) For instance, Article 1131 of NAFTA provides that the arbitral tribunal “shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.”

Indirect Application of International Law

Application of International Law Absent Choice-of-Law Clause

Under the ICSID system which is widely used in disputes relating to State contracts, the ICSID Convention, absent choice-of-law clause, commands the

(2) Case concerning the Payment of Various Serbian Loans Issued in France/Cases concerning the Payment in Gold of the Brazilian Federal Loans Issued in France, Judgment, 12 July 1929, Series A, Nos. 20/21, 41.
(6) Ibid., 1332.

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arbitral tribunal to ensure an— at least “supplemental and corrective”— application of international law to the dispute. Its article 42(1), after recognizing the principle of party autonomy, provides that in the absence of a choice-of-law agreement, the arbitral tribunal “shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” Although this provison has been subject to divergent interpretations by arbitral tribunals, (12) it is clear that “applying the rules of international law is to be understood as comprising the general international law, including customary international law.” (13)

**Application of International Law as Part of the Applicable Domestic Law**

Although “it would not be wise to rely on the incorporation of international law into domestic law as a general proposition,” (14) some arbitral tribunals took advantage of domestic constitutional provisions making an explicit reference to international law in order to include the latter into the former. In *Wena Hotels v. Egypt*, the Tribunal indicated that “[t]his amounts to a kind of *remvo* to international law by the very law of the host state.” (15) Therefore, even though the choice-of-law clause refers exclusively to domestic law, such a reference not only ensures the incorporation of international law, but also its supremacy over domestic statutes. In *National Grid v. Argentina*, an UNCERTRAL arbitral tribunal considered that “international treaties are incorporated into Argentine law as the ‘supreme law of the land’, preempting conflicting provincial and federal laws” (16) and that “[a]ccordingly, as a matter of Argentine law, the standards of protection granted by an international investment treaty and applicable principles of international law prevail over any lower standard provided by domestic law.” (17) Moreover, while constitutional provisions usually refer only to treaties or other international agreements and do not recognize the direct effect of customary international law in domestic law, the *Wena Hotels* annulment decision clearly indicated that this incorporation “might be also


(14) SCHMIDT et al., *op. cit.* (fn. 10), 582.


(17) Ibid.
It is possible to conceive a transnational regime of investment law (23) or a “multilateralization” of its legal framework. (24) However, claiming that it structurally affects customary international law is more questionable. Although some arbitral tribunals, such as in Mondex v. USA, expressed the opinion that the content of customary international law “is shaped by the conclusion of more than two thousand bilateral investment treaties,” (25) more convincing are the arguments supporting the opposite conclusion, and notably the inconsistency of State practice stemming from investment treaties. (26) Several arbitral awards unwilling to extend the interpretation of certain investment standards such as “fair and equitable treatment” or “full protection and security” beyond what is required by customary international law also support this view. (27) In Noble Ventures v. Romania, the Tribunal held regarding a BIT provision stipulating that

[the investment shall [...] enjoy full protection and security [that] it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. (28)

However, while the existing legal framework dedicated to the protection of foreign investments cannot be “transplanted” into customary international law, it is not altogether devoid of interest with respect to the identification of customary principles regarding State contracts. Indeed, this legal framework has facilitated through its abundant case-law both the consolidation of existing and the crystallization of future customary norms applicable to such contracts. (29)

1.2. Internationalizing Through Private International Law Concepts

The customary principles regarding State contracts identified in this Chapter are understood to include rules stemming from both “customary international law” (such as the principle of respect for acquired rights) and from “general principles of law” (such as the principle pacta sunt servanda). (30) These “customary principles” – an expression that appropriately reflects the dual origin of these rules – are essentially rooted in public international law. However, the mixed nature of investor-State arbitration, in between international law and domestic law and in between interstate adjudication and international commercial arbitration, has led some tribunals to rely on instruments and methods that are more familiar to the private international law arena. (31) Some clarifications are therefore necessary to better identify those of interest for State contracts.

a) “Lex mercatoria” as a Source of Internationalization

Without necessarily adhering to the view that State contracts are rooted in a transnational legal order and solely governed by a lex mercatoria, it remains difficult to ignore several references to the lex mercatoria in some arbitral awards. This is notably the case when the parties did not refer to a domestic law applicable to the dispute (32) or in the absence of a choice-of-law clause. (33) In the latter case, it was particularly clear in an arbitration between an Iranian governmental entity and an American corporation conducted under the auspices of the ICC in which the Tribunal held that the contract “shall be governed by and interpreted according to, general principles of law applicable to international contractual obligations having earned a wide international


(25) ICSID, Case No. ARB(AF)/99/3, Mondex International Ltd v. The United States of America, Award, 11 October 2002, para. 125.


(28) ICSID, Case No. ARB(AF)/99/3, Mondex International Ltd v. The United States of America, Award, 11 October 2002, para. 125.

(29) DUMKERT, op. cit. (fn. 26), 693 et seq.

(30) SCHEUER ET AL., op. cit. (fn. 10), 604 et seq.; see also B. CHENG, General Principles of Law as Applied by International Courts and Tribunals, 22 (2006) (noting that “the line of demarcation between custom and general principles of law [...] is often not very clear”). However, in the context of ICSID arbitration, see contra O. K. FAYE, “The Legal Reasoning of ICSID Tribunals – An Empirical Analysis”, 19 J.E.LL 301, 310 et seq. (2008).


(33) The Preamble of the “UNDROIT Principles of International Commercial Contracts” provides that these principles “may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like [...] or when the parties have not chosen any law to govern their contract”; UNDROIT Principles of International Commercial Contracts (2010), available at www.undroitr.org/eng/ principles/contracts/principles2010/blackletter2010-english.pdf (last visited 15 December 2015).
consensus, including notions said to form part of the lex mercatoria as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted notions and principles." (34) Transnational law may also be applied in conjunction with international law. In *Lemire v. Ukraine*, the tribunal pointed out that the parties "were apparently unable to reach an agreement to apply either Ukrainian or US law" and given this negative choice of any municipal legal system, the Tribunal finds that the most appropriate decision is to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles. (35)

This raises the question of whether these principles or other transnational rules may be incorporated in the customary principles regarding State contracts.

When it comes to lex mercatoria, it is first necessary to clearly distinguish between its two prime sources: "principles of law common to trading nations and the usages of international trade." (36) With regard to the latter, given the various interpretations of this concept and the broad diversity of trade usages across economic sectors, especially a diversity of contractual practices and standardization, (37) it constitutes a body of rules from which it seems both unlikely and inappropriate to infer customary principles potentially applicable to all State contracts. With respect to the former, it is noteworthy to point out a conceptual similarity between these general principles and those mentioned in Article 58(1)(c) of the ICF Statute since they are both abstract and common to most domestic legal orders. (38) It is therefore not surprising that these general principles "may to a certain extent overlap with the principles of public international law." (39)

Beyond this potential "coincidence" between these two sets of principles, the relevance of lex mercatoria is an issue of interest since it would be possible to dip into lex mercatoria in order to identify new principles regarding State contracts that are not yet recognized as "general principles" in international law. It is all the more relevant given the recent increasing reliance of the "UNIDROIT Principles of International Commercial Contracts" in investment arbitration. (40) This invariably leads to the question of possible analogies between "international commercial contracts" and "State contracts," the answer to which requiring a case-by-case analysis. The practice suggests that lex mercatoria principles have a greater role to play in State contracts that significantly resembles purely private transactions, such as for instance a contract for a supply of goods between a government agency and a foreign corporation. (41) Apart from these agreements, that could be qualified as *ius gestionis* acts, the relevance of lex mercatoria principles for other State contracts is of variable intensity depending on their degree of "publicness" or "administrativeness".

Therefore, special attention is devoted to the analysis of their object and their content. This public/private duality of variable intensity was underlined in *Lianme v. Libya*, the tribunal pointing out that

[although a concession contract partakes of mixed public and private legal character, it retains a predominant contractual nature [...] [The concessionaire's activities in mining, petroleum and similar concessions, does not have the character of public service, but are considered as private projects and enterprises, and as such are generally governed by the principles of the private law of contracts. (42)]

The sovereign nature of the contracting party is also taken into consideration with regard to its responsibility in order to determine whether its behavior

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(34) ICSID, Case No. ARB/00/18, *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010, paras. 111. The Tribunal previously noted that "[i]t is impossible to place the UNIDROIT Principles – a private codification of civil law, approved by an intergovernmental 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" (Gd., pars. 109).


(36) GAILLARD, op. cit. (fn. 36), 206 et seq.


(41) It was the case in *Westinghouse*, op. cit. (fn. 34).

reflects the exercise of its official powers as public authority, thereby going beyond measures that an ordinary contracting party might have adopted.\footnote{(43) ICSID, Case No. ARB/00/6, Consortium RFCOC v. La Boguena do Mar, Sentence, 22 December 2002, paras. 51.}

Consequently, lex mercatoria rules such as the UNIDROIT principles are of subsidiary interest in order to identify certain customary principles applicable to State contracts since they deal with matters for which the sovereign nature of the contracting party is unimportant. They will be significantly less relevant in issues such as unilateral termination or modification, distinct matters on which the UNIDROIT principles are silent.\footnote{(44) J. CRAWFORD and A. NICOLAS, "The UNIDROIT Principles and their Application to State Contracts", in UNIDROIT, Principles of International Commercial Contracts: Reflections on their Use in International Arbitration, ICC International Court of Arbitration Bulletin, Special Supplement, 60 et seq. (2002).}

b) "Ordre Public Transnational" (or "Ordre Public Réellement International") as a Source of Internationalization


While the "international public policy" is rooted in domestic law, the "transnational public policy" has a genuine international origin. It constitutes a set of norms of higher value widely accepted by the international community, such as the prohibition of apartheid or corruption.\footnote{(46) A. MILLS, The Confluence of Public and Private International Law – Justice, Pluralism and Subsidiarity on the International Constitutional Ordering of Private Law, 274 et seq. (2009).} (49) This is why it has also been coined as an "ordre public réellement international" ("truly international public policy").\footnote{(50) P. LALIVE, "Ordre Public Transnational (ou Réellement International) et Arbitrage International", 1 Recueil de l’Arbitrage 329 (1996); see also M. FORTEAU, "L’Ordre Public Transnational ou ‘Réellement International’- L’Ordre Public International Face à l’Enchevêtrement Croisant du Droit International Privé et du Droit International Public", 138 Journal du Droit International 3 (2011).} (51) LALIVE, op. cit. (fn. 50), 336 et seq.; see also E. GAELLI, "Arbitrage Philosophique du Droit de l’Arbitrage International", 329 Recueil des Courts 49, 176 et seq. (2007).\footnote{(52) In its resolution on arbitration between States and foreign corporations, the Institut de Droit International recognized that "[i]n no case shall an arbitrator violate principles of international public policy [understood as transnational public policy] so as to which a broad consensus has emerged in the international community." Institut de Droit International, Arbitration Between States, State Enterprises, and Foreign Enterprises, Article 2, Session of Santiago de Compostela (1989), available at www.idi-tif.org/idireolutionsE/1989 comp_01_en.PDF (last visited 8 September 2013).}

Inevitably, this concept of "ordre public transnational" has been extended to investment arbitration and has been used to assess the validity of State contracts.\footnote{(53) World Duty Free v. Kenya, op. cit. (fn. 45), para. 141.} (54) Ibid., para. 157.\footnote{(55) Also as regards the implementation of these principles of "international" or "transnational public policy" to the extent they override the domestic law of the contracting State should it be applicable, see infra Section 3.2.} (56) See generally FORTEAU, op. cit. (fn. 50), 3 et seq.
2. Customary Principles Regarding Protection of Contractual Rights in International Law

2.1. Customary Principles Recognizing the “Protectability” of Contractual Rights

Unless a tribunal is of the - unlikely or minority - view that a State contract is per se an agreement governed by international law(57) or has been fully "internationalized" or "elevated to international law" through an "umbrella clause" contained in an investment treaty,(58) breaches of contractual obligations do not constitute as such violations of international law.(59)

While such contractual rights are not ipso jure recognized in the international legal order, they have been treated as property rights deserving protection under international law, in particular against unlawful expropriation. It was recognized as early as 1903 by the American-Venezuelan Commission in the Rudloff case in which it was held that

[the} the taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the suffered to redress, as the taking away or destruction of tangible property.(60)

This position was subsequently endorsed by other arbitral tribunals(61) and the PCIJ in Certain German Interests in Polish Upper Silesia in which it held on the question of

whether, by taking possession of the Chorzow factory [...] Poland has unlawfully expropriated the contractual rights of that Company [that] it is clear that the rights [...] to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland.(62)

This extensive meaning of the concept of property in international law has been subsequently implemented by the Iran-US Claims Tribunal and in investment arbitration.(63)

(57) See supra Section 1.1.1. (“State Contracts as Acts of a Public International Law Nature”). (58) On “umbrella clauses”, see Voss, op. cit. (fn. 1), 231 et seq. (59) See infra Section 4.3.; see also S.M. Schwebel, “On Whether the Breach of a State of a Contract with an Alien is a Breach of International Law”, in S.M. Schwebel, Justice to International Law – Selected Writings of Stephen M. Schwebel, 425 et seq. (1994). (60) Rudloff Case (United States of America v. Venezuela), Interlocutory Decision, 9 R.I.A.A 244, 290 (1903). (61) See, for instance, PCA, Norwegian Shipowners’ Claims (Norway v. United States of America), Award, 13 October 1922, 1 R.I.A.A 307, 325, 334; see also Sheffield Claim (Guatemala v. U.S.A.), Award, 24 July 1930, 2 R.I.A.A 1079, 1097 (pointing out that “[t]here can be no doubt that property rights are created under and by virtue of a contract”). (62) PCIJ, Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, 25 May 1926, Series A, No. 7, 44.


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Although valid in principle, the doctrine of "acquired rights" was being challenged through decolonization and does not prevent the successor State or government from altering such rights since the expropriation of alien property – and per extensionem of contractual rights – remains possible under certain conditions in international law. Moreover, by way of analogy with the doctrine of "odious debts", the doctrine of "acquired rights" would have no application in the context of State or government succession if the private contracting party blatantly acted in bad faith and/or concluded a contract contrary to the fundamental interests of the State, for instance with a despotic or corrupted regime. Transposed to current arbitral practice, such a situation would undoubtedly constitute a violation of the "ordre public transnational" such as in World Duty Free v. Kenya. (74)

So far, to our knowledge, arbitral tribunals have never adjudicated such State (and not solely government) succession issues. They have only had the occasion to acknowledge the continuity of investment treaty obligations between the predecessor and the successor States. (75)

3. Customary Principles Regarding Contract Formation

3.1. Absence of Customary Principles Protecting Potential Contractors during the Pre-Contractual Stage

a) Absence of Customary Principles Regulating Government Procurement

There are mainly two ways through which a contract can be concluded between a public authority and a foreign private person: through the purchase by the public entity from a private person of goods or services, or through the authorization given by the public entity to a private person to conduct an economic activity – usually of general interest. It may roughly be said that the first category of contracts falls within the scope of international trade law and the second of international investment law, it being understood that these two categories can overlap each other. (76) For instance, long-term contracts for the supply of goods or services may qualify as protected investments. The question at issue is whether these two legal frameworks recognize customary principles regarding the protection of potential contracting parties in the bidding procedures that are generally applicable at domestic level.

The WTO Agreements do not include multilateral disciplines in the area of government procurement. While the GATS indicates that "shall be multilateral negotiations on government procurement in services", it also concurrently provides that the most important GATS disciplines (Most-Favored-Nation treatment, market access and national treatment) are explicitly inapplicable to "laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes." (77) A similar provision exists under the GATT. Moreover, the Agreement on Government Procurement seeks to provide a non-discriminatory treatment and an open access to all potential bidders but it is an optional plurilateral agreement and only applies to 45 WTO members currently party to it. Similarly, the majority of international investment agreements follow a "post-entry" or a "controlled entry" model which provide no admission and establishment rights for foreign investors. States implementing this model can exclude the participation of foreign investors in bidding procedures for public contracts. In addition, the pre-establishment obligation usually included in BITs according to which the host State has to encourage and promote favorable conditions for investments has been interpreted as "lacking sufficient content to be treated a stand-alone, positive commitment giving rise to substantive rights." Consequently, it seems difficult to infer from international trade and investment agreements a customary principle of non-discriminatory access to government procurement.

(77) Article XIII.2 of GATS.
(78) Article XIII.1 of GATS.
(79) Article III.8 of GATT. This article exempts government procurement only from the application of the national treatment principle.
(80) A. Newcombe and L. Paradd, Law and Practice of Investment Treaties: Standards of Treatment, 134 (2009); J. Gomez-Palacio and F. Mucilinski, "Admission and Establishment", in Mucilinski et al., op. cit. (fn. 78), 339 et seq.
(81) UNCITRAL, Arbitration (Australia/India BIT), White Industries Australia Ltd v. The Republic of India, Award, 30 November 2011, para. 9.2.12.
b) Absence of Customary Principles Protecting Pre-Contractual Expenditures

The conclusion of State contracts usually requires government procurement procedures during which potential contractors incur significant pre-contractual expenses in the preparation or submission of their proposal. In Mihály v. Sri Lanka, an ICSID tribunal found that such expenditures did not constitute a protected investment under the ICSID Convention. (82) While the Tribunal primarily addressed a rationale materiae jurisdictional issue, it also emphasized the purely unilateral nature of these expenses, even if they were incurred during a period of exclusive negotiation following selection of a preferred bidder. (83) Therefore, per extensionem, they cannot, as such, be treated as contractual rights deserving protection under customary international law. (84) However, the Tribunal pointed out that, had a contract subsequently been formed, "the parties in a sense may retrospectively sweep those costs [expenses incurred during the negotiation phase] within the umbrella of an investment." (85) Under this perspective, these expenditures could therefore retroactively be treated as contractual and protected under international law. (86)

3.2. Customary Principles Regarding the Validity of State Contracts

In most cases, the issue of the validity of State contracts has been raised in order to determine whether or not a given operation qualifies as an investment deserving protection. While arbitral tribunals did not originally intend to identify principles regarding the validity of State contracts, their case-law related to the existence of an "investment" within the meaning of an investment treaty or of the ICSID Convention – and more broadly on jurisdictional issues – has indirectly generated a body of such principles potentially applicable in all cases.


(83) Ibid., para. 51 ("The Respondent [the State] clearly signalled, in the various documents which are relied upon by the Claimant [the investor], that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made.").

(84) Ibid. However, the Tribunal pointed out in the same paragraph that "during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith."

(85) Ibid., para. 50.


To this extent, the following principles identified by arbitral tribunals – in particular those regarding the competence to conclude a public contract and the violation of an "international public policy" rule – reflect both customary rules applicable in a treaty context for the determination of the existence of an investment as well as customary rules that are relevant to assess the validity of State contracts in general.

a) Absence of Customary Principles Regarding the Form of the Contract

While it was truisms for the Tribunal in AMCO v. Indonesia to declare that general principles drawn from the main legal systems, which constitute an source of international law [... ] conceive of the contract as an agreement based on a meeting of minds and wills and creating obligations [ ... ]; (87)

it is reasonable to express skepticism about the – unconvinning – attempts of some arbitral tribunals to identify precise principles as regards the form of the contract. In African Holding Company v. Congo, the Tribunal held that a written form is not necessarily a requirement under international law. (88) However, it reached this conclusion by relying on the UNIDROIT principles according to which "nothing [...] requires a contract [...] to be made in or evidenced by a particular form" (89) and that the "conduct of parties [...] is sufficient to show agreement." (90)

It seems difficult to lay down such a principle applicable in all cases for two main reasons. First, should a domestic law rule applicable to the contract require a written form, a tribunal would have difficulties in attempting to completely disregard the domestic rule and make prevail a principle which is part of a supplementary lex mercatoria. (91) Second, more subsidiarily, should the tribunal be of the view that the State contract is per se "an agreement governed by international law," (92) it might take into consideration by analogy the principle embedded in the Vienna Convention on the Law of Treaties according to which a treaty must be concluded in written form. (93)

(87) ICSID, Case No. ARB/81/1, AMCO Asia Corp. and others v. The Republic of Indonesia, Award, 20 November 1984, 24 ILM 1023, 1029 (1985), paras. 143.

(88) African Holding Company v. Congo, op. cit. (fn. 40), paras. 32 ("[e]n outre, les contrats ne doivent pas nécessairement être conclus par écrit aux termes de la législation congolaise ou du droit international.").


(90) Article 2.1.1, ibid.

(91) Even though the non-observance of the domestic law rule does not necessarily affect the validity of the contract, see infra Section 3.2.b).


b) Violation of Domestic Law Regarding the Competence to Conclude a Public Contract (Relative Ground for Invalidity)

Since most of State contracts are governed by the domestic law of the host State and investment treaties usually provide that investments must be made "in accordance with the laws and regulations" of the host State, arbitral tribunals are frequently asked at the jurisdictional stage to determine whether the violation of domestic law rule regarding the conclusion of a public contract necessarily affects the validity of the State contract from an international law perspective. The way arbitral tribunals have dealt with this issue bears a resemblance to the way in which international law addresses the question of the validity of treaties in the case of a violation of a domestic rule regarding competence to conclude treaties. (94)

Tribunals have not impaired the validity of State contracts for every violation of domestic rules regarding the competence to conclude a public contract. Rather, they have conducted a global assessment of the good faith conduct of the parties with respect to their behavior during the conclusion and the performance of the contract in order to prevent their invalidation. (95) In BSM v. The Central African Republic, the Tribunal underlined that the irregularities in connection with the conclusion of the contract were attributable to the administration, which did not take the appropriate steps to institute proceedings before domestic courts. (96) According to the Tribunal, such a conduct precludes the State from subsequently invoking the invalidity of the contract in arbitral proceedings. Similarly, in Ioannis Kardassopoulos v. Georgia, the tribunal took into consideration the "assurances given to the Claimant regarding the invalidity of the contract" and their endorsement "by the Government itself, and some of the most senior Government officials of Georgia." (97) It also noted that in the years following the execution of these contracts, "Georgia never protested nor claimed that these agreements were illegal under Georgian law." (98) The Tribunal pointed out that the conduct of State authorities "created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law." (99)

Therefore, foreign contractors do not have a Sword of Damocles hanging over their head and permanently threatening the validity of State contracts. Somehow, they are regarded as a "less-informed party" deserving protection as regards to domestic law of the host State. Besides, some arbitral tribunals have already considered that a State has a duty to disclose the provisions of its domestic law on contract-law making by public entities and, absent such disclosure, do not take into consideration the violation of these provisions potentially limiting the validity of such contracts. (100) Arbitral tribunals have also taken all appropriate steps to ensure the stability of contractual obligations, even when a mandatory rule of domestic law has been disregarded, of course to the extent this violation is not attributable to the private party. In BSM v. The Central African Republic, the "Mining Code" provided for a maximum permissible duration of four years while the State contract was concluded for a period of five years. The tribunal acknowledged that the four-year limit was a mandatory rule that did not invalidate the contract but rather had the effect of overriding the parties' agreement with respect to its duration, thus enabling the tribunal to reduce proprio motu the duration of the contract to four years. (101) Therefore, except when it coincides with a violation of an "international public policy", the violation of domestic law regarding the competence to conclude a public contract only constitutes a relative ground for invalidity.

c) Violation of an "International Public Policy" Rule (Absolute Ground for Invalidity)

While the validity of a State contract is not necessarily called into question in the case of a violation of a domestic law rule (relative ground for invalidity), it is necessarily at stake when the contract is concluded in violation of an "international (or transnational) public policy" rule. (102) To this extent, such a violation constitutes an absolute ground for invalidity.

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In World Duty Free v. Kenya, the arbitral tribunal had to decide on the validity of the contract concluded between the claimant and the respondent containing the arbitration clause. Kenya argued that the contract was procured

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(94) See, in particular, Article 46 of the Vienna Convention on the Law of Treaties.
(96) BSM v. La République Centrafricaine, op. cit. (fn. 9), paras. 119-120.
(97) ICSID, Case No. ARB/05/18, Ioannis Kardassopoulos v. Georgia, Decision on Jurisdiction, 6 July 2007, para. 191.
(98) Ibid., para. 192. See also BSM v. La République Centrafricaine, op. cit. (fn. 9), para. 139.
(99) Ioannis Kardassopoulos v. Georgia, op. cit. (fn. 97), para. 192. Such a reasoning was already found in the 1990 Shufeldt case, op. cit. (fn. 61), 1924 et seq. ("[d]uring all these six years Shufeldt had been carrying out his contract [...]. Relying on the good faith of the Government he expended large sums. [...] During these six years the Government [...] recognized and treated the contract as a legal contract [...]."

[The Guatemalan Government having recognized the validity of the contract for six years and received all the benefits to which they were entitled under the contract and allowed Shufeldt to go on spending money on the concession, is precluded from denying its validity, even if the approval of the Legislature had not been given to it].

(101) BSM v. La République Centrafricaine, op. cit. (fn. 9), paras. 134-135.
(102) On "international public policy", see supra Section 1.2 b.)
by bribery and was therefore illegal and unenforceable. (103) After a thorough analysis of the practice in an international and comparative perspective, the Tribunal considered that "bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy." (104) and reached the conclusion that "claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this arbitral Tribunal." (105)

Since a violation of an "international public policy" rule constitutes an absolute ground for invalidity, this precedent has quickly been viewed as a potential shield for governments willing to bar arbitration claims brought by investors. Indeed, the invalidity of State contracts for acts of corruption may invalidate an arbitration clause contained in the contract or lead a tribunal to declare that a given investment has not been established "in accordance with the laws and regulations," thereby not deserving the protection under an investment treaty. Following the attempts of some States to leap into this breach, tribunals have decided to strictly regulate the conditions under which this "international public policy" rule may be invoked by raising the standard of proof to clear and convincing evidence. (106)

**Good Faith and Misrepresentation**

While it has early been recognized that there is no "duty of full disclosure" to a partner in a contract, (107) arbitral tribunals have, on the basis of "good faith," developed a body of principles aimed at regulating the conduct of the parties during contractual negotiations, notably the behavior of the private contractor in government procurement procedures. In *Inceysa v. El Salvador*, the Tribunal held that

in the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties. (108)

It was clearly proven that the foreign contracting party misrepresented its finances and qualifications during the bidding process and, by doing so, the tribunal concluded that it was awarded the contract in violation of the principle of good faith. (109) The tribunal did not declare the nullity of the contract but rather refused to recognize that it constituted an investment benefiting from the protection of the BIT. (110) To this extent, while the arbitral tribunal could not regard itself as vested with the authority to declare the nullity of the contract, it could refuse to ensure the protection or enjoyment of contractual rights at the basis of the investment in case of misrepresentation which, in practice, leads to the same result.

In *Hamester v. Ghana*, in which it was questioned whether the signing of the joint-venture agreement (JVA) was obtained on the basis of fraud, the Tribunal recalled that it placed a heavy burden of proof on the party seeking to establish such allegations. (111) Although it noted that the Claimant's practices "might not be in line with what could be called "l'éthique des affaires"" (112), it pointed out that "they did not amount, in the circumstances of the case, to a fraud" (113) and accepted to recognize that "[t]here is not a single witness from Ghana attesting to the alleged fraudulent action having induced the JVA as was the case with the misrepresentations in the *Inceysa* and *Klöckner* cases." (114)

### 4. Customary Principles Regarding Sovereign Decisions Adversely Affecting Contractual Rights

Once concluded, the contract is binding upon the parties and must be performed in good faith according to the principle *pacta sunt servanda* recognized as applicable to State contracts. (115) It is nonetheless necessary to clarify the meaning of this abstract principle and particularly to determine to what extent the main feature of State contracts – the sovereign nature of one contracting party – may legitimate sovereign decisions affecting contractual rights. As pointed out in *Amoco v. Iran*, it is inappropriate to consider that "sovereign States are bound by contracts with private parties exactly as they are bound by treaties with other sovereign States." (116) Three types of sovereign decisions may adversely affect contractual rights: (4.1.) decisions intentionally and directly modifying or terminating State contracts, (4.2.) decisions modifying the

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(105) *Ibid*.


(110) *Inceysa v. El Salvador*, op. cit. (fn. 45), para. 239.


(113) *Ibid*.


(115) *Troncoso/Culiacasian v. Libya*, op. cit. (fn. 4), 19, para. 51; *AMCO v. Indonesia*, op. cit. (fn. 87), paras. 248 et seq.

legal environment. State contracts, and (4.3.) other decisions adversely affecting contractual rights.

4.1. Sovereign Decisions Directly and Intentionally Modifying or Terminating State Contracts

International courts and tribunals early recognized that a State has the right to unilaterally modify or terminate a contract in the public interest. (117) This customary rule has subsequently been endorsed by tribunals settling investment disputes and labeled as a "fundamental principle" (118) or an "unquestionable attribute of sovereignty." (119) The European Court of Human Rights also considered that "any State has a sovereign power to amend or even terminate a contract concluded with private individuals, provided it pays compensation" (120) thereby reflecting "recognition that the superior interests of the State take precedence over contractual obligations and takes account of the need to preserve a fair balance in a contractual relationship." (121)

This recognition of sovereign prerogatives beyond the principle pacta sunt servanda has raised the question of the relevance of a category of "administrative contracts" in international law. In Texaco v. Libya, the Tribunal recognized the distinct features of administrative contracts in certain domestic legal systems, in particular the sovereign power to amend the stipulations of the contract and to abrogate. It acknowledged that the theory of administrative contracts is "typically French [and] consecrated [...] by certain legal systems which have been inspired by French law." (122) However, it took the view that this distinction made by certain legal systems between 'civil contracts' and 'administrative contracts' cannot [...] be regarded as corresponding to a 'general principle of law [...] since [it is not] sufficiently, widely and firmly recognized in the leading legal systems of the world. (123)

(117) For an overview of the jurisprudence, see S.W. Schell, "Umbrella Clauses as Public Law Concepts in Comparative Perspective", in S.W. Schell (ed.), International Investment Law and Comparative Public Law, 326 et seq. (2010); see also G. Napoleano, Diritto Amministrativo Corporativo, 190 et seq. (2007).

(118) AMCO v. Indonesia, op. cit. (fn. 87), para. 188 ("[t]his is the fundamental principle of the right of a sovereign State to rationalize or expropriate property, including contractual rights previously granted by itself, even if they belong to aliens").

(119) SPP v. Egypt, op. cit. (fn. 64), para. 158.


(121) Ibid.

(122) Texaco/Calsosatia v. Libya, op. cit. (fn. 4), para. 57.

(123) Ibid. In Amicola v. Kuwaiti, op. cit. (fn. 32), para. 98, the Tribunal attempted to identify a commonly accepted category of concession agreements which are "one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages."

4.2. Sovereign Decisions Modifying the Legal Environment of State Contracts

While contractual rights may be directly affected by sovereign decisions to amend or terminate the agreement between the State and the private party, a similar effect may be indirectly reached through the exercise by the State of its regulatory powers. This is notably the case in fields such as taxation, environmental regulation, intellectual property, cultural identity and heritage, currency devaluation or trade restrictions. The evolution of the legal environment may create substantial interferences with contractual rights and hinder their peaceful enjoyment, a situation likely to constitute an indirect expropriation requiring compensation. (126) It may also undermine the legitimate expectations of the foreign private party and give rise to a violation of the minimum standard of treatment. (127)


(126) For an in-depth analysis see A. Reinecke, "Expropriation", in Michelsmeier, Ortino and Schreuer, op. cit. (fn. 76), 430 et seq.

(127) The frustration of the legitimate expectations of foreign investors is usually addressed by arbitral tribunals under the "fair and equitable treatment" treaty standard. However, as pointed out in Saluka v. Czech Republic, op. cit. (fn. 78), para. 291, "it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real." Likewise, in an UNCITRAL arbitration it was noted that "in the instant case the treaty standard is not different from that required under international law concerning both the stability of the legal and business framework of the investment" (UNCITRAL Arbitration, LCIA Case No. UN 3467, Occidental Exploration and Production Company v. The Republic of Ecuador, Final Award, 1 July 2004, para. 190).
Tribunals have constantly recognized that substantive protection offered to foreign investors shall not impede the bona fide exercise by the State of its regulatory powers to protect the public interest. This “right to regulate” is deeply rooted in customary international law. It was clearly expressed in Marvin Feldman v. Mexico in which the tribunal held that governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this (128).

However, this sovereign right to regulate is not limitless and is subject to two sets of conditions applicable regardless of the nature of rights adversely affected (contractual or not). First, under a lower level of judicial scrutiny, the tribunal ascertains the existence of a public interest protected by the State but his control is limited to a manifest error of assessment. In S. D. Myers v. Canada, it was pointed out that international law extends “a high measure of deference [...] to the right of domestic authorities to regulate matters within their own borders.” (129) In Lemire v. Ukraine, the Tribunal underlined that this deference “is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community.” (130) However, the recognition of the existence of public interest does not immunize the domestic measure since, in a second step and under a higher level of judicial scrutiny, tribunals assess its overall rationality and proportionality. (131) As regards rationality, the tribunal determines whether the State policy follows “a logical (good sense) explanation [...] with the aim of addressing a public interest matter” (132) and ascertains the existence of “an appropriate correlation between the State’s public policy objective and the measure adopted to achieve it.” (133) With respect to proportionality, it seems to be comprised of both intrinsic and extrinsic dimensions. The former requires a balancing test ensuring “a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought” (134) and suggesting that no least restrictive measure is reasonably available. The latter aims at ensuring that the measure “does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination.” (135) Eventually, the domestic measure is carefully and closely scrutinized to such an extent that it seems legitimate to wonder whether the unanimous recognition of the sovereign right to regulate is a mere façade aimed at reassuring States involved as respondents in investment disputes. (136)

4.3. Other Sovereign Decisions Adversely Affecting Contractual Rights

Decisions modifying or terminating State contracts and those modifying their legal environment may be taken by sovereign entities that are not necessarily parties to State contracts affected by these decisions. The situation is different with breaches of contract since they are only attributable to the public contracting party. The question at stake is whether and to what extent a breach of contract entails a breach of international law, such as an unlawful expropriation or a violation of the minimum standard of treatment. In this respect, customary international law is well-established and it has been clearly recognized by the ILC that, in the absence of an umbrella clause, (137) the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. (138)

Tribunals adjudicating investment disputes have also constantly reaffirmed this customary principle, (139) also labeled as the “Something More” doctrine. (140)
Arbitral tribunals have relied on the distinction between *jure gestionis* and *jure imperii* acts in order to clarify the relationship between breaches of contract and breaches of international law. In *Impregilo v. Pakistan*, the Tribunal held, in the context of a State contract, that a violation of international law “must be the result of behavior going beyond that which an ordinary contracting party could adopt.” It added also that “[i]n July the State in the exercise of its sovereign authority (‘puissance publique’), and not as a contracting party, may breach” international obligations. On this basis, arbitral tribunals have for instance recognized that “a mere refusal to pay a debt is not an expropriation of property” but, however, bad faith repudiations or unilateral modifications of State contracts undoubtedly constitute violations of international law.

5. Customary Principles Regarding Contract Remedies

5.1. Domestic Remedies: Access to Courts and Due Process Rights

This distinction between breaches of contract and breaches of international law — clear in theory but sometimes fuzzy in practice — does not necessarily mean that the private contracting party does not enjoy an international law protection for a pure contractual breach. Indeed, customary rules concerning the denial of justice to aliens require States to ensure the effectiveness of minimum contractual remedies and due process rights.

It is a well-established customary rule of international law that “the foreigner shall enjoy full freedom to appear before the courts for the protection of his rights.” Restricting or hindering those fundamental and uncontroversial rights to access to courts would result in a denial of justice. This has led arbitral tribunals, such as in *Parkering-Compagnie AS v. The Republic of Lithuania*, to recognize that “[a]n investor faced with a breach of an agreement by the State counter-party should, as a general rule, sue that party in the appropriate forum to remedy the breach.” The Tribunal clearly pointed out that from an international perspective, should the foreigner be denied access to domestic courts or an opportunity to obtain redress for a contractual breach, the arbitral tribunal “will decide over the ‘treatment’ that the alleged breach of contract has received in the domestic context, rather than over the existence of a breach as such.”

The claim of denial of justice for violation of the right to access to courts for a contractual breach is subject to three sets of conditions. First, “a preliminary determination of the existence of a contractual breach under domestic law is, in most cases, a prerequisite.” Second, the private contracting party must have reasonably taken the appropriate steps to obtain correction before the contractually chosen forum. As noted in *Generation Ukraine v. Ukraine*, “an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim.” Third, the private contracting party must have been “deprived, legally and practically, of the possibility to seek a remedy before the appropriate domestic court.” Under the denial of justice standard, this also implies the access to fair judicial proceedings and, more broadly, the respect of fundamental due process rights in every stage of judicial proceedings.

5.2. International Remedies

a) Substantive Aspects: Limitations of Contractual Remedies Available under International Law

The remedies that may be granted by an arbitral tribunal against a sovereign entity for a modification or termination of contract are limited in nature.
A State responsible for an internationally wrongful act has under customary international law the obligation of making *restitutio in integrum* unless restitutio is materially impossible or involves a disproportionate burden for the State. (156) In *OPC v. Ecuador*, the Tribunal pointed out that

"It is well established that where a State has, in the exercise of its sovereign power, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible." (157)

The same reasoning applies as regards a decision modifying the legal environment of a State contract. Specific performance of contract cannot be ordered since "it would be utterly unrealistic for the Tribunal to order to turn back to [previous] the regulatory framework." (158) In these situations, compensation is therefore the only remedy available.

b) Procedural Aspects: International Dispute Settlement Mechanisms

**Absence of Customary Principle Granting Access to International Arbitration**

No customary principle grants the private contracting party the right to submit a dispute before an arbitral tribunal or other international forum. Indeed, the jurisdiction of arbitral tribunals is based on an arbitration clause or agreement between the private contracting party and the host State or on unilateral State offer to arbitrate contained in a domestic law or in an investment treaty. However, as mentioned above, regardless of the dispute settlement mechanism directly available for the private contracting party, the tribunal is likely to take into consideration customary principles identified in this Chapter. (159)

**Diplomatic Protection**

Diplomatic protection is the only remedy available in customary international law for international law violations arising out of a State contract. While most of foreign investment disputes were settled through the diplomatic protection channel in the early twentieth century, this mechanism is no longer commonly used in a State contract context since the claim can only be discretionarily endorsed by the State of nationality of the private contracting party which must have exhausted all local remedies, such conditions contrasting with the flexibility of current arbitral procedures. (160)

Despite this decline of diplomatic protection, (161) the recent development of this old institution could be of interest for State contracts. Indeed, although the ICJ has considered that investment treaties have not altered the "secondary rules" of diplomatic protection (for instance, the protection of shareholders in international investment law has not instituted a broader diplomatic protection of shareholders in customary international law), (162) it has nonetheless acknowledged that

"[w]hile the substantive development of international law over recent decades [...], 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." (163)

This extension naturally applies to the rights recognized by investment treaties and, besides, the International Law Commission (ILC), in its Draft Articles of Diplomatic Protection, has mentioned that "[b]ilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights." (164) Therefore, the litigation of these treaty rights that may affect State contracts is not necessarily limited to existing State/investor dispute settlement mechanisms and, moreover, for the sake of consistency, diplomatic protection claims brought before other courts and tribunals may take into consideration the extensive interpretations of standards commonly used in investment treaties beyond what is prescribed by the minimum standard of treatment of aliens. (165)

(160) For a recent case of diplomatic protection see *Ad Hoc Arbitration (Italy-Cuba BIT), La République d'Italie v. La République de Cuba*, Award, 15 January 2006, paras. 130 et seq.

(161) ICSID, Case No. ARB/01/8, CMS Gas Transmission Company v. The Argentine Republic, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, 42 ILM 788, 795 (2003), para. 45 ("Diplomatic protection itself has been dwindling in current international law [...]. To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements recognizing the direct right of action by individuals. It is precisely this kind of arrangement that has come to prevail under international law, particularly in respect of foreign investments, the paramount example being that of the 1965 Convention").


(163) Ibid., para. 39.


(165) The ICJ took this initiative in the *Diallo* case with regard to the interpretation of human rights treaties; see *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Judgment, 30 November 2010, *ICJ Reports*, 639, 664, para. 64 ("Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the [Human Rights Committee], it believes that it should ascribe great weight to the interpretation adopted*.

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(156) Article 35 of ILC Articles on Responsibility of States for Internationally Wrongful Acts.

(157) ICRID, Case No. ARB/06/11, Occidental Petroleum Corporation/Occidental Exploration and Production Company v. The Republic of Ecuador, Decision on Provisional Measures, paras. 79.

(158) CMS v. The Argentine Republic, op. cit. (fn. 18), paras. 406.

(159) See *supra*, Section 1.1.b).
Customary principles regarding contracts concluded with foreigners are deeply rooted in ancient rules of customary international law governing the treatment of aliens. The recent intense development of investment arbitration has been a golden opportunity to further clarify how these principles have developed and are applied to current contractual practices. Admittedly, there is now in general international law a set of principles recognizing and taking into consideration the distinct features of State contracts, beyond the specific rules regarding the protection of foreign investment. Moreover, this process of internationalization has progressively been enriched by principles that are more familiar to international commercial arbitration, and in particular those related to the "ordre public transnational".

However, the scope of these principles is limited and it would be exaggerated to suggest the existence of a consistent and complete international law regime of State contracts. Some differences remain as regards issues for which the law applicable to the contract or the doctrinal conception of State contracts has an impact on the principles and rules applicable by the tribunal. This is particularly the case with questions such as compensation (166) or contractual interpretation (167) in which an interplay – not to say an overlapping – between customary international law and lex mercatoria rules (notably the UNIDROIT Principles) is identifiable.

(166) See, for instance, Gemplus v. Mexico, op. cit. (fn. 40), paras. 13.62-13.94.
(167) The Channel Tunnel Group v. U.K. & France, op. cit. (fn. 7), para. 92 ("... a general matter there was little disagreement between the Parties on the interpretative approach to be adopted, [...]").

It was agreed that, although the Concession Agreement is not a treaty, it is an agreement governed by international law, an "international contract", and that international law principles of interpretation are to be applied); Lemire v. Ukraine, op. cit. (fn. 55), paras. 111 et seq. (application of the UNIDROIT Principles); Occidental Petroleum v. Ecuador, op. cit. (fn. 157), para. 71 (application of the "elementary principles of contract interpretation").