CHAPTER 12
Customary Principles Regarding Public Contracts Concluded With Foreigners

Régis BISMUTH

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/Calasiatic*, 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

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

(3) For an overview see C. LEBEN, "La Théorie du Contrat d'État et l'Évolution du Droit International des Investissements", 302 *Recueil des Cours* 197, 251 et seq. (2003).

(4) *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic*, Award, 19 January 1977, 17 *ILM* 1, 12 (1978), para. 26.

(5) *Revere Copper and Brass v. Overseas Private Investment Corporation*, Award, 24 August 1978, 17 *ILM* 1321, 1331-2 (1978).

(6) *Ibid.*, 1332.

(7) *The Channel Tunnel Group, Ltd. & France-Manche SA v. United Kingdom & France*, PCA, Partial Award, 30 January 2007, para. 92, available at www.pca-cpa.org/ET_PAena0a9.pdf?fil_id=218 (last visited 15 December 2015).

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

(8) *Texaco/Calasiatic v. Lybia*, *op. cit.* (fn. 4), 9 et seq., paras. 25 et seq.; see also A.F.M. MANIRUZZAMAN, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies", 12 *EJIL* 309, 322 (2001).

(9) See, for example, ICSID, Case No. ARB/07/02, *RSM Production Corporation v. La République Centrafricaine*, Décision sur la Compétence et la Recevabilité, 7 December 2010, para. 79 [all decisions and awards in investor-state arbitration can be found, unless otherwise stated, on the Investment Treaty Arbitration website at http://italaw.com]; see also VOSS, *op. cit.* (fn. 1), 29-30; K. SCHMALENBACH, "Article 3 – International Agreements not within the Scope of the Present Convention", in O. DÖRR and K. SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties*, 49, 75 et seq. (2012).

(10) R. DOLZER and C. SCHREUER, *Principles of International Investment Law*, 74-75 (2008); T. BEGIC, *Applicable Law in International Investment Disputes*, 13 et seq. (2005); see also C. SCHREUER, L. MALINTOPPI, A. REINISCH and A. SINCLAIR, *The ICSID Convention: A Commentary*, 558 et seq. (2009).

(11) See also SCHREUER *et al.*, *op. cit.* (fn. 10), 575 et seq.; BEGIC, *op. cit.* (fn. 10), 25 et seq.

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 provision 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 *renvoi* 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 UNCITRAL 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

(12) E. GAILLARD and Y. 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 Review* 375 (2003).

(13) ICSID, Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, Decision on Liability, 3 October 2006, para. 89.

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

(15) ICSID, Case No. ARB/98/4, *Wena Hotels Ltd. v. The Arab Republic of Egypt*, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated 8 December 2000, 5 February 2002, 41 *ILM* 933, 942 (2002), para. 42.

(16) UNCITRAL Arbitration, *National Grid, Plc. v. The Argentine Republic*, Award, 3 November 2008, para. 89.

(17) *Ibid.*

true of other sources of international law, such as those listed in Article 38(1) of the Statute of the International Court of Justice."(18)

Application of International Law Regardless of the Applicable Domestic Law

The arbitral practice clearly indicates that the principle of party autonomy is inherently limited since the choice-of-law applicable to State contracts is potentially subject to the overriding control of some fundamental norms of international law that are "not open to the disposition of the parties,"(19) such as the minimum standard of treatment of aliens. In *Mobil Oil v. Iran*, the Iran-US Claims Tribunal held that despite Iranian law being solely applicable to the agreement, "the lawfulness of an expropriation must be judged by reference to international law [and] [t]his holds true even when the expropriation is of contractual rights."(20) It added that "[a] concession, for instance, may be the object of nationalization regardless of the law the parties chose as the law of the contract."(21) In the same vein, in *Duke v. Peru*, an ICSID arbitral tribunal explicitly asserted that

> even if the law of Peru were held to apply to the interpretation of the [agreement], this Tribunal has the authority and duty to subject Peruvian law to the supervening control of international law.(22)

In conclusion, regardless of the dispute settlement mechanism (ICSID arbitration, institutional arbitration or ad hoc arbitration) and the law chosen by the parties, it is highly unlikely that a tribunal would blatantly disregard the fundamental customary principles regarding State contracts this Chapter intends to identify.

c) Customary International Law and International Investment Law

Beyond this general applicability of customary international law to dispute settlement mechanisms relating to State contracts, the specificity of such mechanisms as well as the growing number of international investment agreements has raised the question of whether customary international law has developed and has progressively incorporated new rules and standards such as those usually referred to in investment treaties.

(18) *Wena Hotels, op. cit.* (fn. 15), para. 44; see also ICSID, Case No. ARB/01/8, *CMS Gas Transmission Company v. The Argentine Republic*, Award, 12 May 2005, paras. 119 et seq.

(19) SCHREUER *et al.*, *op. cit.* (fn. 10), 587.

(20) *Mobil Oil Iran Inc. v. Government of the Islamic Republic of Iran*, Partial Award, 14 July 1987, 16 *Iran-US CTR* 3, 25, para. 73.

(21) *Ibid.*

(22) ICSID, Case No. ARB/03/28, *Duke Energy International Peru Investments No. 1 Ltd. v. The Republic of Peru*, Decision on Jurisdiction, 1 February 2006, para. 162.

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 *Mondev 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)

(23) J.W. SALACUSE, "Making Transnational Law Work Through Regime Building: The Case of Investment Law", in P.H.F. BEKKER, R. DOLZER and M. WAIBEL (eds.), *Making Transnational Law Works in the Global Economy – Essays in Honour of Detlev Vagts*, 406 et seq. (2010).

(24) S.W. SCHILL, *The Multilateralization of International Investment Law* (2009).

(25) ICSID, Case No. ARB(AF)/99/2, *Mondev International Ltd. v. The United States of America*, Award, 11 October 2002, para. 125.

(26) See, for instance, P. DUMBERRY, "Are BITs Representing the "New" Customary International Law in International Investment Law?", 28 *Penn St. Int'l L. R.* 675, 680 et seq. (2010); see also J.E. ALVAREZ, "A BIT on Custom", 42 *NYU J. Int'l L.* & Pol. 17, 24 et seq. (2009).

(27) For an overview see C. YANNACA-SMALL, "Fair and Equitable Treatment in International Investment Law", in OECD, *International Investment Law: A Changing Landscape – A Companion Volume to International Investment Perspectives*, 81 et seq. (2005).

(28) ICSID, Case No. ARB/01/11, *Noble Ventures Inc. v. Romania*, Award, 12 October 2005, para. 164.

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

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

(30) SCHREUER *et al.*, *op. cit.* (fn. 10), 604 et seq.; see also B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, 23 (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. FAUCHALD, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis", 19 *EJIL* 301, 310 et seq. (2008).

(31) See S.W. SCHILL, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law", 22 *EJIL* 875, 887 et seq. (2011). For an award making a clear-cut distinction between commercial arbitration and investment arbitration see ICSID, Case No. ARB(AF)/98/3, *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America*, Award, 26 June 2003, para. 233.

(32) See, for instance, *American Independent Oil Company (Aminoil) v. Government of the State of Kuwait*, Award, 24 March 1982, 21 *ILM* 976, 980 (1982).

(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"; UNIDROIT Principles of International Commercial Contracts (2010), available at www.unidroit.org/english/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 38(1)(c) of the ICJ Statute since they are both abstract and common to most domestic legal orders.(38) It is therefore not surprising that these general

(34) ICC, Award No. 7375, *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. Westinghouse Electric Corp.*, 5 June 1996, 11 *Mealey's International Arbitration Report* A-1, A-42 (1996)

(35) ICSID, Case No. ARB/06/18, *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010, para. 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" (*ibid.*, para. 109).

(36) M. MUSTILL, "The New Lex Mercatoria: The First Twenty-Five Years", 4 *Arb. Int'l* 86, 92 (1988); see also E. GAILLARD, "La Distinction des Principes Généraux du Droit et des Usages du Commerce International", in *Études offertes à Pierre Bellet*, 203 et seq. (1991). For a broader view of the sources of transnational commercial law see G. CORDERO-MOSS, "The Transnational Law of Contracts: What it Can and What it Cannot Achieve", in T. WEILER and F. BAETENS (eds.), *New Directions in International Economic Law*, 45 et seq. (2011).

(37) GAILLARD, *op. cit.* (fn. 36), 205 et seq.

(38) LEBEN, *op. cit.* (fn. 3), 311-312, footnote 165; see also A.F.M. MANIRUZZAMAN, "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?", 14 *Am. U. Int'l L. Rev.* 657, 712 et seq. (1999).

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 *iure 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 *Liamco v. Lybia*, the tribunal pointing out that

> [a]lthough a concession contract partakes of mixed public and private legal character, it retains a predominant contractual nature [...]. [T]he concessionaire's activities in mining, petroleum and similar concessions, do 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

(39) CORDERO-MOSS, *op. cit.* (fn. 36), 45; see also E. GAILLARD and J. SAVAGE, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 103 (1999).

(40) See, for instance, *Lemire v. Ukraine*, *op. cit.* (fn. 35), para. 111; ICSID, Case No. ARB/05/21, *African Holding Company of America Inc. et Société Africaine de Construction au Congo SARL v. La République Démocratique du Congo*, Sentence sur les Déclinatoires de Competence et la Recevabilité, 29 July 2008, paras. 32, 35, 121; ICSID, Cases Nos. ARB(AF)/04/3 & ARB(AF)/04/4, *Gemplus SA, SLP SA & Gemplus Industrial SA de CV v. The United Mexican States/Talsud SA v. The United Mexican States*, Award, 16 June 2010, paras. 13-87 et seq.

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

(42) *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic*, Award, 12 April 1977, 20 *ILM* 1, 30 (1981). It was also taken into consideration in *Texaco/Calasiatic v. Lybia*, *op. cit.* (fn. 4), 19 et seq., paras. 55 et seq.; see also P. BERNARDINI, "The Law Applied by International Arbitration to State Contracts", in R. BRINER, L.Y. FORTIER, K.P. BERGER and J. BREDOW (eds.), *Law of International Business and Dispute Settlement – Liber Amicorum Karl-Heinz Böckstiegel*, 59 et seq. (2001).

reflects the exercise of its official powers as public authority, thereby going beyond measures that an ordinary contracting party might have adopted.(43)

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.(44)

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

The concept of *"ordre public transnational"* ("transnational public policy") has recently emerged in investment arbitration, in particular since *World Duty Free v. Kenya* in 2006.(45) It requires to be distinguished from *"ordre public international"* ("international public policy"),(46) even though the latter is sometimes used in the context of the former.(47) "International public policy", despite a designation suggesting a supranational origin, has a domestic center of gravity and is specific to every State. It represents that part of public policy which is more vital for the legal system, its principles which are jealously adhered to and which cannot be affected by the access into that legal system of a foreign, provision (or decision) which conflicts with them.(48)

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.(49) This is why it has also been

(43) ICSID, Case No. ARB/00/6, *Consortium RFCC v. Le Royaume du Maroc*, Sentence, 22 December 2003, para. 51.

(44) J. Crawford and A. Sinclair, "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).

(45) ICSID, Case No. ARB/00/7, *World Duty Free Company Ltd v. The Republic of Kenya*, Award, 4 October 2006, paras. 138 et seq.; ICSID, Case No. ARB/03/26, *Inceysa Vallisoletana SL v. The Republic of El Salvador*, Award, 2 August 2006, paras. 245 et seq.; ICSID, Case No. ARB/05/16, *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. The Republic of Kazakhstan*, Award, 29 July 2008, paras. 236 et seq.; see also M. Hunter and G. Conde e Silva, "Transnational Public Policy and its Application in Investment Arbitrations", 4 *J. World Inv. & Trade* 368 (2003).

(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).

(47) It was the case in the three ICSID awards mentioned in, *op. cit.* (fn. 45). However, in *World Duty Free v. Kenya* the Tribunal mentioned both "transnational public policy" and "international public policy" (*World Duty Free v. Kenya*, *op. cit.* (fn. 45), paras. 138 et seq.).

(48) M. Rubino-Sammartano, *International Arbitration – Law and Practice*, 506 (2001).

(49) Gaillard and Savage, *op. cit.* (fn. 39), 853.

coined as an *"ordre public réellement international"* ("truly international public policy").(50) Considered as the "public policy" of a transnational legal order, these norms of higher importance have been taken into consideration by tribunals in international commercial arbitration, particularly with respect to validity of contracts obtained through bribery.(51)

Inevitably, this concept of *"ordre public transnational"* has been extended to investment arbitration and has been used to assess the validity of State contracts.(52) The method implemented by tribunals in order to identify these norms closely resembles the one used for the identification of customary international law. It was blatant in *World Duty Free v. Kenya* in which a tribunal headed by the former President of the International Court of Justice pointed out that

> [t]ribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards.(53)

This analysis has led the tribunal to consider that

> [i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.(54)

This methodology suggests that these principles relating to State contracts belong to customary international law(55) and indicates more broadly a process of "publicization" of the *"ordre public transnational"*.(56)

(50) P. Lalive, "Ordre Public Transnational (ou Réellement International) et Arbitrage International", 1 *Revue de l'Arbitrage* 329 (1986); see also M. Forteau, "L'Ordre Public 'Transnational' ou 'Réellement International' - L'Ordre Public International Face à l'Enchevêtrement Croissant 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. Gaillard, "Aspects Philosophiques du Droit de l'Arbitrage International", 329 *Recueil des Cours* 49, 176 et seq. (2007).

(52) In its resolution on arbitration between States and foreign corporation, 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] as to which a broad consensus bas emerged in the international community"; Institut de Droit International, *Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises*, Article 2, Session of Santiago de Compostela (1989), available at www.idi-iil.org/idiE/resolutionsE/1989_comp_01_en.PDF (last visited 8 September 2013).

(53) *World Duty Free v. Kenya*, *op. cit.* (fn. 45), para. 141.

(54) *Ibid.*, para. 157.

(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

> [t]he 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, licences, 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

(57) See *supra* Section 1.1.b) ("State Contracts as Acts of a Public International Law Nature").

(58) On "umbrella clauses", see VOSS, *op. cit.* (fn. 1), 221 et seq.

(59) See *infra* Section 4.3.; see also S.M. SCHWEBEL, "On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law", in S.M. SCHWEBEL, *Justice in International Law – Selected Writings of Stephen M. Schwebel*, 425 et seq. (1994).

(60) *Rudloff Case (United States of America v. Venezuela)*, Interlocutory Decision, 9 *RIAA* 244, 250 (1903).

(61) See, for instance, PCA, *Norwegian Shipowners' Claims (Norway v. United States of America)*, Award, 13 October 1922, 1 *RIAA* 307, 325, 334; see also *Shufeldt Claim (Guatemala v. USA)*, Award, 24 July 1930, 2 *RIAA* 1079, 1097 (pointing out that "[t]here can not be any 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.

investment arbitration.(63) It was particularly obvious in *SPP v. Egypt*, the Tribunal underlining that it cannot

> accept the argument that the term "expropriation" applies only to *ius in rem*. The Respondent's cancellation of the project had the effect of taking certain important rights and interests of the Claimants. [...] Clearly, those rights and interests were of a contractual rather than *in rem* nature.(64)

The Tribunal added that

> there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.(65)

Besides, investment arbitration case law has clearly shown that the scope of this customary principle regarding the protection of contractual rights is not limited to a certain type of agreements since it has been applied to a wide variety of contracts (concessions contracts, construction contracts, energy purchase contracts, sovereign debts instruments, etc.).(66)

2.2. Customary Principles Recognizing the Continuity of Contractual Rights in Situations of State or Government Succession

The PCIJ early recognized the doctrine of "acquired rights" according to which "private rights [...] do not cease on a change of sovereignty"(67) and regarded it as one of "generally accepted principles of international law."(68) This doctrine has been subsequently extended to rights arising out of a contract of a public law character such as concessions.(69) The contracts concluded between the predecessor State (or government) and aliens are therefore transferred to the successor State (or government) by way of subrogation.(70)

(63) For an overview see, C. SCHREUER and U. KRIEBAUM, "The Concept of Property in Human Rights Law and International Investment Law", in S. BREITENMOSER, B. EHRENZELLER, M. SASSÒLI, W. STOFFEL and B. WAGNER PFEIFER (eds.), *Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber*, 748 et seq. (2007).

(64) ICSID, Case No. ARB/84/3, *Southern Pacific Properties (Middle East) Ltd v. The Arab Republic of Egypt*, Award, 20 May 1992, 32 *ILM* 933, 968 (1993), para. 164.

(65) *Ibid.* See also *Ad Hoc* Arbitration (Netherlands/Poland BIT), *Eureko BV v. The Republic of Poland*, Award, 19 August 2005, para. 241 ("The deprivation of contractual rights may be expropriatory in substance and in effect").

(66) See the references cited by SCHREUER and KRIEBAUM, *op. cit.* (fn. 63), 747 et seq.

(67) PCIJ, *German Settlers in Poland*, Advisory Opinion, 10 September 1923, *Series B*, No. 6, 36.

(68) *Certain German Interests in Polish Upper Silesia*, *op. cit.* (fn. 62), 22.

(69) PCIJ, *The Mavrommatis Palestine Concessions*, Judgment, 30 August 1924 (Objection to the Jurisdiction of the Court), *Series A*, No. 2, 28.

(70) See M.-I. TORRES CAZORLA, "Rights of Private Persons on State Succession: An Approach to the Most Recent Cases", in P.-M. EISEMANN and M. KOSKENNIEMI (eds.), *State Succession: Codification Tested*

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.(71) Moreover, by way of analogy with the doctrine of "odious debt",(72) 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.(73) 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

against the Facts, 707 et seq. (2000). The result would be the same in the case of Government succession, see T.-H. Cheng, *State Succession and Commercial Obligations*, 4 (2006).

(71) P. Daillier, M. Forteau and A. Pellet, *Droit International Public*, 607-608 (2009); M.N. Shaw, *International Law*, 1003 (2008).

(72) I. Alvik, *Contracting with Sovereignty – State Contracts and International Arbitration*, 259-260 (2011).

(73) See, for instance, the *Tinoco* case in the context of Government succession: *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v. Costa Rica)*, Award, 18 October 1923, 1 *RIAA* 369, 394.

(74) *World Duty Free v. Kenya*, *op. cit.* (fn. 45), para. 138 et seq.

(75) UNCITRAL, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro/Republic of Serbia*, Partial Award on Jurisdiction, 8 September 2006, para. 158; UNCITRAL *Ad Hoc* Arbitration, *Austrian Airlines v. The Slovak Republic*, Final Award, 9 October 2009, para. 8; UNCITRAL, *Saluka Investments BV v. The Czech Republic*, Partial Award, 17 March 2006, para. 31.

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",(77) 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."(78) A similar provision exists under the GATT.(79) 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.(80) 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."(81) Consequently, it seems difficult to infer from international trade and investment agreements a customary principle of non-discriminatory access to government procurement.

(76) F. Weiss, "Trade and Investment", in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, 182 et seq. (2008).

(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. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 134 (2009); I. Gómez-Palacio and P. Muchlinski, "Admission and Establishment", in Muchlinski *et al.*, *op. cit.* (fn. 76), 239 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 *Mihaly 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 *ratione 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.

(82) ICSID, Case No. ARB/00/2, *Mihaly International Corporation v. The Democratic Socialist Republic of Sri Lanka*, Award, 25 March 2002, 17 *ICSID Review* 142, 157 et seq. (2002), paras. 55 et seq.

(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.

(86) W. Ben Hamida, "Les Contrats BOT à l'Heure du Nouveau Droit des Investissements Internationaux", in P. Kahn and T.W. Wälde, *New Aspects of International Investment Law*, 304 et seq. (2007); see also ICSID, Case No. ARB/02/5, *PSEG Globak Inc., The North American Coal Corporation and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. The Republic of Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 80-81.

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 truism for the Tribunal in *AMCO v. Indonesia* to declare that

> general principles drawn from the main legal systems, which constitute au 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 – unconvincing – 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* 1022, 1029 (1985), para. 183.

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

(89) Article 1.2 of UNIDROIT Principles of International Commercial Contracts, *op. cit.* (fn. 33).

(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).

(92) *The Channel Tunnel Group v. UK & France*, *op. cit.* (fn. 7), para. 92.

(93) Article 2(1)(a) of Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331. But see also ICSID, Case No. ARB/02/13, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Award, 31 January 2006, paras. 76 et seq.

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 *RSM 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 contracts]" 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)

(94) See, in particular, Article 46 of the Vienna Convention on the Law of Treaties.

(95) U. KRIEBAUM, "Illegal Investments", *Austrian Yearbook on International Arbitration*, 307, 319 et seq. (2010).

(96) *RSM 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 *RSM 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 1930 *Shufeldt* case, *op. cit.* (fn. 61), 1094 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 [...].

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 *RSM 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 the 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.

Corruption

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 and containing the arbitration clause. Kenya argued that the contract was procured

[T]he Guatemala 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").

(100) P. LEBOULANGER, "Some Issues in ICC Awards Relating to State Contracts", 15 *ICC International Court of Arbitration Bulletin* 93, 94 (2004).

(101) *RSM 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

(103) *World Duty Free v. Kenya*, *op. cit.* (fn. 45), paras. 105 et seq.
(104) *Ibid.*, para. 157.
(105) *Ibid.*
(106) *African Holding Company v. Congo*, *op. cit.* (fn. 40), para. 55.
(107) ICSID, Case No. ARB/81/2, *Klöckner v. Republic of Cameroon*, Decision on Annulment Rendered by the *Ad Hoc* Committee, 3 May 1985, 1 *ICSID Review* 89, 111 et seq. (1986), paras. 66 et seq.
(108) *Inceysa v. El Salvador*, *op. cit.* (fn. 45), para. 231.

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

(109) *Ibid.*, para. 236. See also ICSID, Case No. ARB/03/24, *Plama Consortium Ltd v. The Republic of Bulgaria*, Award, 27 August 2008, paras. 130 et seq.
(110) *Inceysa v. El Salvador*, *op. cit.* (fn. 45), para. 239.
(111) ICSID, Case No. ARB/07/24, *Gustav F. W. Hamester GmbH & Co KG v. The Republic of Ghana*, Award, 18 June 2010, paras. 123 et seq.
(112) *Ibid.*, para. 138.
(113) *Ibid.*
(114) *Ibid.*, para. 137.
(115) *Texaco/Calasiatic v. Lybia*, *op. cit.* (fn. 4), 19, para. 51; *AMCO v. Indonesia*, *op. cit.* (fn. 87), paras. 248 et seq.
(116) Case No. 56, Award No. 310-56-3, *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran et al.*, 14 July 1987, 15 *Iran-US CTR* 189, 242, para. 178.

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. Lybia*, 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 contact 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. SCHILL, "Umbrella Clauses as Public Law Concepts in Comparative Perspective", in S.W. SCHILL (ed.), *International Investment Law and Comparative Public Law*, 336 et seq. (2010); see also G. NAPOLITANO, *Diritto Administrativo Comparato*, 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 nationalize 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.

(120) ECHR, Application No. 13427/87, *Stran Greek Refineries and Stratis Andreadis v. Greece*, Judgment, 9 December 1994, *Series A*, No. 301-B, para. 72.

(121) *Ibid.*

(122) *Texaco/Calasiatic v. Lybia*, *op. cit.* (fn. 4), para. 57.

(123) *Ibid.* In *Aminoil v. Kuwait*, *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."

The references to the concept of administrative contracts mentioned in some arbitral awards must not be misleading since they were made in disputes in which a domestic law recognizing this category was applicable to the contract.(124) Besides, recognizing a category of administrative contracts at the international level would imply the difficult task of identifying commonly accepted criteria of "administrativeness" such as those existing in some domestic legal systems (clauses granting exceptional powers to the administration, public service mission, etc.).(125) The principle recognizing the power of the State, upon making compensation, to unilaterally amend or terminate agreements concluded with foreign private parties is thus applicable to all State contracts regardless of their object, nature or contents.

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)

(124) LEBOULANGER, *op. cit.* (fn. 100), 96 et seq.; J.-F. LALIVE, "Contrats entre États ou Entreprises Étatiques et Personnes Privées – Développements Récents", 181 *Recueil des Cours* 9, 118 et seq. (1983).

(125) For the French system see P.-L. FRIER and J. PETIT, *Précis de Droit Administratif*, 341 et seq. (2008); J. WALINE, *Droit Administratif*, 411 et seq. (2008). For a comparative study see C.C. TURPIN, "Public Contracts", in A. VON MEHREN (ed.), *International Encyclopedia of Comparative Law*, Vol. VII "Contracts in General", 27 et seq. (1982).

(126) For an in-depth analysis see A. REINISCH, "Expropriation", in MUCHLINSKI, ORTINO and SCHREUER, *op. cit.* (fn. 76), 420 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. 75), 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 and the predictability 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 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

(128) ICSID, Case No. ARB(AF)/99/1, *Marvin Feldman v. Mexico*, Award, 16 December 2002, para. 103. See also *Saluka v. The Czech Republic*, *op. cit.* (fn.75), para. 255; UNCITRAL Arbitration (Canada/Ecuador BIT), *EnCana Corporation v. The Republic of Ecuador*, Award, 3 February 2006, para. 173.

(129) UNCITRAL Arbitration (NAFTA), *S.D. Myers Inc. v. Government of Canada*, Partial Award, 13 November 2000, para. 263.

(130) *Lemire v. Ukraine*, *op. cit.* (fn. 35), para. 505. The award also mentions that "it certainly is not the task of this Arbitral Tribunal, constituted under the ICSID Convention, to review or second-guess the rules which the representatives of the Ukrainian people have promulgated" (*ibid.*, para. 240).

(131) See B. KINGSBURY and S.W. SCHILL, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality", in SCHILL, *op. cit.* (fn. 117), 88 et seq.

(132) ICSID, Case No. ARB/07/22, *AES Summit Generation Ltd./AES-Tisza Erömü Kft. v. The Republic of Hungary*, Award, 23 September 2010, para. 10.3.8.

(133) *Ibid.*, para. 10.3.9. The tribunal was of the view that determining the existence of this "appropriate correlation" constituted an assessment of the "reasonableness" of the measure rather than its "rationality". See also *Lemire v. Ukraine*, *op. cit.* (fn. 35), paras. 510-511.

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)

(134) ICSID, Case No. ARB(AF)/00/2, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, 29 May 2003, para. 122.

(135) *Saluka v. The Czech Republic*, *op. cit.* (fn. 75), para. 307.

(136) F. LATTY, "Arbitrage Transnational et Droit International Général", 56 *Annuaire Français de Droit International* 607, 614 (2010).

(137) VOSS, *op. cit.* (fn. 1), 221 et seq.

(138) ILC, A/CN.4/SER.A/2001/Add.1, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001(II/2) YBILC 26, 41 (2001) (footnotes omitted).

(139) In the context of a treaty violation see ICSID, Case No. ARB/04/19, *Duke Energy Electroquil Partners & Electroquil S.A. v. The Republic of Ecuador*, Award, 18 August 2008, para. 342.

(140) S. MONTT, *State Liability in Investment Treaty Arbitration – Global Constitutional and Administrative Law in the BIT Generation*, 338 et seq. (2009).

Arbitral tribunals have relied on the distinction between *iure gestionis* and *iure imperii* acts in order to clarify the relationship between breaches of contract and breaches of international law.(141) In *Impreglio v. Pakistan*, the Tribunal held, in the context of a State contract, that a violation of international law "must be the result of behaviour going beyond that which an ordinary contracting party could adopt."(142) It added also that "[o]nly the State in the exercise of its sovereign authority (*'puissance publique'*), and not as a contracting party, may breach"(143) international obligations.(144) On this basis, arbitral tribunals have for instance recognized that "a mere refusal to pay a debt is not an expropriation of property"(145) but, however, bad faith repudiations or unilateral modifications of State contracts undoubtedly constitute violations of international law.(146)

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 requires States to ensure the effectiveness of minimum contractual remedies and due process rights.(147)

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

(141) This approach has been subject to some criticism, see SCHILL, *op. cit.* (fn. 117), 325-326; see also *Noble Ventures v. Romania*, *op. cit.* (fn. 28), para. 82.

(142) ICSID, Case No. ARB/03/3, *Impreglio S.p.A. v. The Islamic Republic of Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 260.

(143) *Ibid.*

(144) See also ICSID, Case No. ARB/02/8, *Siemens A.G. v. The Argentine Republic*, Award, 6 February 2007, para. 248 ("such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract"). In the same vein *Consortium RFCC v. Royaume* du Maroc, *op. cit.* (fn. 43), para. 51; ICSID, Case No. ARB/01/12, *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, para. 315.

(145) ICSID, Case No. ARB/02/06, *SGS Société Générale de Surveillance v. Philippines*, Decision of the Tribunal on objections to jurisdiction, 29 January 2004, para. 161.

(146) *Siemens v. The Argentine Republic*, *op. cit.* (fn. 144), para. 308 ("the initiation of the renegotiation of the Contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens' investment").

(147) See generally J. PAULSSON, *Denial of Justice in International Law* (2005). As pointed out by an ICSID tribunal, "[t]he concepts of 'due process' and 'denial of justice' are closely linked. A failure to allow a party due process will often result in a denial of justice" (ICSID, Case No. ARB/05/15, *Waghuih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, 1 June 2009, para. 252).

or defence of his rights."(148) Restricting or hindering these fundamental and uncontroversial rights to access to courts would result in a denial of justice. This has led arbitral tribunals, such in *Parkerings-Compagniet v. 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."(149) 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."(150)

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."(151) Second, the private contracting party must have reasonably taken the appropriate steps to obtain correction before the contractually chosen forum.(152) 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."(153) Third, the private contracting party must have been "deprived, legally of practically, of the possibility to seek a remedy before the appropriate domestic court."(154) 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.(155)

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.

(148) *Ambatielos (Greece v. United Kingdom)*, Award, 6 March 1956, 12 *RIAA* 83, 111.

(149) ICSID, Case No. ARB/05/8, *Parkerings-Compagniet AS v. The Republic of Lithuania*, Award, 11 September 2007, para. 448.

(150) *Ibid.*, para. 317.

(151) *Ibid.*, para. 448.

(152) *Ibid.*, paras. 449 et seq.

(153) ICSID, Case No. ARB/00/9, *Generation Ukraine Inc. v. Ukraine*, Award, 16 September 2003, para. 20.30.

(154) *Parkerings-Compagniet v. Lithuania*, *op. cit.* (fn. 149), para. 449.

(155) A. EHSASSI, "Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle", in SCHILL, *op. cit.* (fn. 117), 220 et seq.; PAULSSON, *op. cit.* (fn. 147), 176 et seq.

A State responsible for an internationally wrongful act has under customary international law the obligation of making *restitutio in integrum* unless restitution is materially impossible or involves a disproportionate burden for the State.(156) In *OPC v. Ecuador*, the Tribunal pointed out that

> [i]t is well established that where a State has, in the exercise of its sovereign powers, 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

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

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

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

(159) See *supra*, Section 1.1.b).

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

> [o]wing to 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/investors 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 2008, paras. 139 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").

(162) *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Preliminary Objections, 24 May 2007, 582 *ICJ Reports* 614-615, paras. 88-89.

(163) *Ibid.*, para. 39.

(164) Draft Articles on Diplomatic Protection with Commentaries, International Law Commission, Report on the Work of its Fifty-Eighth Session (1 May-9 June and 3 July-11 August 2006), A/61/10 26, para. 4 (2006).

(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. 66 ("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

6. *Concluding Remarks*

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.

by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law [...]").

(166) See, for instance, *Gemplus v. Mexico*, *op. cit.* (fn. 40), paras. 13.62-13.94.

(167) *The Channel Tunnel Group v. UK & France*, *op. cit.* (fn. 7), para. 92 ("[a]s 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. 35), 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").