

Table of Contents

Preface	xi
List of Abbreviations	xiii
Introduction: The Unsettled Relationship Between International Law and Municipal Law	1
I The International Law Commission and the Role of Municipal Law	1
II <i>Barcelona Traction</i> and <i>Renvoi</i> to Municipal Law	3
III Investment Treaty Protection and the Continuing Relevance of Municipal Law	8
IV Two Categories of Interaction Between International Law and Municipal Law	11
[A] International Law Standing Alone	11
[B] <i>Renvoi</i> to Municipal Law	11
[C] The Contract-Treaty Problem	12
V Role of Municipal Law in the Investment Treaty Context	12
CHAPTER 1	
Attribution under the Law of State Responsibility	15
§1.01 Introduction	15
§1.02 ILC Article 4 and the Meaning of ‘State Organ’	18
[A] ILC Article 4 and State Organ	19
[B] <i>The Genocide Case</i> , <i>De Facto</i> State Organ and the Role of Municipal Law	24
[C] Investment Treaty Awards	25
[1] <i>Eureko v. Poland</i> and the Question of Separate Personality	25
[2] <i>Bosh International et al. v. Ukraine</i> and the Attribution of Obligations Stemming from Undertakings	28

	[3] <i>Salini Costruttori S.p.A. and Italstrade v. Morocco and Noble Ventures v. Romania: The Notion of De Facto Organ</i>	30
§1.03	Para-Statal Entities and the Role of Municipal Law	33
	[A] <i>Maffezini v. Spain: The Structural and Functional Tests</i>	36
	[B] <i>Encana Corporation v. Ecuador</i> and 'Governmental Nature'	38
§1.04	Investment Treaty Provisions on Attribution: <i>Lex Specialis</i> and the Role of Municipal Law	39
	[A] <i>United Parcel Service of America v. Canada</i>	39
	[B] <i>Metalclad Corporation v. United Mexican States</i>	41
§1.05	Conclusions	42
	[A] State Organs	42
	[B] Para-Statal Entities	43

CHAPTER 2

	Article 42 of the ICSID Convention and the Relationship Between International Law and Municipal Law	45
§2.01	Introduction	45
§2.02	The Relevance of the Historical Background of Article 42(1)	48
	[A] The Vienna Convention, Articles 31 and 32, and the Principles of Treaty Interpretation	49
	[B] The Two Antecedent Draft Conventions	51
	[C] <i>ICSID Convention: Travaux Préparatoires</i>	52
	[D] <i>ICSID Convention: Article 42</i>	59
§2.03	Jurisprudence from <i>Klöckner/Amco</i> to <i>Wena</i>	60
	[A] <i>Klöckner v. Cameroon</i>	60
	[B] <i>Amco Asia Corp. v. Indonesia (Amco Asia)</i>	62
	[C] <i>Wena Hotels Ltd v. Egypt</i>	64
§2.04	The Three Schools of Thought in Light of the ICSID Travaux	66
	[A] The Complementary/Corrective Interpretation	66
	[B] The Reisman Interpretation: BITs Require Application of International Law	68
	[C] The 'Tribunal Discretion' Interpretation	70
§2.05	Conclusion	72

CHAPTER 3

	Investor Nationality under Municipal and International Law	75
§3.01	Introduction	75
§3.02	Investor Nationality and Municipal Law	76
	[A] The Investment Treaty Background	76
	[B] Nationality and Diplomatic Protection	78
	[C] <i>Arbitral Decisions on Investor Nationality</i>	80
	[1] <i>Fakes v. Turkey</i> and Effective Nationality of Individuals	81
	[2] <i>Tokios Tokelés v. Ukraine</i> and the Question of Tenuous Links to the State of Incorporation	83

	[3] <i>Plama Consortium v. Bulgaria</i> , Corporate 'Control', and Denial of Benefits Clauses	86
	[4] <i>Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic</i> ('CSOB v. Slovakia') and the Question of State Control of Corporations	92
	[5] <i>AFT v. Slovak Republic and Tenaris S.A v. Venezuela</i> : The Concept of Corporate 'Seat'	93
	[6] <i>Soufraki v. United Arab Emirates</i> and Proof of Nationality	97
§3.03	Conclusion	99
CHAPTER 4		
	From Property to Investment	101
§4.01	Introduction	101
§4.02	The Role of International Law in Defining Property	104
	[A] European Convention on Human Rights	104
	[B] Inter-American Convention on Human Rights	106
	[C] The 1959 Abs-Shawcross Draft Convention on Foreign Investments	107
	[D] Harvard Draft Convention on International Responsibility of States for Injuries to Aliens	108
	[E] The OECD Draft Convention on the Protection of Foreign Property	109
§4.03	The Role of Municipal Law in Defining Property	111
	[A] The PCIJ and the ICJ	111
	[B] Investment Treaty Tribunals	112
	[1] Intangible Rights	113
	[a] <i>Pope & Talbot Inc. v. Canada</i>	113
	[b] <i>Encana Corporation v. Republic of Ecuador</i>	114
	[2] Contracts	115
	[a] <i>In the matter of Revere Copper and Brass Inc. and Overseas Private Investment Corporation</i>	115
	[b] <i>Eureko v. Poland</i>	116
	[c] <i>Waste Management Inc v. Mexico</i>	117
	[d] <i>Emmis International Holding B.V. et al. v. Hungary</i>	118
	[3] Legitimate Expectations	119
	[a] <i>Tecnicas Medioambientales Tecmed SA v. Mexico</i>	120
	[b] <i>Metalclad Corporation v. Mexico</i>	120
	[c] <i>Biloune and Marine Drive Complex v. Ghana Investment Centre</i> (and the Government of Ghana)	122
	[d] Other Investment Treaty Tribunal Decisions and the ECHR	123
§4.04	Definition of 'Investment'	125
	[A] Early Investment Treaties: Multilateral and Bilateral	126
	[B] The ICSID Convention	128

§4.05	The Role of Municipal Law in the Definition, Registration Requirements, and Legal Validity of Investments	133
[A]	Definition of an Investment	133
[1]	<i>Mihaly International Corporation v. Sri Lanka</i>	133
[2]	<i>Fedax v. Venezuela</i>	134
[3]	<i>Salini Costruttori S.p.A. and Italstrade v. Morocco</i> (<i>'Salini v. Morocco'</i>)	137
[4]	<i>Mitchell v. Congo</i>	138
[5]	<i>Pantechniki SA Contractors & Engineers v. Albania</i> (<i>'Pantechniki'</i>) and <i>'Inherent Meaning'</i> of Investment	140
§4.06	Registration Requirements	141
§4.07	Legal Validity of Investment	143
§4.08	UNCITRAL Investment Arbitration Proceedings	145
§4.09	Conclusion	147
CHAPTER 5		
	Shareholders' Rights	149
§5.01	Introduction	149
§5.02	Shareholders' Rights Pre-Barcelona Traction	153
[A]	Awards Pre-Barcelona Traction	154
[1]	<i>Ruden</i>	154
[2]	<i>Delagoa Bay and East African Railway Company</i>	154
[3]	<i>El Triunfo</i>	155
[4]	<i>Kunhardt & Co.</i>	156
[5]	<i>Baesch e Römer v. Venezuela</i>	156
[6]	The Alsop Claim	157
[7]	The Shufeldt Claim	157
[B]	Treaties Pre-Barcelona Traction	158
[1]	Treaty of Versailles (1919)	158
[2]	The Mexican Claims Conventions	159
[3]	Treaty of Peace with Italy (1947)	160
[4]	The Algiers Declaration	161
§5.03	ICJ Judgments on Shareholders' Rights	163
[A]	<i>Barcelona Traction, Light and Power Company Limited</i>	163
[B]	<i>Elettronica Sicula S.p.A.</i>	166
[C]	<i>Diallo</i>	168
§5.04	The ILC's Articles on Diplomatic Protection	170
§5.05	European Court of Human Rights	172
§5.06	Investment Treaty Disputes	175
[A]	ICSID	176
[B]	NAFTA	177
[C]	Shareholders' Indirect Claims in Investment Treaty Disputes	178
[1]	Loss of Value of Shares	181

	[a] <i>CMS Gas Transmission Company v. Argentina</i> (<i>CMS v. Argentina</i>)	182
	[b] <i>Compañía de Aguas del Aconquija SA and Vivendi</i> <i>v. Argentina (Vivendi II)</i>	184
	[c] <i>Azurix Corp. v. Argentina</i>	186
	[d] <i>Enron Corp. and Ponderosa Assets L.P. v. Argentina</i>	188
	[e] <i>Poštová Banka As and Istrokapital SE v. The Hellenic</i> <i>Republic</i>	190
	[2] Claims on Behalf of the Company: <i>GAMI v. Mexico</i>	192
§5.07	Conclusion	193

CHAPTER 6

Treaty Versus Contract Claims, and Umbrella Clauses: When a Contract Breach May Become a Treaty Breach

§6.01	Introduction	199
§6.02	History of the Distinction Between Treaty and Contract Claims	202
	[A] Draft Conventions or Codifications	202
	[1] Garcia Amador Reports on State Responsibility	202
	[2] Harvard Draft Convention on International Responsibility of States for Injuries to Aliens (1961) ('The Harvard Draft')	203
	[3] Foreign Relations Law of the United States (Restatement 3rd of Foreign Relations Law)	203
	[B] Awards and Judgments	205
	[1] <i>Affaire Martini</i>	205
	[2] <i>Illinois Central Railroad Company (USA) v. United</i> <i>Mexican States</i>	206
	[3] <i>International Fisheries Company (USA) v. United</i> <i>Mexican States</i>	207
	- [4] The PCIJ and the ICJ	207
	[C] Principles to Be Drawn from Draft Conventions/Codifications and Awards/Judgments	210
§6.03	Distinction Between Treaty and Contract Claims in International Investment Disputes	213
	[A] <i>Aguas del Aconquija – Vivendi</i> and the Separation Between Treaty and Contract Claims	214
	[B] <i>Noble Ventures v. Romania</i> and the Violation of the FET Standard	216
	[C] The Relevance of Contractual versus Governmental Acts	217
	[D] <i>Waste Management Inc v. Mexico</i>	219
§6.04	The Historical Background of Umbrella Clauses	220
	[A] Premise: Abs-Shawcross Draft Convention 1959, First Modern BIT, OECD Draft Convention, and 1998 Draft MAI	222
	[B] Outcome: Umbrella Clauses and Draft Conventions	224

§6.05	Four Schools of Thought Concerning Umbrella Clauses	225
[A]	The 'Negative' Interpretation: <i>Société Générale du Surveillance SA v. Pakistan</i>	225
[B]	The 'Automatic' Interpretation: <i>Fedax N.V. v. Venezuela</i> ; <i>CMS Gas Transmission Company v. Argentina</i> ; <i>LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentina</i>	227
[C]	The 'Iure Imperii' Interpretation: <i>Pan American Energy LLC and Bp Argentina Exploration Company v. Argentina</i> ; <i>El Paso Energy International Company v. Argentina</i>	228
[D]	The 'Enforcement' Approach: <i>Société Générale Du Surveillance SA v. Philippines</i>	229
§6.06	Umbrella Clauses: Attribution and Parties to the Undertaking	233
§6.07	Assessment of the Four Schools of Thought	235
§6.08	Conclusion	239
Conclusion: The Unsettled Relationship Between International and Municipal Law		243
I	The Necessity of <i>Renvoi</i> in the Investment Treaty Context	245
II	<i>Renvoi</i> in This Book's Six Chapters	248
III	The Need for Treaty Arbitrators to Apply Municipal Law	251
Appendices		253
APPENDIX I		
Hermann Abs and Lord Shawcross, <i>Draft Convention on Investments Abroad</i> (1959)		255
APPENDIX II		
Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959)		259
APPENDIX III		
Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961)		271
APPENDIX IV		
Organisation for Economic Co-operation and Development Draft Convention on the Protection of Foreign Property (1967)		277