APPLICABLE LAW UNDER INTERNATIONAL INVESTMENT TREATIES

Investment treaty tribunals have adopted different approaches to the question of determining the law applicable to the dispute before them. This article explores the reasons for such variability, examining the significance of different treaty structures and the consequences of the extent to which they refer to the law of the Contracting Parties. It considers the negotiation of Art 42(1) of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States and how it has been applied in different cases involving different treaty structures.

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I. Introduction

1 Every tribunal established to resolve an investment treaty claim must decide the law applicable to the dispute.[1] Answering this apparently simple question can turn out to be rather more complicated in practice and it is not susceptible to generalised rules. This article seeks to explain why the approach taken in one case may be quite different from that taken in another.

2 One reason why the issue defies generalisation stems from the variability in drafting of the over 3,000 investment treaties presently in

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1 This article deals with the substantive law applicable to investment treaty claims. There are, of course, the additional questions pertaining to the law applicable in matters of procedure, jurisdiction, privilege, *etc*; these lie beyond the scope of this discussion.

force.[2] Four differences in treaty structures bear upon the applicable law issue. First, States have taken different approaches on the inclusion and expression (or not) of applicable law clauses in their treaties. Second, the treaties vary by the jurisdiction *ratione materiae* granted to tribunals.[3] Third, many treaties give claimants a choice of arbitral rules; those rules do not treat applicable law in identical terms. As a result, tribunals applying the same treaty, but under different arbitration rules, could conceivably decide the applicable law issue differently.[4] Fourth, treaties vary by the extent to which they expressly refer to the local law of their Contracting Parties. Some refer to each Party's law concerning the nationality of natural persons when defining who has standing to make a claim. Some will refer to each Contracting Party's law when defining its territory for the purposes of the treaty's territorial application. Some will, for example, refer to each Party's law regarding entitlements to permits or licences which may constitute investments.[5] Other treaties are essentially silent on these definitional matters.

3 To these differences in treaty formulation can be added the variability in approaches taken by tribunals on this issue when there is no mandatorily worded express choice of law.[6] Given that investment treaty tribunals operate on a "flat" international plane, and that there is no formal doctrine of *stare decisis* in international law, no tribunal is bound to follow the approach taken by any other tribunal.

4 Choosing the law applicable to a dispute is generally viewed as one of the attributes of the exercise of party autonomy.[7] In the

2 United Nations Conference on Trade and Development's Issues Note on "International Investment Policymaking in Transition: Challenges and Opportunities for Renewal" (June 2013) at p 1 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf> (accessed 5 October 2013).

3 Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at pp 234–235.

4 The possibility of different approaches under different arbitration rules motivated in part the approach adopted by the tribunal in *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006 at [290]–[291].

5 For example, Art 15.1(13) and n 15-3 of the United States-Singapore Free Trade Agreement (6 May 2003) (entered into force 1 January 2004) includes in its definition of "investment" "licenses, authorizations, permits, and similar rights" with the important qualifier that they be "conferred pursuant to domestic law"; the footnote notes that whether these hold the characteristics of an investment "depends upon such factors as the nature and extent of the rights that the holder has under the domestic law of the Party".

6 Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at p 40: "An investment treaty tribunal has the inherent authority to characterise the issues in dispute in determining the laws applicable thereto."

7 Ibrahim F I Shihata & Antonio R Parra, "Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the

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investment treaty context, two types of party autonomy exist: (a) the autonomy of the State Parties exercised when formulating the terms of the treaty (including the arbitration mechanism to which any claimant must adhere when submitting a claim);[8] and (b) that of the parties to a specific dispute in agreeing how their dispute will be resolved under the said treaty.[9] Choices pertaining to the applicable law generally result from the exercise of the States' autonomy, rather than that of the disputing parties, although some tribunals have relied heavily upon the disputing parties' conception of the applicable law when the State Parties have not designated the applicable law.[10]

5 Where the State Parties have specified an applicable law clearly, tribunals have had little difficulty in ascertaining and applying it. The problem arises when the treaty is silent on the issue or when multiple

ICSID Convention" in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (Albert Jan van den Berg ed) (Kluwer Law International, 1996) at pp 298–299; Institute of International Law, "Resolution on Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises" (1990) 5 ICSID Rev 139, Art 6 (parties have "full autonomy" with regard to the selection of the applicable law).

8 *Caratube International Oil Co LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Award, 5 June 2012 at [331]–[332]:

> If a tribunal's jurisdiction is based on an investment treaty, claimant does not negotiate an individual agreement with the host State, but accepts a non-negotiable offer addressed to persons or entities that fulfil its conditions. That offer is contained in an investment treaty and its conditions are agreed between the parties to that investment treaty. Unlike in the context of investment contracts, the acceptance of an offer contained in an investment treaty cannot create an assumption that the claimant fulfils the conditions of that offer.

9 *In the matter of: The North American Free Trade Agreement (NAFTA) and A Request for Consolidation by the United States of America of the Claims in: Canfor Corp v United States of America and Tembec et al v United States of America and Terminal Forest Products Ltd v United States of America*, Order of the Consolidation Tribunal, 7 September 2005 at [78]:

> Claimants contest consolidation of the grounds that it would be against the consensual nature of arbitration (or the principle of party autonomy). However, the dispute settlement mechanism contained in Section B of Chapter 11 of the NAFTA is a result of an international treaty negotiated by three States. They provided for dispute settlement between them and investors by means of arbitration governed by international law. In so doing, the State Parties to the treaty are entitled as sovereigns to set certain conditions.

10 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at [78]–[79]:

> The Tribunal finds that, beyond the provisions of the IPPA, there is no special agreement between the parties on the rules of law applicable to the dispute. Rather, the pleadings of both parties indicate that, aside from the provisions of the IPPA, the Tribunal should apply both Egyptian law (*ie*, 'the law of the Contracting State party to the dispute') and 'such rules of international law as may be applicable'.

This was upheld in *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Annulment Proceeding, 28 January 2002 at [44]–[45].

sources of law are stipulated with no ranking of priority. In the former case, the tribunal may either apply a default rule or find an implicit choice of law (usually finding that since the arbitration has been initiated pursuant to an international treaty, public international law applies in whole or in part). In the case of multiple sources of law, the tribunal must discern the Parties' intention; when confronted with these sorts of clauses, tribunals regularly find that the investment treaty takes priority over any other source of applicable law. Some find that the treaty has overriding, almost exclusive importance; others find that the treaty and the host State's law apply.

6 As noted above, the applicable law issue can also be shaped by the subject-matter jurisdiction granted to tribunals. The North American Free Trade Agreement between the Governments of Canada, the United Mexican States and the United States of America[11] ("NAFTA"), for example, contains a public international law governing law and NAFTA tribunals have jurisdiction to determine breach of a limited list of treaty obligations (and no more); their jurisdiction does not extend to such matters as deciding breach of contract claims between an investor and a state entity.[12] Other treaties grant a broader jurisdiction which may extend to alleged breaches of investor-state contracts. Tribunals established under those treaties have a more expansive jurisdiction than NAFTA tribunals; questions then arise as to the law applicable to the contract over which the tribunal has been granted jurisdiction. *Compañiá del Aguas Aconquija SA and Vivendi Universal SA v Argentine Republic*,[13] a decision of an ICSID *ad hoc* Annulment Committee, for example, distinguished between the proper law of the contract and the law applicable to alleged breaches of the treaty.

7 Quite apart from the issue of subject-matter jurisdiction is the question of what legal rights and interests are protected by the treaty. When treaties define types of investments they refer to interests derived from rights created by and under municipal law. For example, shares in a company are derived from the company's gaining its legal personality under the law of a State. Concessions are granted pursuant to a State's

11 17 December 1992, Can TS 1994 No 2.

12 *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 at [73]:

> The Tribunal begins by observing that – unlike many bilateral and regional investment treaties – NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an 'umbrella clause' committing the host State to comply with its contractual commitments.

13 ICSID Case No ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010 at [261]–[262].

legislation. Intellectual property rights, created initially under the laws of one State, will typically be registered and given effect under the law of other States. These all generally fall within treaty definitions of "investment", leading one naturally to look to the law of the State pursuant to which the legal rights or interests are created in order to understand their nature.

8 This has led Zachary Douglas to formulate no less than 12 separate rules on applicable law in international investment law.[14] He observes that the diversity of legal relationships that arise in an investment dispute necessitates the use of different applicable laws, positing the image of a "mosaic of applicable laws" which is quite unlike the classical international law position which, in its strictest formulation, holds that public international law plays an exclusive role in deciding international disputes and questions of municipal law are to be treated as questions of fact.[15]

9 Whether it is a mosaic or the legal equivalent of a Rubik's Cube, the applicable law issue can generate questions going to the heart of the relationship between municipal and international law and the tribunal's own conception of its role as an international tribunal. While certain basic features of the applicable law question are common to all treaty disputes – the rule that in the event of conflict between a State's law and its international obligations, the latter prevails being a good example – there are many subsidiary issues generated by differences in treaty structures.

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14 Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) ch 2.

15 Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at p 40:

> A diverse range of legal relationships arises in an investment dispute and this necessitates the application of several different applicable laws by an investment treaty tribunal. The investor is often a corporate entity established under a municipal law of one contracting state, whereas its investment is a bundle of rights acquired pursuant to the municipal law of a different contracting state. The acts of the state that is host to the investment might attract its international responsibility upon a breach of the minimum standards of treatment in the investment treaty in accordance with international law. If the investment treaty tribunal has jurisdiction over contractual claims, and the investor has a contract with an emanation of the host state, then its contractual rights fall to be determined by the law governing the contract. The investment treaty regime thus summons the image of a mosaic of applicable laws, unlike the position in classical international regimes where public international law might be destined to play an exclusive role, and questions of municipal law may be treated as questions of fact.

See also Christoph Schreuer, "International Domestic Law in Investment Disputes: The Case of ICSID" (1996) 1 Austrian Rev of Int and Eur L 89 at 89.

10 To attempt to explain how this issue has evolved, it is appropriate to begin with the foundational treaty for much of present-day investment treaty arbitration, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States[16] ("ICSID Convention"). In the early days of investment treaty-making, the International Centre for Settlement of Investment Disputes ("ICSID") was considered to be the only available forum and many treaties were negotiated with the ICSID Convention's provisions in mind. One such provision is the Convention's applicable law clause, Art 42(1), and one can see that the choices and compromises made in its formulation foreshadowed some of the issues that tribunals encountered after the Convention entered into force and disputes began to be arbitrated.

II. Article 42(1) of the ICSID Convention

11 Article 42(1) provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the 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.

12 The first sentence of Art 42(1) embraces the role of party autonomy in recognising that the parties' agreement on the applicable law must be applied by the tribunal. It warrants noting that the phrase "such rules of law as may be agreed" is capacious and does not restrict the parties to agreeing on a single law.[17]

13 The second sentence is a default (or "supplemental") rule which applies when there is no agreement. In this case the tribunal must apply *two* sources of law, the law of the host State (unless its conflict of law rules point to the law of some other State) and such rules of

16 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 UNTS 159 (entered into force 14 October 1966) ("ICSID Convention").

17 Ibrahim F I Shihata & Antonio R Parra, "Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention" in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (Albert Jan van den Berg ed) (Kluwer Law International, 1996) at p 298:

> By referring to agreed 'rules of law', the ICSID Convention opens up other possibilities. These include the subjection of different issues to rules derived from different legal systems or *dépeçage*. They also include the submission of the parties' relationship to rules common to two or more national legal systems, to combinations of national and international law or to a law frozen in time subject to certain modifications.

international law as may be applicable.[18] The inclusion of two sources of law reflected both the ICSID arbitral process' international character and the Convention's need to encompass all types of investment disputes (not just most of them) that could be submitted to the future Centre.[19] Both considerations militated against an exclusively domestic law rule.[20]

14 While the legal experts consulted in the ICSID Convention's elaboration easily agreed on what became the first sentence of Art 42(1), formulating the second sentence was more controversial. Developing countries' legal experts argued that the host State's law should have primacy and must apply exclusively unless the parties agreed otherwise.[21] They argued that foreign investors, in making an investment in the host State, consented to comply with its national law.[22] Thus, the Convention should affirm such compliance instead of allowing for the application of other laws, the effect of which would potentially elevate foreign investors to a special position above domestic law.[23] The developing countries' historical experience with colonialism and in some cases with treaties of capitulation fed concerns about undefined

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18 Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure" in *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Aron Broches ed) (Netherlands: Martinus Nijhoff Publishers, 1995) at p 184.

19 It was believed that since the International Centre for Settlement of Investment Disputes ("ICSID") jurisdiction would be seized by different instruments (contracts, *ad hoc* agreements, an offer to arbitrate in a State's legislation, and through investment treaties), mandating the application of the respondent State's law in all cases would be unsuitable. This would be so where, for example, the State's rules on the conflict of laws pointed to the national law of a different State and in "expropriation cases in which an investor might complain of both under-compensation under the host State's own laws and under some minimum standard of international law, if such standard existed" (Memorandum of the Meeting of the Committee of the Whole, SID/65-6 (25 February 1965) p 5 in *Documents Concerning the Origin and Formulation of the Convention* (Washington DC: ICSID, 1968) ("*History*") at p 986); or cases in which governments and investors signed agreements that accorded special treatment to the investor which was not provided by local law (Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, Z10 (27 April–1 May 1964) p 55 in *History* at p 514).

20 Chairman's Report on the Regional Consultative Meetings of Legal Experts, Z11 (9 July 1964) para 62 in *History* at p 571.

21 See, *eg*, the representative from India's comment at p 46 of Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, Z10 (27 April–1 May 1964) in *History* at p 505.

22 Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, Z10 (27 April–1 May 1964) p 46 in *History* at p 513.

23 Summary Proceeding of the Legal Committee Meeting, SID/LC/SR/14 (30 December 1964) p 5 in *History* at p 803.

rules of foreign or international law taking priority over or displacing the law of the host State.[24]

15 On the other side of the issue were legal experts, mainly from developed countries, who insisted that international law must play a role, especially in the default situation. This was also the position of the World Bank's General Counsel, Aron Broches, who wished to ensure that international law would act at least in a corrective fashion after the law of the disputing Contracting State was applied.[25] He initially sought to ensure that international law could potentially apply in all cases, and conferring wide discretion on future tribunals to determine the applicable law issue.[26]

16 An early draft of the ICSID Convention proposing to give tribunals the discretion to decide whether to apply national *or* international law provoked a sharp response from representatives of developing countries. Broches then suggested redrafting the rule to require the tribunal to apply rules of national *and* international law "to avoid the impression that international law would always apply or that it was necessarily a question of alternatives".[27] But even this proved controversial. This led Broches to acknowledge that if a State wished to exclude international law from the tribunal's jurisdiction it could agree with the investor that only the State's law (or the law of some other State) would apply to any disputes arising between them.[28]

17 Broches later reported to the World Bank's Executive Directors that certain countries:[29]

> … were apprehensive not so much of the application of international law to the transaction, but of the national law of some foreign State, a situation with which their governments would have great difficulty. For that reason they did not wish to give the tribunal too great a freedom in its choice of law. He had himself concluded that, in the normal case, the reference should be to the law of the host State, and that it would be reasonable so to provide in Article 42(1).

24 Summary Proceeding of the Legal Committee Meeting, SID/LC/SR/14 (30 December 1964) p 4 in *History* at p 802; Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (25 February 1965) p 4 in *History* at p 985.
25 See, *eg*, Memorandum of the Meeting of the Committee of the Whole, SID/65-6 (25 February 1965) p 4 in *History* at p 985.
26 Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, Z7 (16–20 December 1963) p 29 in *History* at p 267.
27 Summary Proceedings of the Legal Committee Meeting, SID/LC/SR/14 (30 December 1964) p 2 in *History* at p 800.
28 Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, Z7 (16–20 December 1963) p 29 in *History* at p 267.
29 Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (25 February 1965) p 4 in *History* at p 985.

18 Once the legal experts settled the phrasing of Art 42(1), Broches described the import of its second sentence to the Executive Directors, as follows:[30]

> Where the parties by an oversight, or because they could not agree, or because they felt that the tribunal is best qualified to decide the matter, did not reach agreement on the applicable law, the supplementary rule in Article 42(1) would require the tribunal to look to two sources, *viz* in the *first place, to national law and specifically to the law of the country where the investment had taken place; and secondly, to international law if international law should be applicable.* [emphasis added]

19 Of particular note was Broches' view of the sequential phasing of this approach: the tribunal would first apply national law and then international law if it should be applicable. Sequential application was not to be taken to mean that there would be no hierarchy of legal rules; throughout the negotiations, Broches was clear that if international law applied and there was a conflict between domestic and international law, the latter would prevail.[31]

20 This begged the question of precisely what rules of international law might be applicable. When questioned on the meaning of the phrase, "such rules of international law as may be applicable", Broches suggested these were "basic rules of international law" such as the "prohibition of discriminatory treatment, the obligation to act in good faith and prohibition of measures contrary to international public policy or general principles of law".[32] At the same time, he was careful to distinguish between general rules of international law and the situation

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30 Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (25 February 1965) p 3 in *History* at p 984.

31 Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure" in *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Aron Broches ed) (Netherlands: Martinus Nijhoff Publishers, 1995) at p 229:

> The Tribunal will first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law. In that sense, as I suggested earlier, international law is hierarchically superior to national law under Article 42(1).

32 Chairman's Report on the Regional Consultative Meetings of Legal Experts, Z11 (9 July 1965) p 14 in *History* at p 570.

that might prevail under an international treaty.[33] In response to a question from India's Executive Director, he stated that:[34]

> … the reference to international law in Article 42 … in reality, comprised (*apart from treaty law*) only such principles as that of good faith and the principle that one ought to abide by agreements voluntarily made and ought to carry them out in good faith. [emphasis added]

21 Broches thus foreshadowed the possibility that there might be significant differences between applying a treaty that provided for ICSID arbitration as compared to an ICSID tribunal's applying more rudimentary rules of general international law. Indeed, early on in the ICSID Convention's elaboration, at one regional consultation, a French expert observed that "[u]nfortunately, there were few well-established rules of international law on the subject of investments" (a view echoed by some other European experts) and asked whether the Convention ought not to set out substantive standards of treatment.[35] For different reasons, principally the sensitivity of the issue of the treatment of the rights of aliens and their property in North-South relations at that time, Broches objected, noting that the draft left the "whole question of the substantive rules of law to the tribunal" and expressed his preference to leave it that way. He noted that international tribunals had not in the past encountered "insuperable difficulties" in ascertaining the rules of international law and, on balance, he deemed it "preferable not to state the position too specifically".[36]

22 In short, such rules of *general* international law as were identified during the negotiation of the ICSID Convention were rudimentary and few. The question then arose as to whether investment treaties would fit within the phrase "such rules of international law as may be applicable". Broches considered – and confirmed to the Bank's Executive Directors – that if a future bilateral investment treaty provided for ICSID arbitration, it would be encompassed by Art 42(1)'s reference to "such rules of international law as may be applicable".[37] Even

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33 Chairman's Report on the Regional Consultative Meetings of Legal Experts, Z11 (9 July 1965) p 14 in *History* at p 570; see also, Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (23 February 1965) p 3 in *History* at p 984.

34 Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (23 February 1965) p 4 in *History* at p 985.

35 Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, Z9 (17–22 February 1964) p 50 in *History* at p 418.

36 Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, Z9 (17–22 February 1964) pp 51–52 in *History* at pp 419–420.

37 Germany's Executive Director commented that:

> … he understood the reference in Article 42(1) to 'rules of international law' as including the rules of law set down in bilateral investment treaties between the State party to the dispute and the State whose national was a party to the dispute … Could Mr Broches give an assurance that there was in fact no

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if the treaty did not specify international law as the applicable law, its rules, in the default situation, would thus supply at least part of the applicable law. It was thus understood from the beginning that international law, in some form or another, could play a corrective role to the application of municipal legal rules. Unless explicitly deemed inapplicable, international law could supply a rule that would take priority over an inconsistent national rule.

23 As to the way in which a domestic law might be found to be inconsistent with international law, this was not discussed in any detail during the ICSID Convention's negotiation. It warrants recalling that at the time it was expected that ICSID's future caseload would arise mainly from investment contracts rather than treaties and so the focus of discussion tended to be in connection with contracts. It would not be difficult in such cases to follow the sequential analysis of first applying the law of the Contracting State party to the dispute and then the applicable rules of international law posited by Broches' interpretation of the second sentence of Art 42(1).[38]

24 However, an investment treaty presents a greater possibility for conflict between the two sources of applicable law because it supplies a set of conventional international law standards against which state measures, *including the domestic law itself* (*eg*, statutes, subsidiary regulations and judge-made law) can be adjudged. For example,

> doubt on this point? … Mr Broches said that there could be no doubt whatever that the term 'international law', in Article 42(1) did in fact include rules set out in bilateral agreements between the States concerned.

(Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (23 February 1965) p 3 in *History* at p 984.) The Executive Directors' Report on the Convention states that "such rules of international law as may be applicable" in Art 42(1) encompass the sources of international law listed in Art 38(1) of the Statute of the International Court of Justice, with investment treaties one such source (*History* at p 1082, para 40).

38 See para 19 above; see also W M Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold* (2000) 15 ICSID Rev FILJ 362 at 371; Memorandum of the meeting of the Committee of the Whole, SID/65-5 (23 February 1965) p 5 in *History* at p 986; and Ibrahim F I Shihata & Antonio R Parra, "Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention" in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (Albert Jan van den Berg ed) (Kluwer Law International, 1996) at p 310 where they observe that in the early years of ICSID arbitration:

> The view taken in these [early *ad hoc* annulment committee] decisions essentially conformed to the understanding that many of the negotiators of the ICSID Convention had of the provision. It will be recalled that this understanding was, in broad terms, that the provision required the application of the law of the State party, with international law also to be applied to fill gaps in the applicable national law or to correct any inconsistencies between it and international law.

national and most-favoured-nation treatment, both legal rules that do not exist at customary international law but which are commonly included in investment treaties, would afford two comparative standards against which the host State's law and measures taken pursuant to it would be scrutinised. The inclusion of a fair and equitable treatment standard which was directly enforceable by an investor before an international tribunal, a legal standard not enforceable by a private party at customary international law, would also expose the host State's law and its application to its being tested against an additional international legal standard.

25 When applying the second sentence of Art 42(1) in the treaty context, therefore, the second source of applicable law (the treaty) often focuses on evaluating the operation of the first source of applicable law (the host State's law).[39] What appears to be an expression of equality of the two sources of applicable law is in fact a hierarchical relationship in which international law prevails. Given the evaluative focus of treaty arbitration, the possibility of finding a conflict with domestic law has to be greater in the investment treaty context than would be the case when an ICSID tribunal applies the *lex contractus* and "such rules of international law as may be applicable" to a contract dispute.

26 That said, international law's primacy over municipal law ought not to obscure the fact that municipal law is more developed than international law. Investment treaties – though themselves more developed than the general rules of international law on the treatment of aliens and their property – are nevertheless drafted in comparatively more general terms than municipal law. Treaties lack the specificity and sheer number of municipal legal rules (be they legislative, administrative or judge-made) that both shape and provide answers to domestic legal questions. Within the modern nation-state, whole areas of economic, commercial and other activity are regulated with a far greater level of detail than in international law.[40] All of this suggests a

39 This is particularly the case when the standards of fair and equitable treatment and national treatment are applied. It will also arise when expropriation, particularly indirect expropriation, is alleged.

40 The International Court of Justice noted this in the area of corporate law in the *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)*, Judgment of 5 February 1970, [1970] ICJ Rep 19 at [38]:

> In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, *whenever legal issues arise concerning the rights of State with regard to the treatment of companies and shareholders, as*

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continuing role for the application of domestic law, particularly when ascertaining the existence of rights and interests which are the subject of treaty claims.

27 In sum, from the beginning of the ICSID Convention's negotiations, it was understood that in the event of conflict, the applicable rules of international law would prevail.[41] But the process by which a tribunal might move to apply the rules of international law over the other source of applicable law, and indeed the rapidity with which this might take place, was not discussed in any detail. Like many other issues arising under the Convention, tribunals would be left to find their own way.

28 With this in mind, we turn to different treaty models and a few of the noteworthy cases that have discussed them.

III. Where the treaty specifies the applicable law

29 Not surprisingly, the applicable law issue is generally unproblematic when the State Parties have expressed it in clear terms in the treaty. Some treaties – starting with the NAFTA and continuing with the many subsequent treaties where States have employed similar approaches – contain straightforward applicable law clauses.[42] Article 1131(1) of the NAFTA, for example, states: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[43] This has facilitated a fairly consistent approach by tribunals when interpreting and applying NAFTA Chapter Eleven's substantive obligations.[44]

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to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights. [emphasis added]

41 Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (23 February 1965) p 2 in *History* at p 590.

42 Article 1131(1) of the NAFTA; see also the Energy Charter Treaty, 17 December 1994, 34 ILM 360, Art 26(6) of which provides that: "A tribunal … shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

43 Article 1131(2) of the NAFTA provides further that: "An interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

44 See, *eg*, *Mobil Investments Canada Inc and Murphy Oil Corp v Government of Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 at [210]; *Merrill & Ring Forestry LP v Government of Canada*, UNCITRAL, ICSID Administrated, Award, 31 March 2010 at [183]–[184];

(*cont'd on the next page*)

30 Other treaties take a quite different approach, specifying a range of different applicable laws without necessarily giving guidance as to any priority of one law over another.[45] A typical example would be the 1991 Netherlands-Czech Republic treaty, which provides (in an unnumbered and unranked fashion):[46]

> (6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - the law in force of the Contracting Party concerned;
> - the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
> - the provisions of special agreements relating to the investment;
> - the general principles of international law.

31 This list is not expressed in mandatory terms, nor does it stipulate a priority of application. This is left to the tribunals and they have not always agreed as to whether a listing of laws constitutes an express choice of law, and when they have applied such a clause, they have tended to default rather quickly to the treaty as the primary source of legal rules.

32 The tribunal in *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*[47] found that a provision in the 1993 Egypt-Greece treaty which provided that the tribunal "shall decide on the basis of respect for the law, including particularly the present Agreement and other relevant agreements existing between the two Contracting Parties and the generally acknowledged rules and principles of international law"[48] did *not* constitute an agreement of the parties within the meaning of the first sentence of Art 42(1). In its view, the second sentence of Art 42(1) applied. It therefore applied "the substantive provisions of the BIT" to "all matters regulated by the Treaty" and "Egyptian law … when

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Cargill, Incorporated v United Mexican States, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009 at [132]–[133].

45 See, *eg*, Art 9(7) of the China Model Bilateral Investment Treaty, UNCTAD Compendium (Vol III, 1996) at pp 155–156 and Art 8(3) of the Egypt Model Bilateral Investment Treaty, UNCTAD Compendium (Vol V, 2000) at p 296.

46 Article 8(6) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1 October 1992). Given the wording of the opening clause of sub-para 6, which makes it clear that the tribunal is to *take into account* particular sources of law, this clause is arguably not an applicable law clause in the strict sense.

47 ICSID Case No ARB/99/6, Award, 12 April 2002.

48 Article 9(5) of the Egypt-Greece Bilateral Investment Treaty (16 July 1993).

it is not overridden by the application of provisions of the BIT".[49] The tribunal further considered that general international law could apply in a supplementary fashion.[50]

33 In contrast, the tribunal in *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary*[51] ("*ADC*") adopted a different approach to a similar provision under the 1989 Hungary-Cyprus Treaty. That treaty provided that "[t]he arbitral tribunal shall decide on the basis of respect for the law, including particularly the present Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law".[52] Did this amount to an agreement of the parties under the first sentence of Art 42(1)? The tribunal thought so, disagreeing with the respondent's submission that its domestic law applied as a separate source of law. It reasoned that the parties' consent to arbitration meant they also consented to the treaty as the applicable law under the first sentence of Art 42(1) – in essence, they had made an implicit choice of law.[53] This:[54]

> … consent must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty. This is so since the generally accepted presumption in conflict of laws is that parties choose one coherent set of legal rules governing their relationship (which is the case here as it will be seen below), rather than various sets of legal rules, unless the contrary is clearly expressed.

34 The tribunal's reference to the presumption that the parties chose "one coherent set of legal rules" stands at variance to the ICSID Convention's negotiating history, which clearly contemplated choices of more than one set of rules.[55] The tribunal buttressed its conclusion that

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49 *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002 at [87].

50 *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002 at [87]:

> On the other hand, both according to the 1st sentence of Art 42(1) as the rules of law chosen by the Parties in Art 11 of the BIT and according to the 2nd sentence of Art 42(1) of the ICSID Convention as 'rules of international law as may be applicable', the reference to and application of the BIT implies that the Tribunal may have recourse to the rules of general international law to supplement those of the BIT.

51 ICSID Case No ARB/03/16, Award, 2 October 2006.

52 Article 6(5) of the Hungary-Cyprus Bilateral Investment Treaty (24 May 1989).

53 *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006 at [290].

54 *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006 at [290].

55 See para 12 above.

the treaty and general international law was the applicable law by relying on the fact that the State Parties had conferred a choice of arbitral rules upon claimants:[56]

> That analysis also comports with the primary conflict of laws provisions in the various instruments listed in Article 7(2) of the BIT.[57] Those appear to be similar by referring to party autonomy in the choice of law. In contrast, the subsidiary conflict of laws rules in those instruments differ, at least textually. For example, Article 42(1) of the ICSID Convention requires a tribunal to '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', while Article 17(1) of the ICC Arbitration Rules (another option under Article 7(2) of the BIT) requires a tribunal to 'apply the rules of law which it determines to be appropriate'. *The application of those subsidiary conflict rules may give differing results, which in turn may affect the manner in which the Treaty provisions, in particular the substantive ones, are to be interpreted and applied.* It cannot be deemed to have been the intent of the States Parties to the BIT to have agreed to such a potential disparity. [emphasis added]

35 That the conclusion on applicable law may differ according to the arbitral rules chosen by the claimant illustrates the potential for variability noted in the Introduction to this article. However, rather than accepting such variability, the *ADC* tribunal saw it as another reason to justify holding that the treaty itself was the applicable law. The issue was not pursued further (and in any event the tribunal had already found an implicit choice of law under the first sentence of Art 42(1)), but it could be asked how this analysis stood up against the mandatory requirements of the second sentence of Art 42(1).

36 In *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi v Argentina*,[58] two treaties applied: the Argentina-France Bilateral Investment Treaty ("BIT"), and the Argentina-Spain BIT, which had similar applicable law clauses. The former provided,[59] for example, that:

> … the ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.

56 *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006 at [291].

57 Article 7(2) of the Hungary-Cyprus Bilateral Investment Treaty (24 May 1989) states that a party may choose to submit its dispute to "(a) The Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm; (b) the Arbitral Tribunal of the International Chamber of Commerce in Paris; (c) the International Centre for the Settlement of Investment Disputes …".

58 ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010.

59 Article 8(4) of the Argentina-France Bilateral Investment Treaty (3 July 1991).

37 The tribunal considered that this amounted to the "rules of law agreed by the parties" under the first sentence of Art 42(1) of the ICSID Convention. Reflecting the point made earlier about the exercise of the autonomy of States, it commented that when "accepting to arbitrate under the terms of a treaty, the investor also accepts the choice of law provided in such a treaty".[60] It held further that insofar as state responsibility under the two treaties was concerned, their provisions were paramount over the applicable domestic law except to the extent a treaty itself admitted the application of domestic law.[61]

38 Do these approaches differ from the approaches taken in non-ICSID arbitration? It appears not. Consider the United Nations Commission on International Trade Law[62] ("UNCITRAL") case of *CME Czech Republic BV (The Netherlands) v The Czech Republic* (Final Award),[63] where the tribunal considered Art 8.6 of the 1991 Netherlands-Czech Republic Treaty, which required it to:

> … decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the contracting party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the general principles of international law ….

A Partial Award[64] issued in the arbitration did not explicitly address the applicable law issue, a point taken up by the dissenting arbitrator who asserted that the award was flawed because Czech law should have been

60 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi v Argentina*, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010 at [55].

61 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi v Argentina*, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010 at [62]–[63].

62 Article 33(1) of the 1976 United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules stated: "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable." In contrast to the second sentence Art 42(1) of the ICSID Convention, the second sentence of Art 33 contains no reference to international law at all; the reference to the use of conflict of laws rules – a private international law concept – seems inapt to the applicable law determination to be made by a tribunal established under a bilateral investment treaty. It may well be that given this private law focus, since States continued to include UNCITRAL arbitration as one of the available choices of rules, when it came to amending the rules, Art 35(1) of the 2010 UNCITRAL Arbitration Rules was tailored to be more obviously amenable to being used in investment treaty arbitration: "The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate."

63 UNCITRAL, Final Award, 14 March 2003, IIC 62 (2003).

64 *CME Czech Republic BV (The Netherlands) v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001.

applied since it was listed as the first in a sequence of sources of law in the treaty.[65]

39 After the Partial Award's issuance, the State Parties to the treaty consulted on three issues pertaining to its interpretation and application – including the correct interpretation of Art 8.6. The Contracting Parties recorded their shared view that:[66]

> The arbitral tribunal shall decide on the basis of the law. When making its decision, the arbitral tribunal shall take into account, [in particular] though not exclusively, each of the four sources of law set out in Article 8.6. The arbitral tribunal must therefore take into account as far as they are relevant to the dispute the law in force of the contracting party concerned and the other sources of law set out in Article 8.6. To the extent that there is a conflict between national law and international law, the arbitral tribunal shall apply international law.

40 The respondent then sought a reconsideration of the Partial Award, asserting that "the Tribunal must first apply Czech law to analy[s]e any legal acts that have taken place in the Czech Republic and, in particular, the Tribunal must apply any Czech laws of mandatory nature" and further that "international law only becomes applicable if there is a 'genuine gap' in Czech law and if the Czech law must be corrected as being inconsistent with international law", and finally, that the Partial Award should be annulled, because the tribunal did not apply the proper law.[67]

41 The tribunal deferred the question of annulment to the courts of the place of arbitration (Sweden), but it did discuss the applicable law arguments, noting that the treaty did not purport to rank the four sources of law and the common position only added the qualification that international law prevails in the event of a discrepancy.[68] Article 8.6 was considered broadly worded, giving a tribunal discretion as to the four sources of law: the tribunal was directed to only "*take into account* (not: to apply) the above mentioned sources of law, in particular *though not exclusively*"[69] [emphasis in original].

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65 Dissenting Opinion of the Arbitrator JUDr Jaroslav Hándl against the Partial Arbitration Award, 13 September 2001.
66 See *CME Czech Republic BV (The Netherlands) v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, IIC 62 (2003) at [91].
67 *CME Czech Republic BV (The Netherlands) v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 at [398]–[400].
68 *CME Czech Republic BV (The Netherlands) v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 at [400].
69 *CME Czech Republic BV (The Netherlands) v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 at [402].

IV. Where the treaty is silent on the applicable law

42 Many treaties do not contain an applicable law clause at all, thus leaving it to the tribunal to determine what law will be applied. *Asian Agricultural Products v Democratic Republic of Sri Lanka*[70] ("*Asian Agricultural Products*") presented this issue. The Sri Lanka-UK treaty provided for ICSID arbitration only and did not contain an applicable law clause, leading the tribunal to hold that the first sentence of Art 42(1) was not triggered. In a neat illustration of the two types of party autonomy described in the Introduction, the tribunal found that since the request for arbitration was based upon a treaty, and not on an agreement to arbitrate, the disputing parties "had no opportunity to exercise their right to choose in advance the applicable law".[71] The majority then inferred an agreement on the applicable law from the disputing parties' conduct in the arbitration itself, noting that they had effectively come to the same position that the applicable law was primarily the treaty as *lex specialis*, with international law and domestic law applying as supplementary sources. However:[72]

> … the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature ….

43 This reasoning may well have reflected the novelty of the issue, given that *Asian Agricultural Products* was the first ICSID investment treaty arbitration. The majority seemed to see the absence of a single instrument recording the disputing parties' consent as suggesting that it should therefore infer the law from their submissions. This implied that the applicable law could vary according to the way in which the disputing parties conceived of the issue. In addition, the majority concluded from the inclusion of the "most-favoured-nation" and the "compensation for losses" clauses that since both referred to and incorporated rules from the respondent's internal legal system, this further justified the treaty acting as the primary source of the legal rules.[73]

70 ICSID Case No ARB/87/3, Final Award, 27 June 1990.
71 *Asian Agricultural Products v Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990 at [19].
72 *Asian Agricultural Products v Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990 at [21].
73 *Asian Agricultural Products v Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990 at [22].

44 This seemed to be a rather complicated way to arrive at a conclusion that could have been arrived at by applying the second sentence of Art 42(1), a point taken up in the dissent by Samuel K B Asante who found the treaty to be a clear example of the absence of an agreed applicable law, thus requiring the tribunal to apply the second sentence of Art 42(1) rather than to proceed on a potentially unreliable inference from the parties' pleadings.[74] In Asante's view, it was through the operation of domestic law that the treaty would apply in the dispute:[75]

> This is not to suggest that the Sri Lanka/UK Treaty is not relevant to the resolution of issues before the Tribunal. On the contrary, by virtue of Article 157 of the Constitution of Sri Lanka, the provisions are fully incorporated into the country's laws and have binding force subject only to such law or executive or administrative action that may be enacted or taken in the interests of national security.

45 This conception that the host State's law played the central role, with international law playing a supplementary role, comported with the approach taken in prior ICSID contract cases[76] and indeed with Broches' sequential view of the application of domestic and international law.

46 As seen above, given that the second sentence of Art 42(1) specifies two sources of law, the municipal *and* the international, not a choice between two sources, there was a basis for Asante's insistence on the application of the host State's law.[77] Yet he was not clear as to how the two sources of law comported with each other, in one sentence arguing for "*primary* emphasis on Sri Lankan law" but then going on to suggest that "rules on the protection of property which are municipal in origin *should receive as much attention* as those incorporated into local law from treaties or custom"[78] [emphasis added].

47 In *Wena Hotels Ltd v Arab Republic of Egypt*[79] ("*Wena Hotels*"), the tribunal was faced with another UK treaty, also silent on the applicable law.[80] The parties agreed that the case concerned an alleged

74 *Asian Agricultural Products v Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Dissenting Opinion, 27 June 1990.

75 *Asian Agricultural Products v Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Dissenting Opinion, 27 June 1990 at [8]–[10].

76 See, *eg*, *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v The Republic of Azerbaijan*, ICSID Case No ARB/06/15, Award, 8 September 2009 at [49].

77 As noted at paras 17–19 above, the use of the word "and" in place of "or" was clearly intended by the drafters.

78 *Asian Agricultural Products v Democratic Republic of Sri Lanka*, ICSID Case No ARB/87/3, Dissenting Opinion, 27 June 1990 at [10].

79 ICSID Case No ARB/98/4, Award, 8 December 2000.

80 Article 8 of the Egypt-United Kingdom Bilateral Investment Treaty.

treaty violation, and the tribunal likewise held that the treaty was the primary source of applicable law.[81] However, it noted further that both parties did not consider the treaty, described as a "fairly terse agreement of only seven pages containing thirteen articles", as containing all of the rules of law applicable – a view that the tribunal itself shared.[82] Egypt, in particular, relied on Egyptian law to support its claim of a time bar while the claimant considered that both Egyptian and international law applied.[83] After quoting Art 42(1), the tribunal decided that:[84]

> … beyond the provisions of the [treaty], there is no special agreement between the parties on the rules of law applicable to the dispute. Rather, the pleadings of both parties indicate that, aside from the provisions of the [treaty], the Tribunal should apply both Egyptian law (*ie*, 'the law of the Contracting State party to the dispute') and 'such rules of international law as may be applicable'. The Tribunal notes that the provisions of the [treaty] would in any event be the first rules of law to be applied by the Tribunal, both on the basis of the agreement of the parties and as mandated by Egyptian law as well as international law.

48 The tribunal decided the merits wholly on the basis of the treaty (finding a breach of fair and equitable treatment and an expropriation), before turning to Egypt's objection that the claims were time barred under both the Egyptian Civil Code and on equitable grounds which referred to principles of prescription common to both Contracting Parties' legal systems.[85]

49 This brought to the fore the issue of ranking of the two sources of law in Art 42(1). In this regard, the tribunal, relying upon a decision of the Iran-US Claims Tribunal which had declined to apply an Iranian statute of limitations despite the applicability of Iranian law,[86] noted that municipal statutes of limitation did not necessarily bind a claim for violation of an international treaty before an international tribunal and observed that this principle was recognised as long ago as 1903 by the Italy-Venezuelan Claims Commission, which held in *Gentini*[87] that although local statutes of limitation cannot be invoked to defeat an

81 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at [78].
82 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at [79].
83 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at [79].
84 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at [79].
85 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at [102].
86 *Alan Craig v Ministry of Energy of Iran* (1984) 3 Iran-US Claims Tribunal 280 at 287.
87 *Gentini* Case (1903) Italy-Venezuelan Claims Commission, X RSA 551.

international claim, international tribunals may consider equitable principles of prescription to reject untimely claims. In addressing the respondent's argument that Art 42(1) required the tribunal to apply domestic law, the tribunal considered that one situation in which an international tribunal should apply rules of international law was in order to ensure the precedence of international law norms where there is conflict with domestic law. In this way, the strict application of the Egyptian limitation period:[88]

> Even if applicable, would collide with the general, well-established international principle recognised since before the *Gentini* case: that municipal statutes of limitation do not bind claims before an international tribunal (although tribunals are entitled to consider such statutes as well as equitable principles of prescription when handling untimely claims).

50 The award's annulment was subsequently sought by Egypt. On the allegation that the tribunal had acted in manifest excess of powers, the *ad hoc* annulment committee, in what has become a fairly widely cited decision, rejected the argument that the tribunal had exceeded its powers in applying the treaty, instead of Egyptian law.[89] It considered various views on how Art 42 operated, and endorsed a discretionary approach:[90]

> Some of these views have in common the fact that they are aimed at restricting the role of international law and highlighting that of the law of the host State. Conversely, the view that calls for a broad application of international law aims at restricting the role of the law of the host State. *There seems not to be a single answer as to which of these approaches is the correct one. The circumstances of each case may justify one or another solution* … Further, the use of the word 'may' in the second sentence of this provision indicates that the Convention does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that *this has the effect to confer on to the Tribunal a certain margin and power for interpretation*.
>
> *What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction*

88 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 at [107]. The tribunal further considered that even though the treaty did not contain detailed procedures for starting an arbitration, it did appear to suggest a greater concern that the parties not rush to arbitration, rather than the parties delaying the initiation of proceedings.

89 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Annulment Proceeding, 28 January 2002.

90 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Annulment Proceeding, 28 January 2002 at [39]–[40].

> *with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.*
>
> [emphasis added]

51 The *Wena Hotels* annulment committee's decision has subsequently been applied.[91] For example, in *El Paso Energy International Co v Argentine Republic*,[92] the tribunal concluded that:

> The fact that the BIT and international law govern the issue of Argentina's responsibility for violation of the treaty does not exclude that the domestic law of Argentina has a role to play too. The Tribunal agrees with the Claimant that this role is to inform the content of those commitments made by Argentina to Claimant that the latter alleges to have been violated. Thus, in order to establish which rights have been recognised by Argentina to the Claimant as a foreign investor, resort will have to be had to Argentina's law. However, whether a modification or cancellation of such rights, even if legally valid under Argentina's law, constitutes a violation of a protection guaranteed by the BIT is a matter to be decided solely on the basis of the BIT itself and the other applicable rules of international law.

V. Conclusion

52 What emerges from the foregoing is that in cases of conflict between domestic law and international law, on well-established principle, the latter prevails.[93] But applying this rule in practice can generate a host of questions. When the domestic law of the host State and the investment treaty both apply, is the sequential application described by Broches during the Convention's negotiation valid in the treaty context? Can the international tribunal move directly to determine a breach of the treaty without having first determined the lawfulness of a measure under the host State's law? Should it first determine whether the measure is lawful under domestic law, and then examine whether it is consistent with the treaty? For international law to prevail, must the domestic law be in outright conflict? How is such a conflict to be determined? Does a conflict necessarily exist if the answer

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91 See, *eg*, *El Paso Energy International Co v Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011 at [132]–[141]; *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Award, 26 July 2007 at [140]–[143]; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007 at [236]–[238]; and *CMS Gas Transmission Co v Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005 at [116]–[117].

92 ICSID Case No ARB/03/15, Award, 31 October 2011 at [135].

93 Article 27 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; International Law Commission, "Responsibility of States for Internationally Wrongful Acts 2001" in *Yearbook of the International Law Commission* 2001, vol 2, Pt 2 (New York: UN, 2001) Art 3.

to a particular legal issue differs as between host State and international law?[94]

53 The answers to these questions are to some extent bound up with the tribunal's conception of its role. Some tribunals are more exacting than others. Some are more ready than others to defer to the policy choices of States. Irrespective of where tribunals stand on the spectrum of deference to the policy choices of States and the application of their laws, there are many instances of tribunals examining the lawfulness of a measure at domestic law and finding that to be relevant to a determination of its lawfulness at international law.[95] This is particularly the case where measures complained of had been examined by the local courts. Investment treaty arbitration jurisprudence is replete with examples of tribunals expressly disclaiming the power to review the decisions of a local court as if the tribunal were an appellate court yet, at the same time, having regard to the availability of judicial or administrative review when ascertaining whether a breach of treaty occurred.[96]

54 The variability in treaties and approaches taken by tribunals and the view of successive tribunals as to their discretion to determine the applicable law in the absence of an express choice illustrate the difficulty in laying down general rules on applicable law issues. So long as the field is characterised by such variability in treaty expression and approach, and there is no *stare decisis* rule or appellate review of tribunal decisions, attempts to formulate clear rules on the approach to be taken are unlikely to succeed. At the end of the day, notwithstanding the negotiators' clear choice of "and" in place of "or" when it came to the second sentence of Art 42(1), their inability to anticipate the precise impact of investment treaties, one source of applicable law, on the law of the host State, the other source of applicable law, is yet another example of the difficult issues that were left to international tribunals to decide when presented with claims arising under investment treaties.

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94 For example, where the municipal law stipulates simple interest for an award of damages and an international tribunal applies compound interest.

95 *BG Group plc v Republic of Argentina*, UNCITRAL, Award, 24 December 2007 at [93]–[102]; *Robert Azinian, Kenneth Davitian & Ellen Baca v United Mexican States*, ICSID Case No ARB(AF)/97/2, Award, 1 November 1999 at [97]–[98].

96 *Robert Azinian, Kenneth Davitian & Ellen Baca v United Mexican States*, ICSID Case No ARB(AF)/97/2, Award, 1 November 1999 at [99]; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002 at [126]; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002 at [159].