The Meaning of 'and'

International Law and Domestic Law in Investment Arbitration

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1. Introduction

The determination of the law applicable to the merits of a dispute is an important step in the work of an investment tribunal. It may well be decisive for the outcome of the case.

A typical investment dispute involves questions of international law as well as of domestic law. There is a considerable body of substantive international law protecting foreign investors. It consists of standards of protection in treaties, mostly BITs and FTAs, but also multilateral treaties such as the Energy Charter Treaty (ECT), the NAFTA and its successor the USMCA or the CPTPP. But there is also a good deal of relevant customary international law. This customary international law includes various aspects of state responsibility, and such issues as denial of justice, the law on expropriation, the nationality of individuals and corporations and many other issues. Tribunals also rely on general principles of law like good faith, estoppel, *pacta sunt servanda*, unjust enrichment and *res judicata*.

Investors are also subject to the host State's domestic law. In practically every case there is relevant legislation like commercial law, company law, administrative law, labour law, tax law, foreign exchange regulations, zoning law, real estate law and many other areas of the host State's legal system. Not least, the host State's property law may determine whether the alleged investment does indeed exist.

The governing law may be agreed as between the parties to the dispute, that is the host State and the investor. Some treaties and other international documents providing for investor/State arbitration refer to the parties' agreement on choice of law.[1] Some of the relevant treaties contain choice of law clauses in case there is no agreement on applicable law between the parties.

[1] Article 42 ICSID Convention; Article 54 of the ICSID Additional Facility Rules. See also Article 33 of the UNCITRAL Arbitration Rules (2010).

The ICSID Convention refers primarily to any agreement on choice of law that the parties may have reached. In the absence of such an agreement, it provides for the application of the host State's law and international law.[2] Article 42 of the ICSID Convention provides:

Article 42

> (1) 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.

In non-ICSID arbitration, the relevant Rules also direct that a tribunal primarily apply the law designated by the parties. In the absence of a choice the tribunal is to apply the law that it determines to be appropriate.[3]

Some treaties offering consent to arbitration contain their own rules on applicable law. A rule on applicable law in a treaty that offers consent to arbitration becomes part of the arbitration agreement. Acceptance by the investor of the offer of consent to jurisdiction in the treaty includes the acceptance of the clause on applicable law, leading to an agreed choice of law.

An example for such a provision may be found in the Argentina/Netherlands BIT of 1992:

> The arbitration tribunal … shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of laws), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.[4]

The result of these choice of law clauses is similar to the default rule in Article 42(1). They direct tribunals to apply host State law and international law.[5]

Some treaties refer to international law only. These include the ECT which refers to the ECT itself as well as to 'applicable rules and principles of international law.'[6] Similarly the NAFTA

[2] For a detailed discussion of Article 42(1) of the ICSID Convention see *Schreuer's Commentary on the ICSID Convention* (3rd ed, 2022, S. Schill *et al* eds) Art 42, paras 43-321.

[3] UNCITRAL Arbitration Rules (2010), Article 35(1); ICC Arbitration Rules (2021), Article 21(1).

[4] Art 10 (7) Argentina/Netherlands BIT, 20 October 1992.

[5] *Casinos Austria* v. *Argentina*, Award, 5 November 2021, para 313.

[6] ECT Article 26(6): 'A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'

and the USMCA refer to the respective treaties as well as to applicable rules of international law.[7]

Exceptionally, some agreements between parties to investment disputes refer to the host State's domestic law without any reference to international law.[8]

The majority of treaties for the protection of investments do not offer any guidance on applicable law. In the case of ICSID arbitration this means that the residual rule of Article 42(1), directing the tribunal to apply host state law and applicable rules of international law, will apply.

2. Drafting Article 42(1)

During the ICSID Convention's drafting there was general agreement on the basic freedom of the parties to choose the law they consider most appropriate for their relationship.[9] Early versions of what eventually became Article 42(1), contained no reference to the law of the host State. They provided that, in the absence of an agreement, the tribunal should decide in accordance with such rules of national or (and) international law "as it shall determine to be applicable".[10] The idea behind this somewhat open-ended formula was to let the tribunal find the proper law by applying generally accepted principles of the conflict of laws or private international law.[11] This would have led to the law to which the relationship had the most significant connexion.

Some delegates wanted more precision. Especially representatives of capital-importing countries insisted that only the law of the host country should apply in the absence of an agreement between the parties.[12] This led to the adoption of the version which directs the tribunal to apply the law of the State party to the dispute including its rules on the conflict of

[7] NAFTA Article 1131(1): 'Governing Law A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.' USMCA Article 14.D.9(1): '… the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.'

[8] See e.g., *Atlantic Triton* v. *Guinea*, Award, 21 April 1986, 3 ICSID Reports 13, 23; *Attorney-General* v. *Mobil Oil NZ Ltd.*, New Zealand, High Court, 1 July 1987, 4 ICSID Reports 123; *MINE* v. *Guinea*, Decision on Annulment, 22 December 1989, para 6.31; *TANESCO* v. *IPTL*, Final Award, 12 July 2001, para 51, Decision on Preliminary Issues (Appendix B to the Final Award), paras 98 ff; *Perenco* v. *Ecuador*, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, paras 318, 320; *Grenada Private Power and WRB* v. *Grenada*, Award, 19 March 2020, paras 112, 215.

[9] History of the Convention, Vol. II, pp 266–267, 330, 513-514, 569–571, 984.

[10] History of the Convention, Vol. I, pp 190, 192.

[11] History of the Convention, Vol. II, pp 79, 110, 267, 330, 506, 570.

[12] At pp 418, 419, 466, 469, 513-516, 653, 660, 663, 669, 800, 801, 802.

laws.[13] The reference to that State's rules on conflict of laws was added to take some of the rigidity out of the automatic reference to the host State's law.[14]

The acceptance of the host State's law as the applicable law was closely linked to the acceptance of international law. During the Convention's drafting, representatives of capital-importing countries initially argued against the inclusion of international law. They contended that a foreign investor, by making the investment, submitted to the host State's law and that the host State's sovereignty required the exclusive application of its law.[15] Representatives of capital-exporting countries insisted on the necessity to retain international law as part of the applicable law.[16]

Eventually, a compromise was reached which preserved the applicability of international law but yielded to the demands of developing countries that the national law to be applied in the absence of agreement on choice of law would be that of the host State.[17] A vote taken under these auspices produced a large majority in favour of retaining the formula which included international law.[18]

There was some concern that the mere reference to rules of international law was too unspecific and required further elaboration.[19] Suggestions to clarify the contents of 'rules of international law' by reference to the established sources of international law[20] led to a definition in the First Draft of the Convention which specifically refers to Art. 38(1) of the ICJ Statute[21]. This definition was later transferred from the text of the Convention to the Report of the Executive Directors.[22]

The relationship of the host State's law to international law was also discussed during the Convention's drafting. The early drafts had provided for the application of 'rules of law,

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[13] At pp 804, 939, 985.

[14] At p 804.

[15] At pp 267, 501, 504-505, 513-514, 571, 801 *et seq*, 984.

[16] At pp 419, 421, 801, 803.

[17] A. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure, *in*: International Arbitration Liber Amicorum for Martin Domke (1967) 12, 16.

[18] History of the Convention, Vol. II, p 804.

[19] At pp 330, 418, 570, 801.

[20] At p 418.

[21] History of the Convention, Vol. I, p 192; Vol. II, p 802.

[22] History of the Convention, Vol. II, pp 962, 1029.

whether national *or* international'.[23] The word 'or,' which had indicated two mutually exclusive alternatives, was later replaced by the more neutral 'and'.[24] A suggestion to limit the application of international law to cases where the domestic legislation of the host State was silent, was defeated.[25] The Chairman's (Mr Broches) explanation of the vote which retained the reference to international law, pointed out that the provision, as adopted "would bring it [international law] into play both in the case of a lacuna in domestic law as well as in the case of inconsistency between the two".[26] There was some discussion of a possible principle of priority for domestic law which was to be 'of primary importance' and would be applied 'in the first place'.[27] But a suggestion to insert the word 'first' into the text was not adopted.[28] It was made clear that international law would prevail where the host State's domestic law violated international law, for instance, through a subsequent change of its own law to the detriment of the investor.[29]

Therefore, although the application of the host State's law dominated the discussions during the drafting of the ICSID Convention's provision on applicable law, the result was a neutral reference to both international law and host State law. Article 42(1) does not indicate how a tribunal is to proceed when confronted with arguments based on host State law and international law. The Report of the Executive Directors to the Convention paraphrases Article 42(1), replacing 'and' by 'as well as'.[30]

3. The Supplementary and Corrective Function of International Law

In the early years of the ICSID Convention's application, the prevailing theory on the relationship of international law to host State law under the second sentence of Article 42(1) was the doctrine of the supplemental and corrective function of international law vis-à-vis domestic law. This goes back to the statement by Mr Broches during the ICSID Convention's

[23] History of the Convention, Vol. I, pp 190, 192 (emphasis added).

[24] History of the Convention, Vol. I, p 192; Vol. II, p 421.

[25] History of the Convention, Vol. II, p 804.

[26] *Loc. cit.*

[27] At pp 571, 800, 984.

[28] At p 804.

[29] At pp 570-571, 985.

[30] Report of the Executive Directors on the Convention, para 40: 'Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.'

drafting that international law would come into play both in the case of a lacuna in domestic law and in the event of an inconsistency between the two.[31]

In a subsequent publication, Mr Broches explained the corrective function of international law as follows:

> 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.[32]

Under this theory, the starting point would be the host State's law. The result thus reached would then be checked against international law. International law may be used to close gaps left by national law and to correct a result achieved under domestic law that is in violation of international law. However, it would be impermissible to apply international law alone and to ignore or bypass the host State's domestic law in this process.

At the time, most commentators seemed to agree that the function of international law was to close gaps in domestic law and to prevent any violations of international law that otherwise

[31] History of the Convention, Vol. II, p 804.

[32] A. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours (1972-II) 331, 392.

could arise in the application of the host State's law.[33] Some authors put a stronger emphasis on the host State's law[34] while others stressed the importance of international law.[35]

Tribunals and *ad hoc* committees also embraced the theory of the supplemental and corrective function of international law. The *ad hoc* Committee in *Klöckner* v. *Cameroon* found that where the host State's domestic law had to be applied together with international law, the principles of international law had a dual role namely:

> … *complementary* (in the case of a "lacuna" in the law of the State), or *corrective*, should the State's law not conform on all points to the principles of international law. *In both cases*, the arbitrators may have recourse to the "principles of international law" only *after* having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to *one* principle, even a basic one) and *after* having applied the relevant rules of the State's law.
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> Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the "rules" or "principles of international law."[36]

The *ad hoc* Committee in *Amco* v. *Indonesia* expressed the same idea in slightly different words:

> ...Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure

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[33] G. R. Delaume, Transnational Contracts, Applicable Law and Settlement of Disputes Ch. XV, 68 *et seq.* (1990); P. Feuerle, International Arbitration and Choice of Law under Article 42 of the Convention on the Settlement of Investment Disputes, 4 Yale Studies in World Public Order 89, 118/119 (1977); A. Giardina, The International Centre for Settlement of Investment Disputes between States and Nationals of other States (ICSID), *in*: Essays on International Commercial Arbitration (P. Sarcevic ed.) 214 at 217 (1989); B. Goldman, Le droit applicable selon la Convention de la B.I.R.D., du 18 mars 1965, pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, *in*: Investissements Etrangers et Arbitrage entre Etats et Personnes Privées, La Convention B.I.R.D. 133, 151 (1969); M. Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 134, 140/1 (1993); G. Jaenicke, The Prospects for International Arbitration: Disputes between States and Private Enterprises, *in*: International Arbitration: Past and Prospects (A. H. A. Soons ed.) 155 at 159 (1990); P. Kahn, The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes, 44 Indiana Law Journal 1, 27-29 (1968); E. Lauterpacht, The World Bank Convention on the Settlement of International Investment Disputes, *in*: Recueil d'études de droit international en hommage à Paul Guggenheim 642, 660 (1968); M. Rubino-Sammartano, International Arbitration Law 55 (1990); O. Chukwumerije, International Law and Municipal Law in ICSID Arbitration, 1 Canadian Journal of International Business Law and Policy 61, 82 *et seq*. (1996); G. Elombi, ICSID Awards and the Denial of Host State Law, 11 Journal of International Arbitration 61, 66 *et seq*. (1994); V. C. Igbokwe, Developing Countries and the Law Applicable to International Arbitration, 14 Journal of International Arbitration 99, 114 *et seq*. (1997); *N. Nassar,* Internationalization of State Contracts: ICSID, The Last Citadel, 14 Journal of International Arbitration 185, 202 *et seq*. (1997); I.F.I. Shihata/A.R. Parra, Applicable Substantive Law in Disputes Betwen States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention, 9 ICSID Review - FILJ 183 (1994); C. Schreuer, The ICSID Convention: A Commentary (1st ed, 2001) Art 42, paras 130-148.

[34] W. M. Reisman, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold, 15 ICSID Review – FILJ 362 (2000).

[35] P. Weil, The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a *Ménage À Trois*, 15 ICSID Review – FILJ 401 (2000). At p 409: "The reference to the domestic law of the host State, even if designed only to ascertain whether it is, or is not, compatible with international law, is indeed a pointless exercise, …"

[36] *Klöckner* v. *Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 122. Italics original.

> precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.[37]

Other tribunals reached similar results.[38] But there were also expressions of dissatisfaction with this doctrinaire application of a fixed relationship between host State law and international law. The second Tribunal in the resubmitted case of *Amco* v. *Indonesia* called the theory of the supplemental and corrective nature of international law a distinction without a difference:

> 40. This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference.[39]

Similarly, the Tribunal in the *CDSE* v. *Costa Rica* concluded that ultimately international law is controlling and that hence the arbitration was governed by international law:

> 64. … To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail. Were this not so in relation to takings of property, the protection of international law would be denied to the foreign investor and the purpose of the ICSID Convention would, in this respect, be frustrated.
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> 65. The parties' apparently divergent positions lead, in substance, to the same conclusion, namely, that, in the end, international law is controlling. The Tribunal is satisfied that, under the second sentence of Article 42(1), the arbitration is governed by international law. [40]

The *ad hoc* Committee in *Wena Hotels* v. *Egypt*, found that international law had an independent role to play that went beyond a subsidiary function:

> 40. What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.[41]

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[37] *Amco* v. *Indonesia,* Decision on Annulment, 16 May 1986, para 20.

[38] *LETCO* v. *Liberia,* Award, 31 March 1986, 2 ICSID Reports 358/9; *SPP* v. *Egypt,* Award, 20 May 1992, para 84; *Goetz* v. *Burundi*, Award, 10 February 1999, para 97; *Autopista* v. *Venezuela*, Award, 23 September 2003, paras 101-105. For a recent revival of the theory of the supplemental and corrective function of international law, see *WalAm Energy* v. *Kenya*, Award, 10 July 2020, para 349.

[39] *Amco* v. *Indonesia,* Resubmitted Case: Award, 5 June 1990, para 40.

[40] *CDSE* v. *Costa Rica*, Award, 17 February 2000, paras 64-65.

[41] *Wena Hotels* v. *Egypt*, Decision on Annulment, 28 January 2002, para 40.

4. Gaillard and Banifatemi: 'and' means 'and'

An article by Emmanuel Gaillard and Yas Banifatemi published in 2003[42] brought clarity to this convoluted picture and paved the way for a new approach. It described the genesis of Article 42(1) of the ICSID Convention in some detail[43] concluding that the History of the Convention does not support the limitation of the role of international law to supplementing or correcting the law of the host State.[44]

Gaillard and Banifatemi critically reviewed the practice whereby 'international law is viewed through the hypothetical gaps of national laws or through the inadequacies of such laws vis-à-vis international law and not as an independent body of law'.[45] They pointed out that the idea of a supplemental role of international law is based on the questionable premise that national legal orders have *lacunae*.[46] They also pointed to the ambiguities of a corrective role of international law and found that 'an ICSID tribunal may also apply international law as a body of substantive rules in order to resolve the dispute on a particular issue.'[47]

Gaillard and Banifatemi noted that the *ad hoc* Committee in *Wena* v. *Egypt* rightly espoused the view that 'under Article 42(1), second sentence, international law primarily constitutes a body of substantive rules directly accessible to the tribunal without initial scrutiny into the law of the host State'.[48] Under this approach, 'on a given issue, the rules of international law can be applied as the proper law in the same way as the law of the host State.'[49]

> A tribunal may decide, under the circumstances of each case, that international law provides the proper rule for a given issue. … [This approach] gives international law its full status as a body of substantive rules at the disposal of ICSID arbitral tribunals. … Depending on the circumstances of the case, each ICSID tribunal should have discretion to decide whether any rules of international law are directly applicable, without any requirement of initial scrutiny into the law of the host State.[50]

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[42] 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 (2003) 375.

[43] At pp 382-388.

[44] At p 388.

[45] At p 389

[46] At pp 394-397.

[47] At pp 398-399.

[48] At pp 403-404.

[49] At p 407.

[50] At pp 408, 409.

This means that a tribunal is free to apply those rules of international law and of the host State's law that it finds most appropriate to each question before it. This approach

> recognizes the freedom of ICSID tribunals to find in international law, as well as in the law of the host State, the proper rules for the resolution of the disputes brought before them.[51]

5. The Autonomous Application of International Law and Host State Law

The approach advocated by Gaillard and Banifatemi in their seminal article has since become prevalent. Tribunals apply international law and domestic law on an equivalent footing. They resort to one or the other depending on the issue before them. This issue-specific approach identifies questions that arise before the tribunal in their proper legal context. Tribunals apply host State law where the issue is one of domestic law such as the validity of a contract or the existence of property rights. They apply international law where appropriate, for instance where the issue is one of treaty interpretation or of State responsibility.

The tribunal's task is to identify the questions before it that are governed by international law and those that are governed by domestic law. In many cases this task will be performed intuitively without any discussion. Only in the relatively rare situation where both systems of law provide answers which genuinely contradict each other will there be an opportunity to give precedence to one or the other, normally to international law.

For instance, if the investor claims that by virtue of first a breach and then the termination of a contract there has been a violation of the fair and equitable principle and the rules on indirect expropriation in a BIT, both systems of law will be relevant. Host State law will determine whether there ever was a valid contract, whether it had been breached and whether the termination was lawful and effective under domestic law. International law will determine whether the damaging acts were attributable to the host State, whether they were unfair and inequitable and whether they constituted an illicit indirect expropriation.

ICSID tribunals follow this method of a simultaneous application of international law and domestic law. In cases falling under the residual rule of Art. 42(1), second sentence, they apply domestic law to some aspects of disputes and rules of international law to other aspects.

The Tribunal in *LG&E* v. *Argentina* endorsed the view expressed by the *ad hoc* Committee in *Wena* and developed by Gaillard and Banifatemi. It held:

> It is this Tribunal's opinion that 'and' means 'and,' so that the rules of international law, especially those included in the ICSID Convention and in the Bilateral Treaty,

[51] At p 411.

> as well as those of domestic law are to be applied. In the *Wena Hotels Limited v. Arab Republic of Egypt* case, the Tribunal affirmed that 'and means and,' but accepted the supremacy of international law.[52]

The Tribunal in *CMS* v. *Argentina* had to resort to Art. 42(1), second sentence of the ICSID Convention in the absence of a choice of law by the parties.[53] It noted that the parties had invoked national and international law rules.[54] It concluded that it would apply the Argentine Constitution, the Civil Code, gas legislation and regulations, as well as Argentina's emergency law, while it would 'also apply' the BIT and customary international law 'in reaching the pertinent conclusions.'[55] To justifying this 'à la carte' approach, the *CMS* tribunal relied upon the decision of the *ad hoc* Committee in *Wena* and said:

> 116. More recently, however, a more pragmatic and less doctrinaire approach has emerged, allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies. It is no longer the case of one prevailing over the other and excluding it altogether. Rather, both sources have a role to play.

Other ICSID tribunals have also followed this fact-specific approach.[56] The Tribunal in *Azurix* v. *Argentina*, again relying upon the decision of the *ad hoc* Committee in *Wena*, said:

> 66. Article 42(1) has been the subject of controversy on the respective roles of municipal law and international law. It is clear from the second sentence of Article 42(1) that both legal orders have a role to play, which role will depend on the nature of the dispute and may vary depending on which element of the dispute is considered. The Annulment Committee in *Wena v. Egypt* considered that "The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit."
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> 67. Azurix's claim has been advanced under the BIT and, as stated by the Annulment Committee in *Vivendi II*, the Tribunal's inquiry is governed by the ICSID Convention, by the BIT and by applicable international law. While the Tribunal's inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal's inquiry into the alleged breaches of the Concession Agreement to which Argentina's law applies, but it is only an

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[52] *LG&E* v. *Argentina*, Decision on Liability, 3 October 2006, para 96.

[53] *CMS* v. *Argentina*, Award, 12 May 2005, para 108.

[54] At para 118.

[55] At para 122.

[56] See also eg *MTD* v. *Chile*, Award, 25 May 2004, para 204; *Enron* v. *Argentina*, Award, 22 May 2007, paras 205–209; *National Grid* v. *Argentina* (UNCITRAL), Award, 3 November 2008, paras 82–85; *El Paso* v. *Argentina*, Award, 31 October 2011, para 135; *Bosh* v. *Ukraine*, Award, 25 October 2012, para 280. But see *Tokios Tokelės* v. *Ukraine*, Award, 26 July 2007, para 143 (where the Tribunal, after endorsing the approach of the *Wena ad hoc* Committee, found that the system of protection provided by Ukrainian law was 'replaced *ratione materiae* by the substantive provisions of the Treaty and international law, to the extent that the latter govern the same subject-matter').

> element of the inquiry because of the treaty nature of the claims under consideration.[57]

The Tribunal in *Sempra* v. *Argentina* also gave both legal systems an autonomous role. In response to a detailed discussion of the parties concerning the meaning of Art. 42(1) the Tribunal said:

> 235. The parties' discussion concerning Article 42(1) of the Convention appears to be theoretical to some extent since this Article provides for a variety of sources to play simultaneous roles. Indeed, the Respondent is right to argue that domestic law is not confined in scope of application to the determination of factual questions. It indeed has a broader role, as is evident from the pleadings and arguments of the parties to this very case. The License is itself governed by the legal order of the Argentine Republic, and it must be interpreted in its light.
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> 236. So too, the Claimant is right in arguing for the prominent role of international law. In fact, the Treaty, international conventions and customary law have been invoked by the parties in respect of a number of matters. While writers and decisions have on occasion tended to consider domestic law and international law as mutually incompatible in their application, this is far from actually being the case. Both have a role to perform in the resolution of the dispute, as has been recognized.[58]

Some tribunals have pointed out that Article 42(1) of the ICSID Convention does not allocate matters to either domestic or international law. They found that in the absence of an agreement of the parties on the rules of law applicable to the merits of a dispute, they were not bound by the arguments and sources invoked by the parties. It is for the tribunal to determine whether national or international law is applicable to an issue. In *Quiborax* v. *Bolivia*, the Tribunal said:

> Except for the undisputed application of the BIT, the Parties have not agreed on the rules of law that govern the merits of this dispute. Consequently, the Tribunal shall apply Bolivian law and international law when appropriate. The Tribunal is of the view that the second sentence of Article 42(1) of the ICSID Convention does not allocate matters to either law. It is thus for the Tribunal to determine whether an issue is subject to national or international law.[59]

The Tribunal in *Magyar Farming* v. *Hungary*, after rejecting the Claimant's assertion that the BIT provided for an implied choice of law, applied the second sentence of Art. 42(1) of the ICSID Convention. It referred to the BIT as principal guidance and stated that it would select

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[57] *Azurix* v. *Argentina I*, Award, 14 July 2006, paras 66–67 (footnotes omitted).

[58] *Sempra* v. *Argentina*, Award, 28 September 2007, paras 235, 236 (footnotes omitted).

[59] *Quiborax* v. *Bolivia*, Award, 16 September 2015, para 91 (footnote omitted). See also *Gavrilović* v. *Croatia*, Award, 26 July 2018, para 437: 'The Tribunal will therefore identify and apply the proper source of law on an issue-by-issue basis.' *Alghanim* v. *Jordan*, Award, 14 December 2017, para 349: '[Article 42(1)] requires the Tribunal to characterise the issues before it and to decide which issues are governed by international law and which by national law.'

the appropriate legal norm from either national or international law depending on the issue under consideration:

> … in the absence of a choice-of-law provision in the BIT, or elsewhere for that matter, the default rule of the second sentence of Article 42(1) of the ICSID Convention applies. This provision does not allocate specific matters to either international or domestic law. Instead, it calls for the application of either of these laws "as may be applicable" to a particular issue in dispute. It is thus for the Tribunal to determine whether a particular issue is subject to national or international law. In doing so, the Tribunal will be guided primarily by the BIT.[60]

In *Gosling* v. *Mauritius*, the Tribunal applied Art. 42(1), second sentence, in the absence of an applicable law clause in the BIT. It pointed out that it had to apply and interpret the provisions of the BIT. In addition, host State law applied to matters such as the conditions to acquire property and to develop it. It said:

> 87. ... Absent the Parties' agreement, Article 42(1) of the ICSID Convention requires the 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."
>
> 88. Given the nature of the claims that the Respondent breached its obligations under the BIT, the Tribunal shall apply the provisions of the BIT and interpret them ... This notwithstanding, there are matters underlying the claims such as the conditions to acquire rights to land in Mauritius or to its development to which Mauritian law applies.[61]

The application of international law side by side with the host State's law is apparent also in cases involving treaty clauses that designate the host State's law, the BIT, other agreements, and general international law as the applicable law. In these cases, tribunals did not develop any doctrinal model like the one on the supplementary and corrective function of international law but proceeded to apply international law and the host State's law as it appeared appropriate to them.[62]

In *Maffezini* v. *Spain*, the Argentina-Spain BIT required the Tribunal to apply treaties, including the BIT, host State law, and general principles of international law.[63] The subject-matter of the dispute was the construction of a chemical plant. The Tribunal did not engage in a theoretical discussion on applicable law. It applied international law to some questions and host State law to other questions before it. For instance, on the issue of whether Spain was responsible for the

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[60] *Magyar Farming* v. *Hungary*, Award, 13 November 2019, paras 26.

[61] *Gosling* v. *Mauritius*, Award, 18 February 2020, paras 87–88.

[62] See already *Fedax* v. *Venezuela*, Award, 9 March 1998, paras 29, 30; *Antoine Goetz* v. *Burundi*, Award, 10 February 1999, paras 95-133.

[63] Argentina-Spain BIT Article 10(5).

actions of a State entity the Tribunal relied on the international law of State responsibility and on Spanish administrative law. Having reached an affirmative reply on attribution, it then applied the BIT. On the issue of an environmental impact assessment the Tribunal applied international law, Spanish legislation, a European Community directive, and the BIT. To the question of whether a contract had been perfected between the investor and the State entity, the Tribunal applied the Spanish Civil Code and the Spanish Commercial Code together with authoritative commentaries. On the issue of a statute of limitation under Spanish legislation, the Tribunal found that it did not apply to claims filed under the ICSID Convention.[64]

In *ConocoPhillips* v. *Venezuela*, Art. 9(5) of the Netherlands-Venezuela BIT contained a choice of law clause referring to (i) the law of the Contracting Party concerned; (ii) the provisions of this Agreement and other relevant Agreements between the Contracting Parties; (iii) the provisions of special agreements relating to the investments; (iv) the general principles of international law; and (v) such rules of law as may be agreed by the parties to the dispute. The Tribunal stated that Art. 9(5) of the BIT offered an enumeration of sources without any hierarchy. It said that the rule

> determines the possible applicable sources of law, but it does not determine which one is applicable in a particular context that is relevant for rendering the award. [65]

After stating that international law must prevail over domestic law, and that a State may not invoke its internal law to extract itself from an international law obligation[66] the Tribunal added that domestic law had its own proper role to play:

> This principle of priority of international law over domestic law has its own limitations. International law does not prevail over national law in a matter not governed by international law, in which case national law may apply, in accordance with Article 9(5) of the BIT.[67]

In *Infinito Gold* v. *Costa Rica*, Article XII(7) of the Canada-Costa Rica BIT provided for the application of the BIT itself, international law, and the host State's domestic law to the extent that it is not inconsistent with the BIT or the principles of international law. The Tribunal found that each of these sources had its proper place and that it was its task to determine which of these sources was applicable to a particular issue. It said:

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[64] *Maffezini* v. *Spain*, Award, 13 November 2000, paras 47–57, 67–71, 77, 83, 89–90, 92–93.

[65] *ConocoPhillips* v. *Venezuela*, Award, 8 March 2019, para 85.

[66] At para 88.

[67] At para 89.

> As Article XII(7) of the BIT does not allocate matters to specific sources of law, it is for the Tribunal to determine when an issue is subject to the BIT, other rules of international law or domestic law.[68]

The above examples illustrate the now prevalent position of an autonomous and equivalent application of international law and host State law. This pragmatic, fact-specific approach taken in arbitral jurisprudence means that tribunals identify the various legal issues before them in their proper legal contexts. They will then apply international law to some of these issues and domestic law to other issues. Tribunals do not have complete discretion in selecting international and domestic law. They have to identify the questions to which the respective legal systems apply.

6. International Law Without Host State Law?

The rise of treaty-based investment arbitration[69] has led to a shift of attention towards international law, often at the cost of the host State's law. Some tribunals established under treaties see their primary or even exclusive role in safeguarding the standards of protection established by these treaties. This has led them to focus on the relevant treaties while neglecting the host State's law.

The concentration on international law at the cost of host State law is underpinned by assumptions concerning an implicit choice of law by the parties. Some tribunals found that in cases involving disputes under BITs not containing a choice of law clause, the applicable law had to be the BIT itself and other rules of international law.[70]

Some tribunals have extended the reliance on a treaty as an implicit choice of law beyond the treaty itself to international law in general. In *AAPL* v. *Sri Lanka*, jurisdiction was based on the BIT between Sri Lanka and the United Kingdom. This BIT did not contain a provision on applicable law. The Tribunal found that by arguing their case based on the BIT, the parties had expressed their choice of the BIT as the primarily applicable law. Although it made some reference to the admissibility of recourse to Sri Lankan domestic legal rules,[71] the decision is dominated by considerations of international law. The Tribunal stated that the BIT was not a

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[68] *Infinito Gold* v. *Costa Rica*, Award, 3 June 2021, para 279. See also *Casinos Austria* v. *Argentina*, Award, 5 November 2021, paras 310-317.

[69] See R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law* (3rd ed, 2022) pp 9-10, 16-21, 364-369.

[70] *Wena Hotels* v. *Egypt*, Award, 8 December 2000, paras 78–79; *MTD* v. *Chile*, Award, 25 May 2004, paras 87, 112, 204; *LG&E* v. *Argentina*, Decision on Liability, 3 October 2006, paras 85, 97–98; *Saipem* v. *Bangladesh*, Award, 30 June 2009, para 99; *Bayindir* v. *Pakistan*, Award, 27 August 2009, paras 109–110.

[71] *AAPL* v. *Sri Lanka*, Award, 27 June 1990, para 22.

closed legal system but had to be seen in the wider juridical context of international law. This wider juridical context as well as the parties' submissions led it to apply customary international law.[72] The Tribunal said:

> 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 ...[73]

In *ADC* v. *Hungary*, the BIT did not contain a choice of law clause. The Tribunal found that consent to arbitration under the BIT implied a choice of the BIT as the applicable law. This, in turn, implied a choice of international law in general. The Tribunal said:

> In the Tribunal's view, by consenting to arbitration under Article 7 of the BIT ... the Parties also consented to the applicability of the provisions of the Treaty ... Those provisions are Treaty provisions pertaining to international law. That consent falls under the first sentence of Article 42(1) of the ICSID Convention ("*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties*"). The 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.[74]

In *Addiko* v. *Croatia*, the Tribunal held that the acceptance of the offer to arbitrate in the BIT would also implicitly bring about a choice of the treaty and international law as applicable law, even in the absence of an explicit choice of law clause. The Tribunal said:

> by accepting an offer to arbitrate contained in an investment treaty that does not contain an express applicable law clause, but which nonetheless is implicitly governed by its own terms and by international law under VCLT Article 2(1)(a), an investor thereby agrees to such applicable law for the proceedings. In these circumstances, there generally will be no need to proceed to the second sentence of Article 42(1) of the ICSID Convention[75]

Other tribunals too have held that reliance on a BIT implied a choice of international law.[76] The tendency of some tribunals to focus exclusively on international law appears to be influenced

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[72] At paras 18-24.

[73] At paras 21, 22.

[74] *ADC* v. *Hungary*, Award, 2 October 2006, para 290. Somewhat confusingly, the Tribunal quoted the choice of law clause from the BIT's provision on inter- State arbitration.

[75] *Addiko* v. *Croatia*, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020, para 260.

[76] *Middle East Cement* v. *Egypt*, Award, 12 April 2002, paras 86–87; *MTD* v. *Chile*, Award, 25 May 2004, paras 87, 112, 204; *CSOB* v. *Slovakia*, Award, 29 December 2004, paras 61–63; *Azurix* v. *Argentina I*, Decision on Annulment, 1 September 2009, paras 146-147; *Alpha Projektholding* v. *Ukraine*, Award, 8 November 2010, paras 228, 233.

by the erroneous perception that tribunals established under a treaty are restricted to claims based on that treaty's substantive provisions. In fact, in investor-State disputes, the type of claim for which a tribunal has competence depends on the Treaty's provision circumscribing jurisdiction.[77]

The fiction of a choice of international law in investment treaty arbitration has not found undivided support. Other tribunals have rejected the idea of an implicit choice of law through reliance on a BIT that does not contain a clause on applicable law. These tribunals found that they had to turn to the default rule in Article 42(1) of the ICSID Convention and apply host State law as well as applicable rules of international law.[78]

The Tribunal in *LG&E* v. *Argentina* discussed the proposition of an implicit choice of international law through the invocation of a BIT but rejected it. The Tribunal reasoned as follows:

> It is to be noted that the Argentine Republic is a signatory party to the Bilateral Investment Treaty, which may be regarded as a tacit submission to its provisions in the event of a dispute related to foreign investments. In turn, LG&E grounds its claim on the provisions of the Treaty, thus presumably choosing the Treaty and the general international law as the applicable law for this dispute. Nevertheless, these elements do not suffice to say that there is an implicit agreement by the Parties as to the applicable law, a decision requiring more decisive actions. Consequently, the dispute shall be settled in accordance with the second part of Article 42(1).[79]

In *MCI* v. *Ecuador*, the Claimants contended that reliance on the BIT implied a choice of law in accordance with Article 42(1) first sentence, pointing to the BIT itself and to international law.[80] The Respondent argued that the domestic law of Ecuador would be the applicable law because that would be the law agreed to by the parties for dealing with an alleged default under the contract.[81] The Tribunal decided that it could not find any evidence of an agreement on applicable law. It rejected the argument that there was an implicit choice of law and applied the provisions of the second sentence of Art. 42(1) of the ICSID Convention:

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[77] Generally, see C. Schreuer, Jurisdiction and Applicable Law in Investment Treaty Arbitration, 1 McGill Journal of Dispute Resolution (2014) 1; R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law* (3rd ed, 2022) pp 372-376; *Schreuer's Commentary on the ICSID Convention* (3rd ed, 2022, S. Schill *et al* eds) Art 25, paras 964-980.

[78] *Perenco* v. *Ecuador*, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, paras 532-534; *Quiborax* v. *Bolivia*, Award, 16 September 2015, paras 90–91; *E energija* v. *Latvia*, Award, 22 December 2017, para 792; *Gosling* v. *Mauritius*, Award, 18 February 2020, paras 87-88.

[79] *LG&E* v. *Argentina*, Decision on Liability, 3 October 2006, para 85 (footnote omitted). See also paras 93 and 99.

[80] *MCI* v. *Ecuador*, Award, 31 July 2007, para 214.

[81] At para 215.

> From the supporting documentation supplied by the parties during the proceedings, the Tribunal finds no evidence of any agreement on the law applicable to this dispute. Therefore, the Tribunal considers that it must respect the provisions of the second part of Article 42(1) of the ICSID Convention, i.e., in the absence of an agreement, the Tribunal shall apply Ecuadorian law, including its rules of private international law and such rules of international law as may be applicable. With respect to the latter rules, the Tribunal finds that the rules contained in the BIT, as well as the other pertinent rules of general international law, are applicable in the present case.[82]

The Tribunal in *Magyar Farming* v. *Hungary*, rejected the claimant's assertion that, in the absence of an explicit choice of law, only international law would apply to the merits since the claims were based on the BIT:

> ICSID jurisprudence supports the approach that, when the disputing parties have made no express choice-of-law, such choice cannot be implied from the mere fact that the claims arise under an international treaty. . . Therefore, in the absence of a choice-of-law provision in the BIT, or elsewhere for that matter, the default rule of the second sentence of Article 42(1) of the ICSID Convention applies.[83]

A decision to apply international law alone, to the exclusion of host State law, can have far-reaching consequences. In *Micula* v. *Romania II*, the Claimants' main contention was that Romania had failed to properly apply its tax legislation to their competitors, thereby putting the Claimants at a severe disadvantage. The Tribunal's finding on applicable law was terse. It referred to Article 42(1) of the ICSID Convention in a footnote and said:

> The Parties make no specific submissions on the applicable law. The law relevant to this case is found in the BIT between Sweden and Romania, the relevant provisions of the ICSID Convention and any relevant rules of international law applicable to the interpretation and application of the BIT as well as any rules of international law applicable in the relationship between Sweden and Romania.[84]

The *Micula II* Tribunal acknowledged that 'there may be circumstances in which a failure to enforce laws could amount to a denial of legitimate expectations and hence a breach of the obligation to provide fair and equitable treatment.' But it found that the Claimants had not established a failure by Romania to enforce its taxation laws.[85]

Instances of a focus on international law at the cost of host State law are not limited to cases in which the tribunals should have applied the second sentence of Article 42(1) of the ICSID Convention. In *CME* v. *Czech Republic*, the arbitration took place under the UNCITRAL Rules.

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[82] At para 217.

[83] *Magyar Farming* v. *Hungary*, Award, 13 November 2019, paras 25, 26.

[84] *Micula* v. *Romania II*, Award, 5 March 2020, para 348.

[85] At paras 367, 371, 447.

The Netherlands-Czech BIT's Article 8(6), dealing with the applicable law, referred to host State law, to the BIT and other treaties, special agreements relating to the investment and the general principles of international law.[86] A Partial Award offered no discussion of applicable law and of Article 8(6) of the BIT. The Tribunal examined the merits of the case exclusively from the perspective of international law, specifically the BIT. The Tribunal observed on several occasions that it had no duty to apply the host State's law.[87]

This decision attracted criticism and led to an unsuccessful attempt to have it set aside by a Swedish court.[88] The Tribunal's Final Award[89] defended its treatment of the applicable law in the Partial Award by stating that its only obligation was to 'decide on the basis of law'.[90] In clear contrast to its Partial Award, the Tribunal then proceeded with a detailed discussion of Czech law.[91]

7. Choice of International Law or Host State Law

Some provisions on applicable law do not combine international law and the host State's domestic law but refer to one or the other.

Some treaties, like the ECT, the NAFTA, the USMCA[92] and CETA[93] designate the respective treaties and applicable rules of international law as the law applicable in any arbitration between an investor and the State. Host State law is either not mentioned or relegated to the role of a 'fact'.[94]

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[86] Netherlands-Czech BIT (1991) Article 8(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.'

[87] *CME* v. *The Czech Republic*, Partial Award, 13 September 2001, paras 467, 469, 476, 590. For detailed discussion see C. Schreuer, Failure to Apply the Governing Law in International Investment Arbitration, 7 Austrian Review of International and European Law (2004) 147, 182-194.

[88] *The Czech Republic* v. *CME Czech Republic B.V.*, Svea Court of Appeal, 15 May 2003, 42 ILM 919 (2003). The Court found that 'it is sufficient to clarify whether the arbitral tribunal applied any of the sources of law listed in the choice of law clause'. At p 965.

[89] *CME* v. *Czech Republic*, Final Award, 14 March 2003.

[90] At paras 402-403, 406.

[91] At paras 452, 486, 492, 503-507, 627, 629, 631-632, 637-641, 642, 648.

[92] For the provisions on applicable law in the ECT, NAFTA and USMCA see footnotes 6 and 7 above.

[93] CETA Article 8.31(1): 'When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the *Vienna Convention on the Law of Treaties*, and other rules and principles of international law applicable between the Parties.'

[94] CETA Article 8.31(2) refers to 'the domestic law of the disputing Party as a matter of fact'.

It is questionable whether clauses of this kind can exclude the application of domestic law. A choice of international law cannot rule out considerations of domestic law entirely. Certain questions, such as the investment's legality, the investor's nationality or the existence of property rights can be decided only by reference to domestic law. The protection of property through an investment treaty or general international law is contingent upon the existence and extent of property rights as determined by the applicable domestic law.[95] Similarly, if an investor claims that its rights, arising from a contract, have been expropriated or have been subjected to unfair treatment, domestic law will also be relevant. It will be necessary to look at the existence of the contract and the rights arising under it in terms of the applicable domestic law. Therefore, the preliminary question of the existence of the rights in dispute cannot be answered without resort to a domestic system of law, most often the host state's law. Even if a claim is based on the violation of a BIT or other treaty, domestic law is likely to be relevant. The systematic violation by a State of its own law may amount to a violation of the fair and equitable treatment requirement.[96] Only after clarifying these issues under domestic law, is it possible to determine whether a breach of the international standards has actually occurred.[97]

Tribunals operating under treaties that contained choice of law provisions referring to international law only, did not hesitate to rely on the host States' law where necessary.[98]

In *Encana* v. *Ecuador*, the clause on applicable law in the Canada-Ecuador BIT referred only to the BIT itself and to applicable rules of international law. Nevertheless, the Tribunal found that the existence of the affected rights had to be established under the host State's domestic law. The Tribunal said:

> The relevant clause, Article XIII (7) of the BIT, provides only a tribunal exercising jurisdiction under the BIT "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or

[95] For detailed discussion see Z. Douglas, The Hybrid Foundations of Investment Treaty Arbitration, 74 The British Year Book of International Law (2004) 151, 197 *et seq*.

[96] *Zelena* v. *Serbia*, Award, 9 November 2018, paras 191-267. J. Hepburn, *Domestic Law in International Investment Arbitration* (2017).

[97] See S. Alexandrov, Breaches of Contract and Breaches of Treaty, *The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in* SGS v. Pakistan and SGS v. Philippines, 5 The Journal of World Investment & Trade (2004) 555, 562 (see especially footnote 43 with references to pertinent practice of the Permanent Court of International Justice).

[98] See also *Bayview* v. *Mexico*, Award, 19 June 2007, para 118.

> claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.[99]

In *Libananco* v. *Turkey*, the Claimant alleged a violation of the Energy Charter Treaty. Although Article 26(6) of the ECT refers to international law only,[100] the Tribunal had no doubt that it had to apply the host state's law to the issue of whether the property rights under dispute did, in fact, exist:

> … it is common ground between the Parties that Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an "Investment"[101]

Emmis v. *Hungary*[102] concerned a dispute about the non-renewal of a broadcasting license. The Tribunal operated under two BITs: Hungary's BITs with the Netherlands and with Switzerland. The BIT with the Netherlands contains a choice of law clause that refers to the BIT and other treaties as well as international law.[103] The BIT with Switzerland does not contain a provision on applicable law.

The decisive question before the Tribunal was whether, after the expiry of their old broadcasting license, the Claimants had any proprietary right that was capable of being expropriated.[104] The Tribunal had no doubt that this question had to be answered by reference to Hungarian law.[105] It said:

> [T]he existence and nature of any such rights must be determined in the first instance by reference to Hungarian law, before the Tribunal proceeds to decide whether any such rights can constitute investments capable of giving rise to a claim for expropriation for the purpose of its jurisdiction under the Treaties and the ICSID Convention.[106]
>
> In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law.[107]

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[99] *Encana* v. *Ecuador*, Award, 3 Feb. 2006, para 184.

[100] See footnote 6.

[101] *Libananco* v. *Turkey*, Award, 2 September 2011, para 112. See also paras 385 *et seq*.

[102] *Emmis Intl.* v. *Hungary*, Award, 16 April 2014.

[103] Article 10(2) of the Hungary-Netherlands BIT, dealing with investor-state arbitration, incorporates Article 9(6), dealing with state-state arbitration. Article 9(6) states: 'The 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.'

[104] At paras 45, 46.

[105] At para 48

[106] At para 149.

[107] At para 162.

The Tribunal did not enter a discussion of the applicable law but found that it was its task to determine the contents of the domestic law in question subject to the guidance of the municipal courts.[108] A searching analysis of Hungarian law led the Tribunal to the conclusion that, after the expiry of their old license, the Claimants had no proprietary rights that Hungary could have expropriated and dismissed the claim.[109]

The above examples demonstrate that a rule on choice of law that does not include domestic law is not an obstacle to its incidental application.

The obverse situation of a choice of only domestic law is rare but not unknown. It arises in cases involving choice of law clauses in investment-related contracts.

In such a situation, international law may be applicable as part of the chosen domestic law.[110] But reliance on the uncertainties of a particular domestic legal system in its treatment of international law would not be a satisfactory standard for an international tribunal.[111]

The exclusion of international law through the choice of a particular domestic law cannot be presumed. Doing so would lead to the untenable consequence that an investor, by agreeing to the application of the host State's law, waives the protection of international law.

In *LETCO* v. *Liberia*, the Tribunal determined that a reference to Liberian legislation in the concession agreement 'appears to indicate an express choice by the parties of the Law of Liberia'[112]. After confirming the general compliance of Liberian law with the generally accepted principles of public international law, the Tribunal proceeded to examine the legality of the revocation of the concession and the question of damages under both Liberian and international law. It concluded that 'both according to international law and, more importantly, Liberian law, LETCO is entitled to compensation for damages'[113].

In *SPP* v. *Egypt*, there was disagreement over whether the parties had made a choice of Egyptian law and, consequently, whether international law was applicable. The Tribunal declared this disagreement immaterial, holding that the same sources of law would have to be applied either

[108] At para 175.

[109] At paras 178-255.

[110] See *Metal-Tech* v. *Uzbekistan*, Award, 4 October 2013, para 120.

[111] See *Schreuer's Commentary on the ICSID Convention* (3rd ed, 2022, S. Schill *et al* eds) Art 42, para 155.

[112] *LETCO* v. *Liberia*, Award, 31 March 1986, 2 ICSID Reports 358.

[113] At p 372.

way. It found that 'even accepting the Respondent's view that the Parties have implicitly agreed to apply Egyptian law, such an agreement cannot entirely exclude the direct applicability of international law in certain situations.'[114]

The Tribunal proceeded to apply international law to defeat an Egyptian argument that certain acts of its officials were invalid under Egyptian law. It held that these acts created expectations protected by the application of the principle of international law establishing the international responsibility of States for unauthorized or *ultra vires* acts of officials having an official character:

> Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts.[115]

The Tribunal applied international law also to other questions, such as the protection against uncompensated expropriation, the calculation of damages, and interest.[116]

In *Cambodia Power Company* v. *Cambodia,* the relevant contract contained a choice of English law. The Tribunal found that to preclude the application of customary international law, the parties would have to say so expressly. Otherwise, customary international law would inevitably be relevant in the context of an investment arbitration as a minimum standard:

> Customary international law is inevitably relevant in the context of foreign investment (and ICSID arbitration), given that it comprises a body of norms that establish minimum standards of protection in this field. It is simply unrealistic to assume that the parties to a foreign investment contract such as those in question here would have intended to exclude such inherent protection by simply choosing an applicable national law.[117]

This practice shows a general reluctance to abandon international law in favour of the host State's or another domestic system of law. The complete exclusion of standards of international law as a consequence of an agreed choice of a domestic legal system cannot be presumed. A

[114] *SPP* v. *Egypt*, Award, 20 May 1992, para 80.

[115] At para 83.

[116] At paras 153 *et seq*., 190, 222 *et seq*.

[117] *Cambodia Power Company* v. *Cambodia*, Decision on Jurisdiction, 22 March 2011, para 334

foreign investor does not, by assenting to a choice of law, sign away the minimum standards for the protection of aliens and their property developed in customary international law.[118]

Therefore, theoretical considerations and practice militate in favour of the preservation of the international minimum standard, even in the absence of a reference to international law in a choice of law clause. The international minimum standard of protection for aliens is a set of mandatory rules that exists independently of any choice of law made for a specific transaction. It constitutes a framework of public order within which such transactions operate. Their obligatory nature is not open to the disposition of the parties.

8. Conclusions

Since the drafting of the ICSID Convention, there has been a clear shift from domestic law to international law. The idea of a mere supplementary or corrective role of international law has given way to a more balanced approach whereby both international and domestic law have their proper place. The rise of investment treaties has led some tribunals to focus entirely on international law at the cost of host State law.

Experience shows that both international law and domestic law are essential to investment activities by foreign investors. Clauses on applicable law that refer to both systems of law mirror this situation. Even clauses on applicable law that designate only one or the other are unable to overcome this reality.

The observation made by Emmanuel Gaillard and Yas Banifatemi in 2003 is even more incisive today. 'And' means 'and' not only as a matter of treaty interpretation but also as a characterization of the legal situation of investors abroad.

[118] See also E. Lauterpacht, The World Bank Convention on the Settlement of International Investment Disputes, *in*: Recueil d'études de droit international en hommage à Paul Guggenheim (1968) 658; P.T. Muchlinski, Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes, *in*: Control over Compliance with International Law (W.E. Butler ed., 1991) 175 at 186.