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

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CHOICE OF LAW UNDER Article 42(1) of the Washington Convention is no doubt one the most important questions in ICSID arbitration. However, until recently, the debate on this issue had somewhat fossilized into the general understanding that ICSID tribunals, which are bound by the law chosen by the parties for the resolution of their dispute, should, in the absence of a choice, apply the law of the host State and the rules of international law which either fill the perceived gaps in the law of the host State or prevail over the applicable rules of domestic law which are inconsistent with the requirements of international law.

As any arbitral process, ICSID arbitration recognizes the principle of party autonomy at all stages of the procedure. Choice of law in ICSID arbitration therefore follows the general principle recognizing the parties' freedom to select the substantive rules applicable to the merits of the dispute. The first sentence of Article 42(1) of the Washington Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be

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agreed by the parties." The choice of law achieved in an arbitration agreement may include any "rules of law" selected by the parties, *i.e.* any national legal system or selected rules of that system, general principles of law, rules common to certain legal systems, or international law.[1] In this context, international law may apply either directly, possibly in conjunction with the law of the host State,[2] or indirectly as incorporated into the selected domestic law. Similarly, in arbitrations initiated on the basis of the host State's law or the treaties for the protection and promotion of foreign investments, either bilateral (BITs) or multilateral (such as the NAFTA or the Energy Charter Treaty),[3] it can be the case that such instruments contain their own clause on the applicable law.[4] In such a situation, the investor's acceptance of the general offer made by the

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[1] On the parties' degree of freedom to choose the applicable rules of law pursuant to the first sentence of Article 42(1) of the Washington Convention, see generally A. Broches, Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application, XVIII Y.B. Com. Arb. 627 (1993), at 667 (paras. 113-114); I.F.I. Shihata and A. R. Parra, Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention, 9 ICSID Rev.—FILJ 183 (1994), at 188 *et seq.*; C.F. Amerasinghe, Dispute Settlement Machinery in Relations Between States and Multinational Enterprises—With Particular Reference to the International Centre for Settlement of Investment Disputes, 11 Int'l Law. 45 (1977), at 54-55; Christoph Schreuer, The ICSID Convention: A Commentary (2001), at 558 *et seq.*

[2] *See, e.g.,* Kaiser Bauxite v. Jamaica (ICSID Case ARB/74/3), Decision on Jurisdiction and Competence, July 6, 1975, 1 ICSID Rep. 296 (1993), at 301; AGIP S.p.A. v. The Government of the People's Republic of the Congo (ICSID Case No. ARB/77/1), Award, Nov. 30, 1979, (hereinafter *AGIP* Award), 1 ICSID Rep. 306 (1993), at 318 (paras. 43-47).

[3] Under Article 1131(1) of the North American Free Trade Agreement (NAFTA), entered into force on January 1, 1994, "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Under Article 26(6) of the Energy Charter Treaty entered into force on April 16, 1998, "[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." *See also* Article 9(5) of the Colonia Protocol of the Common Market of the South (MERCOSUR), signed on January 17, 1994, "[t]he arbitral tribunal shall decide the disputes in accordance with the provisions of this Protocol, the law of the Contracting Party that is a party to the dispute, including its rules on conflict of laws, the terms of any specific agreements concluded in relation to the investment, as well as the relevant principles of international law." (Unofficial translation)

[4] This possibility was envisaged during the negotiation of the Washington Convention with respect to the case where the law applicable to a dispute is specified in a State legislation or in a bilateral treaty, *see* Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, Dec. 16-20, 1963, Document No. 25, *in* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention, Vol. II (hereinafter History of the ICSID Convention) (1968), at 267 ("The Chairman remarked that...it was likewise open to the parties to prescribe the law applicable to the dispute. Either stipulation could be included in an agreement with an investor, in a bilateral agreement with another State, or even in a unilateral offer to all investors, such as might be made through investment legislation.").

State constitutes the agreement between the parties set forth in the first sentence of Article 42(1).[5] A number of bilateral investment treaties, for example, contain clauses on the applicable law which can be broadly categorized as follows.[6] Almost always, the dispute is to be decided "in accordance with the provisions of the Agreement" itself.[7] Frequently, the BIT is applicable in conjunction with "the principles of international law"[8] or "the applicable rules of international law."[9] The choice of law may include, in addition, the law of the

[5] In this context, see, on the concept of the "internationalization" of the investment relationship, the award rendered by the Arbitral Tribunal chaired by Professor Weil in Antoine Goetz et al. v. Republic of Burundi (ICSID Case No. ARB/95/3), Award, Feb. 10, 1999 (hereinafter *Antoine Goetz* Award), at paras. 68-69; French original *in* 15 ICSID Rev.—FILJ 457 (2000), at 488-89; English translation *in* XXVI Y.B. Com. Arb. 24 (2001), at 31:

> The Bilateral Treaty on investment protection is not only the basis for the jurisdiction of the Centre and of the Tribunal; it also determines the applicable law. The present case is one of the first ICSID cases where this happens. Considering the growing use of choice of law clauses in investment treaties, as well as their considerable variety, such situation is equally likely to occur with increasing frequency. It may be interesting to remark on this subject that choice of law clauses in investment protection treaties frequently refer to the provisions of the treaty itself, and, more broadly, to international law principles and rules. This leads to a remarkable comeback of international law, after a decline in practice and jurisprudence, in the legal relations between host States and foreign investors. This internationalization of investment relations, be they contractual or not, surely does not lead to a radical 'denationalization' of the legal relations born of foreign investment, to the point that the national law of the host State is totally irrelevant or inapplicable in favour of the exclusive role played by international law. It merely means that simultaneously—one could say in parallel—these relations depend on both the sovereignty of the host State on its national law and its international obligations.

[6] Regarding BITs in general, see Rudolph Dolzer and Margrete Stevens, Bilateral Investment Treaties (1995). Concerning the reliance on a treaty containing a clause on the applicable law, *see* C. Schreuer, *supra* note 1, at 581-83.

[7] *See, e.g.,* BITs entered into by Argentina, Australia, Belgium and Luxembourg (most BITs with exceptions such as the BIT with Mongolia), Canada, Chile, China (most BITs with exceptions such as the BIT with Australia), Costa Rica, Ecuador, Spain; *see also* BITs entered into by Bulgaria (with Albania, Ghana, the Slovak Republic), Cuba (with Mexico), the Czech Republic (with Italy, Ireland, Switzerland, Paraguay), Egypt (with Sri Lanka, Uganda), France (with Algeria, the Dominican Republic, Honduras, Hungary, Mexico, Uruguay), Germany (with Kuwait, India, Peru, Zimbabwe), Greece (with Latvia), Italy (with Venezuela), Malaysia (with Vietnam), Mexico (with Portugal), the Netherlands (with Mexico, Venezuela, Zimbabwe), Panama (with Uruguay), Paraguay (Romania), Peru (with Paraguay, Romania), Poland (with Estonia, France, Latvia, Lithuania), Portugal (with Venezuela, Turkey), Switzerland (with Mexico, Paraguay, Peru), United Kingdom (with Lebanon).

[8] *See, e.g.,* BITs entered into by Argentina, Belgium and Luxembourg, Chile, China, Costa Rica, Ecuador, Spain (with the exception of the BIT with Mexico), *supra* note 7; see also BITs entered into by Bulgaria, the Czech Republic, Egypt, Poland, France, Germany, Italy, Panama, Peru, *supra* note 7.

[9] *See, e.g.,* the BITs entered into between, on the one hand, Canada and, on the other hand, Armenia, Barbados, Croatia, Ecuador, Egypt, Latvia, Lebanon, Panama, Philippines, South Africa, Romania, Thailand, Trinidad and Tobago, Ukraine, Uruguay and Venezuela. *See also* BITs entered into by Mexico, the Netherlands (with the exception of the BIT with Venezuela), Paraguay, Switzerland, United Kingdom, *supra* note 7.

host State.[10] Some BITs do not mention the law of the host State and refer only to the treaty itself and to the applicable rules of international law.[11] Some BITs refer to the BIT, the law of the host State and particular agreements between the parties, but not to the rules of international law.[12]

In all these situations, the issue boils down to the arbitral tribunal's duty to respect the choice of law validly made by the parties[13] pursuant to the first sentence of Article 42(1) of the Washington Convention. In other words, any issue of interpretation by the tribunal would arise in relation to the parties' intention,[14] as opposed to an interpretation of the Washington Convention itself.[15]

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[10] *See, e.g.*, BITs entered into by Argentina, Belgium and Luxembourg, Chile (with exceptions such as the BITs with Greece and Norway), China, Costa Rica, Ecuador (with the exception of the BIT with Canada), Peru, Spain, *supra* note 7; *see also* BITs entered into by Bulgaria, Egypt, France (with the exception of the BITs with the Dominican Republic, Hungary, Mexico), Germany, Italy, Paraguay, Poland, Switzerland (with the exception of the BIT with Mexico), *supra* note 7.

[11] In addition to the NAFTA and the Energy Charter Treaty (*supra* note 3), see BITs entered into by Canada (*supra* note 9); however, the BITs between Canada and Argentina and between Canada and Costa Rica refer also to the law of the host State; in the latter case, the law of the host State applies only insofar as it is not inconsistent with the BIT or the principles of international law). *See also* the BITs entered into between Mexico and the Netherlands, Mexico and Spain, Mexico and Switzerland, the Netherlands and Zimbabwe, or between France and Poland.

[12] *See, e.g.*, the BITs entered into between Australia on the one hand and, on the other hand, the Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Peru, Philippines, Poland, Romania and Vietnam. As an exception, however, the BIT entered into between Australia and Argentina is internationalized and refers also to the "relevant principles of international law." *See also* the BIT entered into between Belgium/Luxembourg and Mongolia.

[13] On the arbitrators' duty to respect the choice of the parties, *see* E. Gaillard, The Role of the Arbitrator in Determining the Applicable Law, *in* The Leading Arbitrators' Guide to International Arbitration (Lawrence Newman, ed., 2003).

[14] This includes, of course, the interpretation of the intention of the parties with respect to their choice of international law. The fact that, in this context, some precedents have applied international law as having a complementary or corrective role is not the issue here: the sole issue in such cases is what the parties have intended when choosing international law as the applicable law. *See* the *AGIP* Award, *supra* note 2. In accordance with the express choice of the applicable law by the parties, the Tribunal had to apply "the law of the Congo, supplemented if need be by any principles of international law." *Id.* at 318 *et seq.* (paras. 43 *et seq.*). The Tribunal held that "the *use of the word 'supplemented' signifies* at the very least that recourse to principles of international law can be made either to fill a lacuna in Congolese law, or to make any necessary additions to it." *Id.* at 323-24 (para. 83) (emphasis added). *See also* the *Antoine Goetz* Award, *supra* note 5, at paras. 97-98 (English translation *in* XXVI Y.B. Com. Arb. 24 (2001), at 37).

[15] An arbitral tribunal may find inspiration in the ICSID case law regarding the interpretation of the second sentence of Article 42(1) when the wording of the choice of law clause of the BIT is similar or exactly the same as the second sentence of Article 42(1). *See, e.g.*, Article 9(3) of the BIT between the Netherlands and Zimbabwe of December 11, 1996, which provides that "[t]he arbitral tribunal to which such legal dispute is submitted shall, unless the parties to the dispute agree otherwise, decide in accordance with the laws of the Contracting Party—party to the dispute—(including its rules on the conflict of laws) *and such rules of international law as may be applicable*" (emphasis added). In this case, however, the tribunal should interpret and give effect to the provision under the BIT and not to Article 42(1) of the Convention as such.

These cases, however, are not the most frequent ones: a very large number of BITs do not provide for any choice of law.[16] Given the ever growing number of arbitrations initiated on the basis of investment treaties[17] (which also contributes to the phenomenon of the "collectivization" of the ICSID dispute settlement mechanism),[18] the second sentence of Article 42(1) gains considerable importance. Accordingly, the issue of its interpretation becomes central to ICSID arbitration.

In the absence of a provision on the applicable law in an investment treaty, there is, by definition, no prior agreement on the applicable law between the parties to an ICSID arbitration. In this context—and unless the parties to the arbitration unequivocally agree otherwise during the course of the proceedings[19]—the law applicable to the merits of the dispute is necessarily the law of the host State and international law, pursuant to the second sen-

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[16] The majority of BITs entered into by countries such as the United States, the United Kingdom, France or Germany do not contain a clause on the applicable law regarding investment disputes between one of the contracting States and the investors of the other contracting State. As of October 6, 2003, none of the 38 BITs entered into by the United States, and which are in force, contain a clause on the applicable law; such a clause can be found in only 12 out of 77 BITs concluded by France (and in force), in only 6 out of 85 BITs concluded by the United Kingdom (and in force), and in only 8 out of the 62 available BITs concluded by Germany (and in force).

[17] The number of ICSID arbitrations initiated on the basis of a treaty for the promotion and protection of investments has evolved from 2 in 1994 to 30 in 2003. *See* Emmanuel Gaillard, La jurisprudence du CIRDI (2004).

[18] On the "collective" nature of investment treaty arbitration, *see* E. Gaillard, L'arbitrage sur le fondement de traités de protection des investissements, 2003 Revue de l'arbitrage 853, 859-62 (para. 11). With the extraordinary growth of arbitrations initiated on the basis of investment treaties, the protection accorded to investors has equally evolved towards standardization. Indeed, each BIT applies to a whole class of investors having common characteristics, provided that they meet the requirements of the treaty. This aspect is reinforced by the fact that States usually enter into more than one BIT. Although the wording may vary from one treaty to another, the provisions that define the protection regime, for example provisions relating to fair and equitable treatment or to expropriation are identical or similar; in addition, some provisions such as "fork in the road" clauses or "umbrella" clauses may be incorporated in some treaties and not in others, which equally defines a family of BITs. On these aspects, see also R. Dolzer and M. Stevens, *supra* note 6. Because of these similarities and the closeness of the legal positions of investors vis-à-vis the host States, an arbitral case law has emerged which concerns the same legal issues (such as the definition of an investment or the determination of the applicable law). Another reason for the increasingly collective nature of ICSID arbitration is that, under a particular BIT, the same events may give rise to multiple arbitrations, with the noticeable case of the economic and financial crisis in Argentina and the effects of the "Emergency" Law No. 25561 of January 6, 2002 abandoning the currency convertibility system and devaluing the peso and ending the US dollar peg, which has given rise to 24 ICSID arbitrations as of October 10, 2003. Finally, the "most favored nation" clause incorporated in many BITs further contributes to enabling foreign investors to benefit from the protection regime accorded by the host State to the investors of others countries under parallel BITs.

[19] In the first ICSID arbitration initiated on the basis of a BIT, the Tribunal had concluded to the choice of law through the parties' submissions. *See* Asian Agricultural Products Limited v. the Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/87/3, Award), June 27, 1990, 4 ICSID Rep. 246 (1997), at 256-57 (paras. 18-24), and the dissenting opinion of A. Asante, *id.*, at 298-99. *See also* C. Schreuer, *supra* note 1, at 576-81.

tence of Article 42(1): "[I]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable."[20] International law is thus part of the equation from the outset. The task for the tribunal deciding on any dispute pursuant to the second sentence of Article 42(1) is therefore to determine the respective roles of the law of the host State and of international law.

The determination of the respective roles of domestic law and international law in the second sentence of Article 42(1) has both practical and symbolic consequences. As a practical matter, the application of the rules of international law may have a major impact on the result of the arbitration. In fact, it could sometimes make the difference between winning or losing the case. For example, as regards the issue of the quantification of damages, if a host State is held liable for having breached its treaty obligation by proceeding with the expropriation of a foreign investment, the appropriate compensation under international law may include the award of compound interest running from the date of the expropriation, while the law of the host State may grant simple interest. It goes without saying that the difference in compensation may be significant.[21]

In addition, the primary applicability of the law of the host State is often perceived by capital-importing States as a symbolic guarantee that their law—which they assume to be more favorable—would be given maximum effect. However, it is by no means obvious that, in every case, the application of the law of the host State, as opposed to international law, is necessarily favorable to the host State and unfavorable to the investor.[22] Conversely, it is

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[20] On Article 42(1), *see* C. Schreuer, *supra* note 1, at 549 *et seq.*

[21] On the *Wena v. Arab Republic of Egypt* case, in which the issue arose in those terms, *see infra,* part III.

[22] *See, e.g.,* the *Klöckner v. Cameroon* case, in which international law could arguably have provided to the *ad hoc* Committee a legal basis for the investor's duty of full disclosure to its partner. *See* Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2), Award, Oct. 21, 1983 (hereinafter *Klöckner* Original Proceeding Award), 2 ICSID Rep. 9 (1994), at 59-60. Another example can be found in situations in which the law of the host State does not accept the doctrine of unforeseen events *(théorie de l'imprévision),* national legal systems providing very contrasted answers on this issue: in certain circumstances, a host State may find itself in a better position in arguing that a given issue is not governed by its own law but by international law, which recognizes the principle of *rebus sic stantibus* (*see, e.g.,* International Court of Justice, Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Judgment, Feb. 2, 1973, 1973 I.C.J. 3, at 18 (para. 36); Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, Award, Apr. 12, 1977, VI Y.B. Com. Arb. 89 (1981), at 103 and 111).

far from clear that the application of the rules of international law is always in the investor's favor.[23]

The perception that the law of the host State should be given maximum effect has nevertheless been the basis for the theory according to which the applicability of international law should be restricted to cases where the law of the host State contains gaps on particular issues brought before the tribunal or where the law of the host State is inconsistent with international law (I). A second theory, also motivated by the desire to give maximum effect to the law of the host State, has limited even further the role of international law to the correction of only those rules of domestic law which collide with fundamental norms of international law (II). There is, however, room for a third view of the role of international law in the second sentence of Article 42(1), that of a truly independent body of substantive rules which may be applied by itself, and not through the filter of the law of the host State (III). Each of these theories will be examined in turn.

I. "AND" MEANS: "AND, IN CASE OF *LACUNAE,* OR SHOULD THE LAW OF THE CONTRACTING STATE BE INCONSISTENT WITH INTERNATIONAL LAW"

A cursory reading of the literature and case law on the topic might lead to the conclusion that there exists a quasi-unanimous understanding according to which, in the absence of a choice of law by the parties, the role of international law is limited to supplementing the law of the host State where it contains *lacunae* or to correcting it where it is inconsistent with international law. Under this reading, the word "and" in the second sentence of Article 42(1) is understood as meaning "and, in case of *lacunae,* or should the law of the Contracting State be inconsistent with international law."

The proposition that international law has a dual "complementary" and "corrective" role was formulated for the first time by the *ad hoc* Committee in the *Klöckner* case and has been reiterated by a number of ICSID awards and decisions since. Under this approach, international law has only a subsidiary role as compared to the law of the host State in that it is viewed

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[23] *See, e.g., Antoine Goetz* Award, *supra* note 5, at para. 99:

> The question of the validity of the acts of a State does not necessarily have the same answer under the national law of that State and under international law. In *Elettronica Sicula SpA (ELSI) v. Italy* the International Court of Justice stated that "the act of a public authority may have been unlawful in municipal law does not necessarily mean that it was an act unlawful in international law or a breach of treaty or otherwise."
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> (English translation *in* XXVI Y.B. Com. Arb. 24 (2001), at 37-38.)

through the filter of, and *after* an investigation into, the law of the host State. This proposition is, however, not supported by the History of the Washington Convention.

A. The History of the Convention does not support the view according to which international law could come into play only in cases of lacunae *or inconsistency*

The main justification for the view according to which international law is limited to cases of *lacunae* or inconsistency is that it is presumed to reflect the intention of the drafters of the Washington Convention, as evidenced in the *travaux préparatoires* of the Convention. In particular, one excerpt of the History of the Convention is often quoted regarding the circumstances in which the relevant part of the provision which became Article 42(1) was adopted: "[t]he final provision relating to international law (which would bring it into play *both in the case of a lacuna in domestic law as well as in the case of inconsistency between the two*) was adopted by a majority of 24 to 6."[24]

The reference to this quotation as an indication of the intention of the drafters of the Convention regarding the meaning of "and such rules of international law as may be applicable" under Article 42(1), second sentence, raises two issues. First, Article 42(1) of the Washington Convention, which is a treaty provision, should be interpreted in accordance with the rules of interpretation of international treaties. In this respect, Article 31(1) of the Vienna Convention of 1969 on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose."[25] It is only when the text to be interpreted (in this case, "and such rules of international law as may be applicable") is obscure that the supplementary rule of Article 32 of the Vienna Convention comes into play, which stipulates that:

> [r]ecourse may be had to supplementary means of interpretation, *including the preparatory work of the treaty and the circumstances of its conclusion,* in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

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[24] Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 804 (emphasis added).

[25] Regarding issues of interpretation, *see, e.g.*, International Court of Justice, Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, Feb. 3, 1994, 1994 I.C.J. 6, at 21-22 (para. 41) (emphasis added).

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable. (Emphasis added)

As a result, one could doubt the necessity of primary recourse to the History as the principle means of interpretation of the second sentence of Article 42(1) of the Convention.

Second, and in any event, the History of the Convention does not support the proposition that international law is *limited* to the supplemental and corrective functions under Article 42(1), second sentence. A close study of the History shows that the main focus of the discussions regarding Article 42 was whether, in the absence of an agreement of the parties on the applicable law, international law should constitute an option available to the arbitral tribunal altogether.

From the outset, international law as a source of law available to an international tribunal[26] was inserted into the drafts on the applicable law, although the conditions of its applicability were not well defined:[27] "[T]he Arbitral Tribunal shall decide the dispute submitted to it in accordance with *such rules of law, whether national or international,* as it shall determine to be applicable."[28] The word "or,"[29] which was not intended to preclude the applica-

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[26] *See* Summary Record of Proceedings, Addis Ababa Consultative Meeting of Legal Experts, Dec. 16-20, 1963, Document No. 25, *in* History of the ICSID Convention, *supra* note 4, at 267-68:

> The Chairman replied that unless parties specifically restricted the tribunal, it would look into all the legal aspects of any dispute brought before it from the standpoint not only of domestic, but also of international law, to see if the rights of either party had been infringed. The tribunal would be in the same position as *any international tribunal* before which, say, the investor's State had brought a claim based on the expropriation of its national's property.... The Chairman [pointed out] that unless the parties had agreed to restrict the competence of the tribunal to determining the validity of the act of expropriation by reference to municipal law, the tribunal could look into municipal law as well as international law. *This was the very purpose of going before an international tribunal.* (Emphasis added).

[27] For a summary of the debates over the applicability of international law, *see* Chairman's Report on the Regional Consultative Meetings of Legal Experts, July 9, 1964, Document No. 33, *in* History of the ICSID Convention, *supra* note 4, at 569-71.

[28] Article VI, Section 5(1), *in* Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, June 5, 1962, Document No. 6, *in* History of the ICSID Convention, *supra* note 4, at 41 (emphasis added). The draft remained the same and was renumbered as Article IV, Section 4(1) of the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 15, 1963, Document No. 24, *in* History of the ICSID Convention, *supra* note 4, at 214.

[29] *See also* Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, Dec. 16-20, 1963, Document No. 25, *in* History of the ICSID Convention, *supra* note 4, at 259 ("The Chairman replied that...the Convention left it to the Tribunal in the absence of a stipulation by the parties, to decide whether a claim was subject to national or international law.").

bility of international law together with domestic law,[30] was later replaced by the word "and":[31] "[T]he Tribunal shall decide the dispute submitted to it in accordance with such rules of national and international law as it shall determine to be applicable. The term 'international law' shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice."[32]

Throughout the debates, however, some delegations pleaded in favor of the primary applicability of domestic law,[33] in particular the law of the host State,[34] excluding in whole or strictly limiting the applicability of international law.[35] Other delegations—notably from capital-exporting countries—

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[30] *Id.* at 267-68.

[31] *See* the position expressed by the representative of France, *in* Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, Feb. 17-22, 1964, Document No. 29, *in* History of the ICSID Convention, *supra* note 4, at 421 ("Mr. Deguen (France) suggested that the words 'whether national or international' should be amended to read 'national and international' in the penultimate line of Section 4(1)."). For an explanation of the reasons for such a change, see the position expressed by A. Broches in the Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 800 ("[T]he earlier draft of the Convention referred to 'national *or* international law'. The present draft uses the word 'and' so as to avoid the impression that international law would always apply or that it was necessarily a question of alternatives." (emphasis in original)).

[32] Article 45(1), Draft Convention: Working Paper for the Legal Committee, Sept. 11, 1964, Document No. 43, *in* History of the ICSID Convention, *supra* note 4, at 630.

[33] *See, e.g.*, the comments of Mr. Brown (Tanganyika) *in* Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, Dec. 16-20, 1963, Document No. 25, *in* History of the ICSID Convention, *supra* note 4, at 267.

[34] Rather than, for example, the law of the nationality or domicile of the investor. *See* the position of the representative of Thailand, *in* Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, Apr. 27-May 1, 1964, Document No. 31, *in* History of the ICSID Convention, *supra* note 4, at 466. *See also*, for a position taken on the new draft of Article 45 referring to the applicability of "such rules of national and international law," the Turkish position *in* Comments and Observations of Member Governments on the Draft Convention, Nov. 23, 1964, Document No. 45, *in* History of the ICSID Convention, *supra* note 4, at 663; *see also* the observations of the representative of Thailand, *id.* at 660; and of Vietnam, *id.* at 669. For the position that the rules of conflict of laws might bring a different law into operation, *see, e.g.*, A. Broches' comments *in* Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 800.

[35] Some delegations first pleaded for the exclusive applicability of domestic law, *see, e.g.*, the position of the representative of Ceylon, *in* Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, Apr. 27-May 1, 1964, Document No. 31, *in* History of the ICSID Convention, *supra* note 4, at 501; the position of the representative of India, *id.* at 506 and 514; the position of the representative of China, *id.* at 513-14; the position of the representative of Iran, *id.* at 516.

Regarding draft Section 4(1) and the issue of the applicability of international law, *see* 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 12 (P. Sanders ed., 1967), at 13-15.

Regarding draft Article 45(1) which included "such rules of national and international law," *see* the positions taken by the representatives of Yugoslavia and Ceylon *in* Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 801-02 ("[T]he reference to international law should be omitted."). *See also*, on the same draft Article 45, the different position of the representative of India, *id.* at 802-03 ("Mr. Lokur (India) expressed some concern that the provisions of Article 45 might give to the Tribunal a complete freedom

expressed the view that it would be difficult to exclude international law.[36] It is against this background that the Legal Committee debated the option of international law. The question of the role—either as a supplemental or as a corrective device—of international law was not debated as such, but was essentially put forward by those delegations opposed to the insertion of international law in the draft and purporting to limit its applicability "to complement or supplement national law,"[37] to "cases where the national law of the host country would be absolutely silent on the issue in dispute,"[38] to "the case of a *lacuna* in domestic law,"[39] to "cases of obscurity or lacunae in the domestic

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to apply either national or international law. In his opinion, investments are governed by the national law of the host State and he did not think that international law should be applicable....").

The position was also taken by these representatives that the law of the host State should apply "first": for a position taken on the new draft of Article 45 referring to the applicability of "such rules of national and international law," *see, e.g.*, the Chinese position *in* Comments and Observations of Member Governments on the Draft Convention, Nov. 23, 1964, Document No. 45, *in* History of the ICSID Convention, *supra* note 4, at 653 ("...Article 45 should be amended to the effect that the law of the host country shall first apply in the absence of an agreement between the parties to the contrary") and *in* Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 800-01. *See also* the position taken by the representative of Spain, *id.* at 801 ("[P]rovision should be made for the application of the national law of the country where the investment takes place with only one exception, namely, that the national legislation would not be applied when it would clearly violate admitted principles of international law."). *See also* the position taken by the representative of the Philippines (limiting the recourse to international law to cases of discrimination), *in* Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 800; for a similar position but favoring the subsidiary applicability of international law as incorporated into domestic law, see the position by the representative of Peru, *id.* at 802.

[36] *See, e.g.*, the position expressed by the representatives of the Federal Republic of Germany and Austria, *in* Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, Feb. 17-22, 1964, Document No. 29, *in* History of the ICSID Convention, *supra* note 4, at 421; *see also* the position of the representative of Thailand, *in* Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, Apr. 27-May 1, 1964, Document No. 31, *in* History of the ICSID Convention, *supra* note 4, at 466.

Regarding the discussions of Article 45 of the draft Convention, see also the position by the representative of Germany, *in* Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 801 ("[T]here are many countries in which the national courts must apply national law as well as international law, and it would seem strange if a tribunal which was admittedly international would be precluded from the application of international law."); by the representative of the United States, *id.* at 803 ("Mr. Gourevitch (United States) said that he considered Article 45 satisfactory and pointed out that national law would usually be applied. He added that is was important to provide for the possibility of applying international law since, under Article 28, Contracting States would have to waive diplomatic protection."); and by the representative of Austria, *id.* ("Mrs. Villgrattner (Austria) said that the possibility of applying international law was also desirable in view of the provisions of Article 57 [recognition and enforcement of awards].").

[37] *See* Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 802 (position by the representative of Dahomey).

[38] *Id.* at 802-03 (position by the representative of India).

[39] *Id.* at 803 (position by the representative of Costa Rica).

legislation of the State in which the investment was made,"[40] or to cases "where [international law] was inconsistent with national law introduced after the investment was made."[41]

The main focus of the debate on international law was whether or not it should be applied at all. As further framed by the Chairman when proposing the rewording of the draft:

> [T]he first [problem] was which was the applicable "national law" and the second, *under what circumstances, if any, should international law be applicable.* Taking these views into consideration, he would propose that the provisions following that dealing with an express choice of law agreement be redrafted to read as follows: "Failing such agreement, the Tribunal shall apply the law of the State party to the dispute (including its rules on the conflict of laws) and such principles of international law as may be applicable."[42]

This "compromise," according to A. Broches, while restricting the arbitrators' freedom to select any national law other than that of the host State,[43] "preserved the tribunal's freedom to apply international law."[44]

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[40] *Id.* (position by the representative of Ivory Coast).

[41] *Id.* at 804 (position by the representative of China).

[42] *See* Summary Proceedings of the Legal Committee Meeting, Dec. 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 803-04 (emphasis added).

[43] As later described by A. Broches:

> Until a late phase of the Convention's legislative history, what became Art. 42(1) left the Tribunal free, in the absence of agreement between the parties concerning the law to be applied to the substance of their dispute, to decide it in accordance with such rules of national and international law as it determined to be applicable. In order to clarify the provision and to meet various concerns expressed, *particularly with respect to the national law to be applied,* it was decided to replace the one-sentence text by two separate sentences, the first of which would firmly establish unlimited party autonomy, *while the second would determine that if the parties had not specified the applicable rules of law the Tribunal would have to apply the law of the State party to the dispute.*

Broches, *supra* note 1, at 666-67 (para. 112) (emphasis added). On this issue, A. Broches has further explained that:

> The developing countries were willing to accept this freedom of the parties, which meant that they might agree on the applicability of 'rules of law' other than those of the law of the State party to the dispute. They were, however, *not prepared to leave the determination of the applicable national law to the Tribunal in the absence of an agreement of the parties. They insisted that in that event the law of the State party to the dispute should apply,* since that is where the investment is made. *Id.* at 667-68 (para. 115) (emphasis added).

See also Aron Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Collected Courses of The Hague Academy of International Law 331 (1972), at 390-91.

[44] A. Broches, *supra* note 35, at 16.

It is in this context that the new draft, which maintained the option of international law, was eventually adopted to become the final provision of Article 42(1). The report of the vote reflects the debate initiated by those delegations wishing to narrow the applicability of international law: "[t]he final provision relating to international law (which would bring it into play *both in the case of a lacuna in domestic law as well as in the case of inconsistency between the two*) was adopted by a majority of 24 to 6."[45] However, it cannot be drawn from this language that the applicability of international law is *limited to* the situations of *lacunae* and of inconsistency. It is particularly telling that the Legal Committee expressly chose, in response to the suggestion made by the delegations favoring the subsidiary applicability of international law, not to adopt the inconsistency test: "Mr. Broches (Chairman) then re-stated the principle adopted and explained the *advantages of the present draft over* a text couched in terms whereby international law would become applicable where the domestic legislation of the host State was *'inconsistent'* with it."[46] Similarly, the Legal Committee voted against a wording on the basis of the *lacunae* test: "Mr. Lokur (India) then requested a vote on a suggestion to *limit* the application of international law to cases where the domestic legislation of the host State was *silent*, whereupon a vote was taken and the motion defeated by a majority of 19 to 7."[47] These issues were no longer raised in the following drafts—of Article 45(1)[48] and, later, of Article 42(1)[49]—in which the wording was identical to that of Article 42(1) of the Convention.[50]

It is further telling that, during the final discussions of what was eventually adopted as Article 42(1), the Chairman of the Legal Committee noted that: "Article 42 intentionally referred to domestic law *and* international law since a tribunal might be called upon to determine whether standards set by

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[45] Summary Proceedings of the Legal Committee Meeting, December 7, 1964, Document No. 81, *in* History of the ICSID Convention, *supra* note 4, at 804 (emphasis added).

[46] *Id.* (emphasis added).

[47] *Id.* (emphasis added).

[48] *See* Sixth Interim Report of the Drafting Sub-Committee, on Chapter IV, Dec. 11, 1964, Document No. 104, *in* History of the ICSID Convention, *supra* note 4, at 863.

[49] *See* the Revised Draft of the Convention, Dec. 11, 1964, Document No. 123, *in* History of the ICSID Convention, *supra* note 4, at 924, whereby Article 45(1) is re-numbered as Article 42(1). *See also* Memorandum from the General Counsel and Draft Report of the Executive Directors to accompany the Convention, Jan. 19, 1965, Document No. 128, *in* History of the ICSID Convention, *supra* note 4, at 962.

[50] *See* the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Document No. 145, *in* History of the ICSID Convention, *supra* note 4, at 1057.

both systems of law had been respected by the host State."[51] Just as significantly, the Report of the Executive Directors on the Convention indicates that "[u]nder 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."[52]

As a result, an attempt to find clear support in the History of the Convention for the *limitation* of the role of international law to supplementing or correcting the law of the host State appears to be unworkable.[53]

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[51] *See* Memorandum of the Meeting of the Committee of the Whole, Feb. 23, 1965, Document No. 132, *in* History of the ICSID Convention, *supra* note 4, at 986, para. 31 (emphasis in original). On the applicability of international law, *see also id.* at 985 para. 26:

> "As to the issue of national versus international law, the vote in the Legal Committee had been very clearly in favor of permitting the tribunal to apply international law particularly in order to take account of cases where a State changed its own law to the detriment of an investor and in violation of an agreement not to do so. In such a case international law would not question the power of the sovereign State to change its law, but could hold that State liable in damages to the investor whose rights it had violated through an act inconsistent with international law.".

See also A. Broches, *supra* note 35, at 17:

> Under these subsidiary rules the tribunal may apply *both national and international law. The history of the provision leaves no doubt, in my opinion,* that the tribunal may apply international law (i) where national law calls for its application, (ii) where the subject matter is directly regulated by international law (a case which may not be easily distinguishable in practice from (i)) and (iii) where national law or action taken thereunder violates international law. (Emphasis added)

For a similar wording, *see also* A. Broches, *supra* note 43, at 392; *see also id.* at 390:

> According to that sentence 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 this case, therefore, the Tribunal is clearly called upon to take account of both national and international law. (Emphasis in original)

See also id. at 391:

> The major question whether rules or, for that matter, principles of international law can be directly applied to a dispute between a State and a non-State party is clearly answered in the affirmative by the text of the Convention. If the intention had been merely to refer to the rules of international law which were applicable as part of the law of the State party to the dispute, the text could have dealt with them in the same manner as with the conflict rules and could have stated that "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of law and its rules of international law)." *The separate mention of international law is unambiguous.* (Emphasis added)

[52] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, Document No. 145, *in* History of the ICSID Convention, *supra* note 4, at 1082 (emphasis added).

[53] *See also* Moshe Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 138 (1993).

B. The Klöckner *and* Amco ad hoc *Committees introduced the view according to which the rules of international law could come into play only in cases of* lacunae *or inconsistency*

The common methodology under the theory of the supplemental or corrective function of international law is that an ICSID arbitral tribunal cannot have access to the rules of international law if it has not, previously, searched into the law of the host State and identified either a gap or a rule which is inconsistent with rules of international law. The triggering factor of the applicability of international law is therefore, not that its rules may be applicable *per se,* but the existence of *lacunae* or possible inconsistencies. Under this methodology, 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 to which the arbitral tribunal has free access. On the basis of what we believe to be a mistaken understanding of the History of the Convention, this doctrine was initially conceived by the first *ad hoc* Committees in *Klöckner* and *Amco.*

In the annulment decision of May 3, 1985, the *ad hoc* Committee in *Klöckner v. Cameroon* (composed of P. Lalive, A. El-Kosheri and I. Seidl-Hohenveldern), had to determine whether the Arbitral Tribunal had manifestly exceeded its powers due to a violation of Article 42(1).[54] In the absence of an agreement between the parties on the choice of law, the second sentence of Article 42(1) had become operative and the Arbitral Tribunal had rendered an award on the basis of the law of Cameroon, the host State in the arbitration. In so doing, the Tribunal had referred primarily to French law which, as a consequence of the colonial heritage, was applied in the eastern part of Cameroon[55] and, specifically, to what it defined as the duty of full disclosure to a contractual partner *(obligation de tout révéler)* which it held had been breached by Klöckner.[56] One of the issues before the *ad hoc* Committee was whether the Tribunal, by basing its decision on a duty of full disclosure, had applied the proper law. Because the Tribunal had referred to "other national codes" and the "universal requirements of frankness and loyalty" the Committee considered whether such reference was in compliance with Article

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[54] Klöckner v. Cameroon, *Ad Hoc* Committee Decision, May 3, 1985 (hereinafter *Klöckner First Ad Hoc* Committee Decision), 2 ICSID Rep. 95 (1994), at 117 *et seq.*

[55] *Klöckner* Original Proceeding Award, *supra* note 22, at 59 ("One must therefore acknowledge the correctness of the Claimant's position when it says that 'since the SOCAME factory project was located in the eastern part of the country, only that part of Cameroonian law that is based on French law should be applied in the dispute.'").

[56] *Id.* at 61.

42(1) and could be understood as a reference to the "general principles of law recognized by civilized nations" as one of the sources of international law incorporated in Article 38 of the Statute of the International Court of Justice.[57] The answer was in the negative, the Committee holding that such reference to international law, even if established, could correspond neither to the complementary function nor to the corrective function of international law under Article 42(1), second sentence:

> Article 42 of the Washington Convention certainly provides that "in the absence of agreement between the parties, the Tribunal shall apply the law of the Contracting State party to the dispute... and *such principles of international law as may be applicable.*" This gives these principles (perhaps omitting cases in which it should be ascertained whether the domestic law conforms to international law) a dual role, that is, *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 rule 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."[58]

This decision constitutes the foundation for the theory of the complementary or corrective role of international law which was later replicated by other ICSID tribunals or committees.

The first *ad hoc* Committee in *Amco* followed suit and recognized the same limited role to international law.[59] In the absence of an agreement between the parties as to the applicable law, the Arbitral Tribunal had to apply the law of Indonesia and such rules of international law as may be applicable.[60]

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[57] *Klöckner First Ad Hoc* Committee Decision, *supra* note 54, at 121-22 (paras. 67-69).

[58] *Id.* at 122 (para. 69) (emphasis in original). *See also* A. Broches, Observations on the Finality of ICSID Awards, 6 ICSID Rev.—FILJ 321 (1991), at 339-41.

[59] Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Decision on the Application for Annulment, May 16, 1986 (hereinafter *Amco First Ad Hoc* Committee Decision, 1 ICSID Rep. 509 (1993).

[60] Amco v. Indonesia, Award, Nov. 20, 1984, 1 ICSID Rep. 413 (1993), at 452 (para. 148).

The application for annulment included the allegation that the Tribunal had violated Article 42 by making its decision on an *ex aequo et bono* basis. The *ad hoc* Committee examined the role of international law within the meaning of the second sentence of Article 42(1), although this was not directly relevant to resolve the issue before it.[61] The reasoning of the Committee (composed of I. Seidl-Hohenveldern, F. Feliciano and A. Giardina) echoed that of the *ad hoc* Committee in *Klöckner*:

> 20. It seems to the *ad hoc* Committee worth noting that 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 precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.*
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> 21. The above view of the role or relationship of international law norms vis-à-vis the law of the host State, in the context of Article 42(1) of the Convention, is suggested by an overall evaluation of the system established by the Convention. The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every ICSID award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention (Art. 54(1), Convention). Moreover, the national State of the investor is precluded from exercising its normal right of diplomatic protection during the pendency of the ICSID proceedings and even after such proceedings, in respect of a Contracting State which complies with the ICSID award (Art. 27, Convention). The thrust of Article 54(1) and of Article 27 of the Convention makes sense only under the supposition that the award involved is not violative of applicable principles and rules of international law.
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> 22. The above view on the *supplemental and corrective role of international law* in relation to the law of the host State as sub-

[61] The Committee held that "equitable considerations" may form part of the law to be applied by the Tribunal, whether under Indonesian law or under international law: It admitted that a tribunal applying international law may take into account equitable considerations, which should be distinguished from a decision *ex aequo et bono*. *See Amco First Ad Hoc* Committee Decision, *supra* note 59, at 516-17 (paras. 24-28).

> stantive applicable law, is shared in ICSID case law (Decision of May 3, 1985 of an ICSID *ad hoc* Committee [Klöckner v. Cameroon] and in literature (e.g. Broches, 'The Convention for the Settlement of Investment Disputes between States and Nationals of Other States', *Recueil des Cours* vol. 136 (1972, II) p. 392), and finds support as well in the drafting history of the Convention (see *ICSID Convention, Analysis of Documents Concerning the Origin and the Formulation of the Convention,* vol. II/1, p. 804 (Washington, D.C. 1970)...[62]

A similar line of reasoning was then followed, albeit with nuances, by the Arbitral Tribunals in *LETCO v. Liberia*[63] and in *CDSE v. Costa Rica.*[64] The

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[62] *Id.* at 515 (emphasis added).

[63] Liberian Eastern Timber Corporation (LETCO) v. Liberia (ICSID Case No. ARB/83/2), Award, Mar. 31, 1986, 26 ILM 647 (1987), at 658. Although not determining whether Liberian law was applicable pursuant to the first sentence of Article 42(1) or the second sentence of Article 42(1), the Tribunal held that:

> In the view of the Tribunal, there is no doubt as to the applicability of Liberian law.... The only question is whether Liberian law is applied on its own (as the law chosen by the parties) or in conjunction with applicable principles of public international law.... This provision of the ICSID Convention [Article 42(1), second sentence] envisages that, in the absence of any express choice of law by the parties, the Tribunal must apply a system of concurrent law. The law of the contracting state is recognized as paramount within its own territory, but is nevertheless subjected to control by international law. *The role of international law as a "regulator" of national systems of law* has been much discussed, with particular emphasis being focused on the problems likely to arise if there is divergence on a particular point between national and international law. No such problem arises in the present case; the Tribunal is satisfied that the rules and principles of Liberian law which it has taken into account are *in conformity with generally accepted principles of public international law* governing the validity of contracts and the remedies for their breach. (Emphasis added)

[64] Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica, ICSID Case No. ARB/96/1, Award, Feb. 17, 2000, 15 ICSID Rev.—FILJ 169 (2000), at 191:

> 64. This leaves the Tribunal in a position in which it must rest on the second sentence of Article 42(1) ("In the absence of such agreement...") and thus apply the law of Costa Rica and such rules of international law as may be applicable. No difficulty arises in this connection. The Tribunal is satisfied that the rules and principles of Costa Rican law which it must take into account, relating to the appraisal and valuation of expropriated property, are generally consistent with the accepted principles of public international law on the same subject. 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. (Emphasis added)

common feature between all these decisions is that international law only comes into play after the scrutiny of the law of the host State. This proposition has been often described in the literature.[65] It is only reasonable to revisit it today, particularly in light of the growing number of arbitrations initiated on the basis of bilateral or multilateral investment treaties.

C. *The* Klöckner–Amco *doctrine revisited*

The distinctive features of the doctrine developed by the *ad hoc* Committees in *Klöckner* and in *Amco* are the following: First, and perhaps most significantly, this doctrine relegates international law to a mere "function," that of supplementing or correcting domestic law. Second, in reducing international law to a function, it subjects it to the requirement that the law of the host State be first scrutinized, thereby further limiting it to a subsidiary role vis-à-vis the law of the host State.

This doctrine is based on the questionable premise that, as regards the supplemental function of international law, national legal orders have *lacunae*. In addition, by focusing on the function of international law, it essentially ignores that international law may also come into play in the second sentence

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[65] *See, e.g.*, I.F.I. Shihata and A. R. Parra, *supra* note 1, at 191-95; C. Schreuer, *supra* note 1, at 622 *et seq.*, in particular, at 627-31; 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 États et ressortissants d'autres États, *in* Investissements Étrangers et arbitrage entre États et personnes privées, La Convention B.I.R.D. du 18 mars 1965, (1969), at 151. (*See also* the critical view expressed by R. Kovar, *id.* at 157 (regarding the fact that the French equivalent of "and," "ainsi que," is not the same as "avant tout"); A. Giardina, The International Centre for Settlement of Investment Disputes between States and Nationals of other States (ICSID), *in* Essays on International Commercial Arbitration 214 (P. Sarcevic ed., 1989), at 217; M. Hirsch, *supra* note 53, at 140-41; J. Westberg, Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation; ICSID and Iran-United States Claims Tribunal Case Law Compared, 8 ICSID Rev.—FILJ 3 (1993), at 10; A.F.M. Maniruzzaman, Conflict of Laws Issues in International Arbitration: Practice and Trends, 9 Arb. Int'l 371 (1993), at 399 *et seq.*; N. Nassar, Internationalization of State Contracts: ICSID, The Last Citadel, 14 J. Int'l Arb. 185 (1997), at 204-06.

For a position which does not limit as strictly the recourse to international law to these two situations, see G. Delaume, The Convention for Settlement of Investment Disputes between States and Nationals of Other States, *in* Transnational Contracts Applicable Law and Settlement of Disputes (A Study in Conflict Avoidance) (1990), at 61; G. Elombi, ICSID Awards and the Denial of Host State Laws, 11 J. Int'l Arb. 61 (1994), at 67.

It should be noted however that, when describing the role of international law with respect to the second sentence of Article 42(1), A. Broches contemplated that, in addition to its supplemental and corrective role, international law may also apply "where the subject matter is directly regulated by international law." Broches, *supra* note 51; *see also* W. M. Reisman, The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold, 15 ICSID Rev.—FILJ 362 (2000), at 380.

of Article 42(1) as a body of substantive rules accessible to ICSID arbitral tribunals on the same footing as the law of the host state.

1. The supplemental role of international law is based on the questionable premise that national legal orders have lacunae

As discussed above, the supplemental role of international law was debated during the negotiation of the Washington Convention[66] and endorsed by the *ad hoc* Committees in *Klöckner* and *Amco*.

However, postulating that national laws have *lacunae* raises serious issues with respect to their nature as a legal order. One may seriously question that some legal systems are more "complete" than others merely because they have anticipated legal issues in a more detailed manner.[67] The characteristic feature of a legal order is the framework it provides for general and particular norms. A legal system may not address a particular issue directly, but this by no means implies that it provides no response or legal framework for that issue. For example, a tribunal may be faced with a situation where the performance of a turnkey contract has raised difficulties under the law of country X. It may well be that the law of country X has not recognized the concept of "turnkey contract." It may not recognize the concepts of "EPC (engineering, procurement and construction) contract," of "design-and-build contract," of "contract for work by the job" or even of *"contrat d'entreprise."* However, it most likely recognizes the concepts of contract, *pacta sunt servanda,* good faith, etc. In situations where the tribunal is called upon to apply the law of country X, it should investigate into the applicable standards of that law in order to determine the existence of a precise and detailed rule and, absent such rule, to determine the body of rules from which it can draw to resolve the issue. Faced with a difficulty, a tribunal should resolve it, if need be, by drawing from general principles of the applicable national law.[68]

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[66] *See supra*, part I(A).

[67] On the issue of the completeness of legal orders, *see* Fouchard Gaillard Goldman on International Commercial Arbitration (E. Gaillard, J. Savage eds., 1999), paras. 1512 and 1557.

[68] Egyptian law, for example, which was held to hold gaps in *SPP* (*see infra* note 69), provides for such framework in Article 1 of the Egyptian Civil Code which, in the absence of legislative provisions, allows judges to decide on the basis of customary rules and, in the absence of such rules, on the basis of principles of Islamic law and, in the absence of such principles, on the basis of natural law and equitable considerations; *see also* the dissenting opinion of Dr. El Mahdi, 3 ICSID Rep. 249 (1995), at 325. For a commentary of *SPP* on this issue, *see* E. Gaillard, Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)—Chronique des sentences arbitrales, 121 Journal du droit international 217 (1994), at 244-45.

An illustration of an ICSID tribunal's failure to sufficiently investigate the law of the host State can be found in the award rendered by the Arbitral Tribunal chaired by Eduardo Jimenez de Aréchaga in *SPP v. Egypt*.[69] Having decided that international law should complement the *lacunae* of domestic law or correct its inconsistencies,[70] the Tribunal applied the rules of international law to various issues, in particular to the issue of *dies a quo* regarding the award of interest. The Tribunal decided that, *in the absence* of a particular provision in Egyptian law regarding "compensatory interest for a yet to be determined amount of compensation arising out of an act of expropriation,"[71] the date from which interest shall run was, under the rules of international law, that "on which the dispossession effectively took place."[72] However, the very notion that, under Egyptian law, there is no *dies a quo* is highly questionable. To the extent that Egyptian law provides for the award of interest, it necessarily provides for the legal framework enabling Egyptian judges to calculate an interest and, by definition, assess the date from which that calculation is carried out.

This criticism of the theory of *lacunae* has been shared by Professor Reisman in his well-known study of the regime for *lacunae* in Article 42(1):[73]

> The question is not whether the host State's law provides the remedies sought by the claimant or, indeed, whether any rem-

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[69] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award, May 20, 1992, (hereinafter *SPP* Award), 3 ICSID Rep. 189 (1995).

[70] *Id.* at 207-09 (paras. 80-85). In *SPP*, the issue arose as to whether Egyptian law was the law agreed to by the parties or whether it applied pursuant to the second sentence of Article 42(1), along with such rules of international law as may be applicable. Rather than determining with a degree of certainty whether there was a choice of the applicable law by the parties, either explicitly or implicitly, or whether in the absence of such choice Article 42(1) would come into play, the Tribunal held that no significant consequences attached to the practical difference between the two options and decided that Egyptian law applied in any event, while determining that it had *lacunae*. The result was that, under the *SPP* reasoning, international law applied not only in cases under Article 42(1), second sentence, but also in cases under Article 42(1), first sentence, regardless of a choice of the applicable law by the parties not incorporating international law. The basis for such applicability of international law raises serious issues as regards the Tribunal's methodology and its failure to make the fundamental distinction between the choice of law and the absence of choice of law by the parties. *See* E. Gaillard, Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)—Chronique des sentences arbitrales, 121 Journal du droit international 217 (1994), at 242-45; *see also* G. Delaume, The Pyramids Stand—The Pharaohs Can Rest in Peace, 8 ICSID Rev.—FILJ 231 (1993), at 248; *compare* with dissenting opinion of Dr. El Mahdi in *SPP v. Egypt*, 3 ICSID Rep. 189 (1995), at 325-26. Even under the theory of the complementary or corrective function of international law, applying international law to supplement or correct the law expressly chosen by the parties disregards the clear stipulations of Article 42(1) and creates serious risks of unpredictability for the parties (*see* however *infra*, part I(C)(2), regarding the applicability of non-derogatory norms of international law even in situations in which the parties have expressly chosen a national legal system to the exclusion of international law).

[71] *SPP* Award, *supra* note 69, at 244 (para. 233).

[72] *Id.* at para. 234.

[73] *See* W. M. Reisman, *supra* note 65, at 371.

> edy provided by the host State approximates a remedy that might be granted by international law in comparable circumstances.
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> ...
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> The question is whether or not the law of the host State addresses the issue at hand. If it does and, as part of its law, has decided not to grant remedies in such matters then there is no remedy, as none is provided in the law that must be applied. The notion of addressing a problem must be understood broadly. Even the most developed of legal systems and even the most articulated code cannot anticipate and provide for every contingency and every possible legal dispute. Thus, the question for an ICSID tribunal under Article 42(1) is not whether the host State law provides a pre-packaged answer. If the host State's law provides a general analytical framework, it is up to the Tribunal to apply that framework to the statutes, judicial precedents, and general principles of that system, in the manner followed by the Permanent Court in *Brazilian Loans* and the Chamber of the International Court in the *ELSI* case.[74]

Professor Reisman concludes that "the absence of a remedy is not necessarily a *lacuna*; it may represent a decision not to regulate a certain matter or to regulate it in a different way."[75]

The theory of *lacunae* easily exempts a tribunal from investigating into the sources of the law of the host State and interpreting it within its own framework. It subjects the result of the dispute to the possibly elastic under-

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[74] *Id.*

[75] *Id.* However, Professor Reisman does not conclude to the absolute exclusion of the theory of *lacunae* and subsequently allows for a limited supplemental role of international law:

> If there is a *lacuna* in the host State's law (and it must be borne in mind that the failure to provide a remedy for a particular matter is not necessarily a *lacuna*), Article 42(1) does not thereupon authorize a Tribunal *promptly or automatically* to resort to international law. The law of the Contracting State may itself provide for a method for dealing with *lacunae*.... Even if a *genuine lacuna* is found in the law applicable by virtue of Article 42(1) or by other choice of the parties, an ICSID tribunal cannot simply turn to international law. It is still obliged to examine the Contracting State's law to see what procedures it provides for dealing with *lacunae*. The Tribunal is not simply looking for a rule in a mechanical fashion. It must explore the analytical framework for decision that the designated legal system has developed for the particular issue, and address the issues within that framework. *Id.* at 374. (Emphasis added)

See also id. at 374-75 ("Where there is a *genuine lacuna, i.e., one for which host State law does not provide a method for filling*, the Tribunal may turn to international law." (Emphasis added)

standing that a tribunal may have of the applicable domestic law, which may be set aside without thorough examination. This theory further illustrates the dangers of a casuistic approach under which legal orders are perceived as being a catalog of detailed rules and precedents rather than as a legal structure with its own logic, mechanisms and rules of interpretation.[76]

2. Under Article 42(1), second sentence, international law may be resorted to not only as a functional element of the choice of law process but also as a body of substantive rules

The meaning of "international law" in the second sentence of Article 42(1) does not raise particular difficulties. It is unambiguously understood in the sense given to it by Article 38 of the Statute of the International Court of Justice. During the negotiation of the Washington Convention, it was firmly established, regarding the last draft of Article 42(1),[77] that "[t]he 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."[78]

Article 38(1) of the Statute of the International Court of Justice constitutes the clearest expression of the sources of international law, *i.e.*: "a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Under Article 42(1), second sentence, the wording "and such rules of international law as may be applicable" should therefore be understood as an option for the tribunal to determine the applicable substantive rules of international law in accordance with the sources set forth in Article 38 of the Statute of the International Court of Justice. In other words, international law should be understood as a *body of substantive rules* which may be applicable to a particular issue presented to an ICSID tribunal.

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[76] The same can be said of transnational rules or *lex mercatoria*, *see* E. Gaillard, Transnational Law: A Legal System or a Method of Decision Making?, 17 Arb. Int'l 59 (2001).

[77] Revised Draft of the Convention, Dec. 11, 1964, Document No. 123, *in* History of the ICSID Convention, *supra* note 4, at 924.

[78] Memorandum from the General Counsel and Draft Report of the Executive Directors to accompany the Convention, Jan. 19, 1965, Document No. 128, *in* History of the ICSID Convention, *supra* note 4, at 962.

In the context of the choice of law process of the second sentence of Article 42(1), international law may unquestionably fulfill a function. Yet, leaving aside the issue of perceived *lacunae*, which has been discussed above[79]—the corrective role of international law is not devoid of ambiguities. It has been understood as covering the situations of "inconsistency." Inconsistency, however, could be understood in two different ways. On the one hand, a rule of domestic law may simply "differ" from a rule of international law. For example, the law of country X may provide that the non-performance of a contract may be justified under the rule of *exceptio non adimpleti contractus,* even where the obligation which is not performed as a defense is not proportional to the initial obligation the non-performance of which triggers the rule; this rule may well differ from the general principle of *exceptio non adimpleti contractus* as recognized by international law.[80] In this case, the rule of domestic law cannot be set aside merely because it is different, and international law certainly tolerates that difference. The availability of the rule of domestic law in the second sentence of Article 42(1) is unquestionable. However, because ICSID tribunals have access to the law of the host State "and" to the substantive rules of international law, the issue is whether they may resolve the point at issue under the proper rule in the circumstances of the case, be it of domestic or international source. This situation is fundamentally different, on the other hand, from that in which a rule of domestic law may "collide with" a non-derogatory rule of international law, which warrants its setting aside. For example, under the law of country Z, expropriations or equivalent measures may be permitted without any compensation; this rule would collide with the principle of international law according to which a State may dispose of its wealth and resources and nationalize, expropriate or transfer ownership of private property or contractual rights, provided that it meets its obligation to compensate for the loss incurred by the private party. In this case, international law comes into play in what private international law specialists would characterize as an international public policy function.[81]

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[79] *See supra*, part I(C)(1).

[80] On the recognition of the *exceptio* principle as a general principle of international law, see the opinion of Judge Anzilotti *in* The Diversion of Water from the Meuse, Permanent Court of International Justice, Judgment, June 28, 1937, Ser. A/B, No. 70, at 50, discussed in *Klöckner* Original Proceeding Award, *supra* note 22, at 63. On this issue, *see also* E. Gaillard, Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)–Chronique des sentences arbitrales, 114 Journal du droit international 135 (1987), at 142.

[81] *See, e.g.*, B. Goldman, *supra* note 65, at 151; A.A. Fatouros, Investissements étrangers et arbitrage entre États et personnes privées. La Convention B.I.R.D. du 18 mars 1965, book review *in* 59 Revue critique de droit international privé 580 (1970), at 587-88 and 593-95.

It is our contention that, under Article 42(1), second sentence, an ICSID tribunal may also apply international law as a body of substantive rules in order to resolve the dispute or a particular issue. The fact that those rules would apply as opposed to the rules of the law of the host State does not mean that the latter, when they simply differ from the former, are set aside, but that the rules of international law constitute, in the arbitrators' determination, the proper law for the issue under consideration. This understanding is, in our view, the only way of giving effect to the unequivocal recognition, including in the History of the Convention, that the "rules of international law" in the second sentence of Article 42(1) are to be understood within the meaning of Article 38 of the Statute of the International Court of Justice.[82] This in no way excludes that, at the same time, international law may fulfill a public policy function, which comes into play regardless of whether or not it has been included in the parties' choice of law.[83]

The public policy role of international law has been recently put forward by Professor Reisman in his alternative understanding of the choice of law process in the second sentence of Article 42(1). Justifiably rejecting the *Klöckner–Amco* doctrine in that international law would automatically come into play to fill the perceived gaps of domestic laws, Professor Reisman has argued in favor of restricting the role of international law in the second sentence of Article 42(1) to the setting aside of the rules of domestic law which are inconsistent with non-derogatory norms of international law. In our view, however, this position is as unsatisfactory as the *Klöckner–Amco* doctrine in that, by confining international law in the second sentence of Article 42(1) to fulfilling a narrow public policy function, it equally undermines its accessibility as a body of substantive rules.

II. "AND" MEANS: "AND, SUBJECT TO ITS COLLISION WITH FUNDAMENTAL NORMS OF INTERNATIONAL LAW *(JUS COGENS)*"

One alternative analysis of the role of international law in the second sentence of Article 42(1) has been offered by Professor Michael Reisman in his study of the regime for *lacunae* in the ICSID choice of law system.[84] Professor

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[82] *See supra*, note 78.

[83] This explains the fact that non-derogatory norms of international law may come into play in the context of Article 42(1), first sentence, *see infra* part II. *See also infra*, note 91.

[84] *See* W. M. Reisman, *supra* note 65.

Reisman generally adopts the *Klöckner–Amco* approach in that he views the applicability of international law through the filter of national laws:

> The text of Article 42(1) contemplates both supplemental and corrective functions for international law. But because there is a priori reference to the law of the contracting State, the critical question is how choice of law is viewed from the perspective of public international law. Article 42(1) directs ICSID tribunals to relate two different bodies of law. Involved here is both a choice of law and, for certain matters, the contingent exercise of certain supplementations and legal controls by one system of law over another. This is especially complex, because, for example, the juridical exercise of choice of law does not involve a qualitative choice between competing systems, but the juridical exercise of control does.[85]

One must agree with Professor Reisman that the second sentence of Article 42(1) constitutes a provision on choice of law and on the substantive rules at a tribunal's disposal, although, in our view, the applicability of the rules of international law is not necessarily achieved over the law of the host State.[86]

It is, however, more difficult to follow Professor Reisman in his limitation of the applicability of international law to the rare cases of the violation by rules of national law of peremptory norms of international law embodied in the notion of *jus cogens*. Indeed, on the basis that "the contingency for correction must be more than a mere difference between international and host State law" and that "[w]hat is required is a veritable collision," Professor Reisman limits the role of international law to the ruling out of "arrangements or procedures that violate fundamental international law norms or shock the conscience of the world."[87] The justification for such a limitation, as well as for the restriction of the automatic recourse to international law in case of *lacunae*, is that the law of the host State must have an effective role. In Professor Reisman's view, "[t]o characterize inconsistencies that are only *different* as violations would simply mean that international law would often be the Tribunal's choice of law and key parts of Article 42(1) would be defeat-

[85] *Id.* at 366; *see also id.* at 373 *et seq.*
[86] *See supra*, part I(C)(2).
[87] W. M. Reisman, *supra* note 65, at 375-77.

ed."[88] Admittedly, the rules of domestic law may be different from those of international law, without violating them.[89] However, if the rationale is that of not defeating key parts of the second sentence of Article 42(1), one must also give effect to the segment "*and* such rules of international law as may be applicable" (emphasis added). If "such rules of international law" were to equate with the rules of *jus cogens,*[90] it would hardly be necessary to refer to them in the second sentence of Article 42(1), given the non-derogatory nature of such rules and the obligation for any international tribunal ruling on the international responsibility of a State not to give effect to rules or arrangements that violate them. Because non-derogatory norms of international law would exercise their limiting function in all cases, there would hardly exist any benefit in distinguishing between the first sentence of Article 42(1) and the second sentence of Article 42(1).[91]

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[88] *Id.* at 375 (emphasis added).

[89] *See supra*, part I(C)(2).

[90] Assuming *jus cogens* covers rules which may effectively be applied in the context of foreign investments.

[91] *See supra*, part I(C)(2). *See also*, in the context of Article 42(1), first sentence, the position taken by A. Broches according to which the choice of a specific law by the parties does not preclude the applicability of "fundamental precepts of international law." A. Broches, *supra* note 1, at 669 (para. 121):

> A persuasive case can be made for the proposition that the choice by the parties of the host State's law should not bar an international tribunal from applying fundamental precepts of international law in the face of demonstrated arbitrary or discriminatory action or reliance in bad faith on the State's law in order to escape its obligations. Parties may admittedly exclude any recourse at all to international law, but it is unreasonable to assume that the specification of an applicable national law is intended to or should have this effect.

The author's position seems to have slightly changed on this issue compared to his 1972 Course at The Hague Academy on The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *supra* note 43, at 389:

> Phrased in a more abstract manner, the question is whether the Tribunal can apply international law where international law is not in terms included in the rules of law agreed by the parties pursuant to the first sentence of Article 42(1). This is a difficult question on which I hesitate to express a firm opinion. However, I submit that in this situation the application by the Tribunal of international law rules is at least permissible to the extent that these rules are 'the law of the land', which is to say that they would presumably be applied by the national courts of the host country.

Compare with C. Schreuer, *supra* note 1, in particular, at 588 [and cited references] [Referring to *LETCO* and *SPP*]:

> Despite the lack of clarity and methodical rigor in these decisions, they show a general reluctance to abandon international law in favour of the host State's domestic law. The complete exclusion of standards of international law as a consequence of an agreed choice of law pointing towards a domestic legal system would indeed lead to some extraordinary consequences. It would mean that an ICSID tribunal would have to uphold discriminatory and arbitrary action by the host State, breaches of its undertakings which are evidently in bad faith or amount to a denial of justice as long as they conform to the applicable domestic law, which is most likely going to be that of the host State.

The reference to international law in the second sentence of Article 42(1) would be defeated if one were to reduce the applicability of international law to "principles such as *pacta sunt servanda* or other peremptory international human rights norms,"[92] while the reference to international law covers all sources of international law as set forth in Article 38 of the Statute of the International Court of Justice.[93] Professor Reisman's proposition, far from satisfying the concern that Article 42(1), second sentence, should be given full effect,[94] would result in the inaccessibility of most rules of international law for an ICSID tribunal, contrary to the expressly stated intention of the drafters of the Convention.

The very purpose of the second sentence of Article 42(1) is to make international law accessible as a body of substantive rules, alongside the law of the host State, to ICSID tribunals. As rightly put by Professor Reisman, "[i]f ...the intention [of the drafters of the Washington Convention] had been to subordinate international law, the text would have been written as *including*. By the same token, if the text had intended to superordinate international law, it would have said *avant tout.*"[95] It is equally true that the Convention does not say "subject to" either: Article 42(1), second sentence, simply says "and."

See also the recent report of the United Nations Conference on Trade and Development on Dispute Settlement: International Centre for Settlement of Investment Disputes (2.6 Applicable Law) (2003), available on the website of UNCTAD (www.unctad.org), at 10:

> The decision in *SPP* shows a reluctance to abandon international law in favour of the host State's domestic law. The complete exclusion of international law as a consequence of an agreed choice of law containing only a domestic legal system would lead to undesirable consequences. It would mean that an ICSID tribunal would have to uphold discriminatory and arbitrary actions by the host State, breaches of its undertakings which are evidently in bad faith or amount to a denial of justice as long as they conform to the applicable domestic law. It would mean that a foreign investor, by assenting to a choice of law, could sign away the minimum standards for the protection of aliens and their property developed in customary international law. Such a solution would be contrary to the goal of the Convention to stimulate investment through the creation of a favourable investment climate.

See also M. Hirsch, *supra* note 53, at 128-29. For a different position, *see* I. Shihata, *supra* note 1, at 209 ("...parties are free, under the first sentence of the first paragraph of Article 42 of the ICSID Convention, to exclude all recourse to international law.").

[92] W. M. Reisman, *supra* note 65, at 368.

[93] *See supra*, part I(C)(2).

[94] W. M. Reisman, *supra* note 65, at 375.

[95] *Id.* at 365 (emphasis in original).

III. "AND" MEANS: "AND"

Independently of the function it may perform vis-à-vis the law of the host State, there is a role for international law as a mere body of rules available to international arbitrators in the second sentence of Article 42(1) of the Washington Convention. As discussed,[96] the wording "and such rules of international law as may be applicable" may be understood as encompassing both a functional element of the choice of law process and a body of substantive rules accessible, along with the law of the host State, to any ICSID tribunal in the absence of a choice of law made by the parties.

For nearly twenty years, however, views other than the conventional *Klöckner–Amco* position have remained a distinct minority: even when going somewhat beyond the *Klöckner–Amco* doctrine, authors[97] and tribunals such as the Arbitral Tribunal in the *Amco* resubmitted case[98] have not gone as far as recognizing the full role of international law as a body of substantive rules. By contrast, the view according to which, 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, which was advocated by some,[99] was authoritatively and, in our view, rightly,

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[96] *See supra*, part I(C)(2).

[97] *See* G. Delaume, *supra* note 65.

[98] *See* Amco v. Indonesia, Resubmitted case, Award, May 31, 1990, 1 ICSID Rep. 569 (1993), at 580 (para. 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.* In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law. (Emphasis added)

See also P. Weil, The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage À Trois*, 15 ICSID Rev.—FILJ 401 (2000), at 408 *et seq.*

[99] Regarding the question of the applicability of international law to issues involving the conduct of the host State, *see* 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 (1968), at 659-61 (suggesting, with respect to "disputes arising out of contracts," that an ICSID tribunal should be able to consider whether a State party conduct is consistent with its obligations under public international law). *See also* E. Gaillard, Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)–Chronique des sentences arbitrales, 114 Journal du droit international 135 (1987), at 157; E. Gaillard, Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)–Chronique des sentences arbitrales, 118 Journal du droit international 165 (1991), at 182-83:

> Pourtant, la rédaction de l'article 42(1) [deuxième phrase] soulevait également la question de l'articulation de ces deux corps de règles que constituent la loi interne de l'Etat d'accueil (ou, infiniment plus rarement, la loi interne désignée par la règle de conflit de l'Etat d'accueil) et les

espoused by the *ad hoc* Committee in the *Wena v. Egypt* annulment proceeding.

A. The Wena *doctrine: the arbitrators' freedom to resort directly to international law*

In the recent decision rendered in the annulment proceeding in *Wena v. Egypt,*[100] the *ad hoc* Committee (composed of K. Kerameus, A. Bucher and F. Orrego Vicuña) gave full effect to the choice of law rule under Article 42(1). In this case, the Arbitral Tribunal had decided that the law applicable to the dispute was primarily the bilateral investment treaty of 1976 between Egypt and the United Kingdom (IPPA) and that beyond the BIT:

> [T]here [was] 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 (i.e. "the law of the Contracting State party to the dispute") and "such rules of international law as may be applicable". The Tribunal

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« principes de droit international »... Aussi l'habitude s'est-elle instaurée de considérer qu'il y avait lieu de partir de la loi de l'Etat d'accueil et de la compléter et, au besoin, de la modifier, par les principes de droit international si cette loi se trouvait entrer en contradiction avec ces principes.... Les arbitres statuant sous l'égide du Centre ne sont nullement tenus de ne recourir aux principes de droit international qu'en cas de lacune du droit local ou de contrariété avec le droit international. Le caractère fâcheux de cette dernière exigence tient surtout au fait qu'elle semble vouloir imposer la démonstration préalable de la lacune ou de la contrariété du droit local au droit international chaque fois que le tribunal entend recourir au droit international.... La conception exprimée par le Comité *ad hoc* tend en définitive à faire jouer au droit international un rôle d'ordre public international destiné à se substituer aux dispositions contraires du droit local. Un tel rôle ne serait pas sans intérêt. Ainsi par exemple, ne suffirait-il pas que le droit local prévoie une expropriation sans indemnité pour qu'un investissement étranger puisse être spolié lorsqu'il existe une convention d'arbitrage CIRDI. Cependant, *cette conception ne donne pas au droit international la place qui lui revient dans le système d'arbitrage CIRDI. Sans que l'on puisse pour autant parler de lacune du droit local ou de contrariété au droit international, le droit local peut différer des prescriptions du droit international,* qu'à la vérité les arbitres siégeant sous l'égide du CIRDI ont autant la charge de découvrir que d'appliquer.... Dans un cas comme dans l'autre, le but est de donner aux arbitres une certaine liberté dans la découverte et la mise en œuvre des principes applicables, sans pour autant les transformer en amiables compositeurs, et sans qu'il leur soit nécessaire d'établir l'existence d'une lacune ou d'une contrariété du droit local avec le droit international. *Subordonner l'application des principes du droit international à la preuve d'une lacune ou d'une contrariété à l'ordre juridique international reviendrait à vider en grande partie l'article 42(1) de son sens et à remettre en cause l'équilibre qu'il a entendu instaurer.* (Emphasis added)

[100] Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Application for Annulment, Feb. 5, 2002 (hereinafter *Wena* Annulment Decision), 41 ILM 933 (2002). Shearman & Sterling was counsel for Wena Hotels Limited in the arbitration and annulment proceedings.

> notes that the provisions of IPPA 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.[101]

The application for annulment was based on the Tribunal's alleged failure to apply the applicable law because Egyptian law was the law applicable to the lease contracts underlying the dispute between the parties. The respondent in the annulment proceeding submitted that there was a distinction to be drawn between the lease contracts (subject to Egyptian law) and the BIT which was the basis for its action in consideration of Egypt's failure to protect its investment under that treaty. The Committee concurred in determining that the subject matter of the lease agreements submitted to Egyptian law was different from the subject matter brought before ICSID arbitration on the basis of the BIT, which is why there was no choice of law under Article 42(1), first sentence.[102] Therefore, in the absence of a choice of law pursuant to the first sentence of Article 42(1), the *ad hoc* Committee considered the issue of the meaning of the second sentence of Article 42(1) and the interrelation between domestic and international law.

First, the *ad hoc* Committee summarized the different meanings given to Article 42(1) and, correspondingly, to the word "and" in this context:

> 38. This discussion brings into light the various views expressed as to the role of international law in the context of Article 42(1). Scholarly opinion, authoritative writings and some ICSID decisions have dealt with this matter. Some views have argued for a broad role of international law, including not only the rules embodied in treaties but also the rather large definition of sources contained in Article 38(1) of the Statute of the International Court of Justice. Other views have expressed that international law is called in to supplement the applicable domestic law in case of the existence of *lacunae*. In *Klöckner I* the *ad hoc* Committee introduced the concept of international law as *complementary* to the applicable law in case of *lacunae* and as *corrective* in case that the applicable domestic law would not conform on all points to the principles of international law. There is also the view that international law has

[101] Wena Hotels Limited v. Arab Republic of Egypt, Award, Dec. 8, 2000 (hereinafter *Wena* Award) 41 ILM 896 (2002), at 910-11.

[102] *Wena* Annulment Decision, *supra* note 100, at 940-41.

> a controlling function of domestic applicable law to the extent that there is a collision between such law and fundamental norms of international law embodied in the concept of *jus cogens.*
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> 39. 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. However, this Committee's task is not to elaborate precise conclusions on this matter, but only to decide whether the Tribunal manifestly exceeded its powers with respect to Article 42(1) of the ICSID Convention. 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.[103]

As regards the meaning of "and" as well as the role of international law, the Committee's conclusion is unambiguous:

> 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.[104]

This wording is in striking contrast with that of the *ad hoc* Committee's decision in *Klöckner*, according to which "Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the 'rules' or 'principles of international law.'"[105] Similarly, it contrasts with that of the *ad*

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[103] *Id.* at 941 (footnotes omitted) (emphasis added).

[104] *Id.* (emphasis added).

[105] *Klöckner First Ad Hoc* Committee Decision *supra* note 54, at 122 (para. 69) (emphasis in original).

hoc Committee's decision in *Amco*, according to which "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 precedence to international law norms where the rules of the applicable domestic law are in collision with such norms."[106]

The rationale underlying the *Wena* holding is that, 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. The tribunal may find two equally applicable rules in each legal system and decide that, under the circumstances of the case, it will apply the rule of international law, without any need to identify either a *lacuna* or an inadequacy of the law of the host State. On this basis, the Committee validated the Tribunal's recourse to international law, in particular the award of compound interest to the investor, justified by the international law standard of "prompt, adequate and effective" compensation under the BIT which could not be achieved through the simple interest rule of Egyptian law.[107]

Some criticisms may be directed towards the interpretation of the *ad hoc* Committee's decision in *Wena* as taking into account international law as an autonomous body of substantive rules at the tribunal's disposal. In particular, some may attempt to argue that the Committee in *Wena* did not go as far as instituting two parallel bodies of applicable law and did nothing more than endorse the precedence of international law with respect to the principle of compound interest on the basis of the inconsistency of the Egyptian law rule on simple interest which was explored first. Such criticisms, however, fall short. First, the terminology used by the Committee is unequivocal, the Committee having clearly accepted that "international law can be applied *by itself*" (emphasis added). Second, and as regards the actual application of international law by the Tribunal in *Wena*, the Committee endorsed the Tribunal's reasoning which neither determined that Egyptian law contained a gap as to the award of compound interest nor established that the Egyptian law rule on simple interest was inconsistent with the international law rule on compound interest. The Tribunal determined the award of compound interest to be the appropriate rule applied by international tribunals in consideration of the

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[106] *Amco First Ad Hoc* Committee Decision, *supra* note 59, at 515 (para. 20) (emphasis added).

[107] *Wena* Annulment Decision, *supra* note 100, at 942-43 (paras. 50-53). For a similar reasoning, in the context of Article 42(1), first sentence, directing the Tribunal to rule on the basis of the applicable BIT as the law chosen by the parties (and proceeding to a *renvoi* to Egyptian law only regarding provisions more favorable to the investor), *see* Middle East Cement Shipping and Handling Co., S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, Apr. 12, 2002 (paras. 173-175), available on the ICSID website (www.worldbank.org/icsid/).

State's wrongful act and of the full compensation of the investor with respect to the loss of its investment.[108] A tribunal may decide, under the circumstances of each case, that international law provides the proper rule for a given issue.

Others may suggest that the Committee refused to take a position among the divergent views regarding the role of international law in the second sentence of Article 42(1). This reading may be based on the Committee's statement—regarding the views aiming at restricting the role of international law and highlighting that of the law of the host State or, conversely, calling for a broad application of international law and restricting the role of the law of the host State—that "[t]here 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."[109] Such a criticism, on the basis that the Committee has not resolved the issue, also falls short. The second sentence of Article 42(1) does not create an obligation for ICSID tribunals to apply international law. Besides, as far as an ICSID tribunal's degree of freedom is concerned, the Committee has clearly held that "the use of the word 'may' in the second sentence of this provision ['such rules of international law as *may* be applicable'] 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.*"[110]

B. Assessment of the Wena *doctrine*

The landmark approach taken by the *ad hoc* Committee in *Wena*, which is likely to be echoed in future ICSID arbitrations, gives international law its full status as a body of substantive rules at the disposal of ICSID arbitral tribunals. In our opinion, this approach is consistent with both the text of

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[108] *See Wena* Award, *supra* note 101, at 919 (paras. 128-129) and the reference to "restor[ing] the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place." *See also Wena Ad Hoc* Committee Decision, *supra* note 100, at 943 (para. 53):

> The option the Tribunal took was in the view of this Committee within the Tribunal's power. International law and ICSID practice, unlike the Egyptian Civil Code, offer a variety of alternatives that are compatible with those objectives [of prompt, adequate and effective compensation]. These alternatives include the compounding of interest in some cases. Whether among the many alternatives available under such practice the Tribunal chose the most appropriate in the circumstances of the case is not for this Committee to say as such matter belongs to the merits of the dispute. Moreover, *this is a discretionary decision of the Tribunal.* (Emphasis added)

[109] *Wena Ad Hoc* Committee Decision, *supra* note 100, at 941 (para. 39).

[110] *Id.* (emphasis added).

Article 42(1)—"and" should only mean "and"—and its object and purpose: there is nothing extraordinary in giving access to the applicable rules of international law when an ICSID tribunal is called upon to rule on the international responsibility of the host State vis-à-vis foreign investors. 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.[111]

Some scholars, however, have described the process leading to the final vote of Article 42(1) during the negotiation of the Convention as a decline of the arbitrators' freedom to determine the applicable law:

> In the earliest drafts, choice of law was to have been assigned to the Tribunal itself. A 1962 working paper provided that: "In the absence of any agreement between the parties concerning the law to be applied [...] the Arbitral Tribunal shall decide the dispute submitted to it in accordance with such rules of law, whether national or international, as it shall determine to be applicable."
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> ...
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> But in the Revised Draft, a major policy change emerges, and is confirmed in the final version of Article 42(1). Whereas all the previous drafts assigned to the Tribunal the initial competence to decide whether national or international rules of law were applicable, the version that became the final text substantially reduces the competence of the Tribunal, in the absence of agreement, to choose so freely.
>
> ...
>
> In the final version, two textual changes, whose clear purport allows no mistake about the drafters' intentions, withdrew such a competence from the Tribunal: "The Tribunal shall

[111] The freedom recognized by the *Wena* Committee to ICSID tribunals goes beyond the acknowledgment by authorities, such as A. Broches, that international law is applicable in those instances in which the subject matter is directly regulated by international law (*see supra* note 65), a position which was left out by the *Klöckner–Amco* doctrine (*see supra* part I). It is our view that, as recognized by the *Wena* Committee, international law is applicable to all types of issues brought before an ICSID tribunal in the absence of a choice of law made by the parties (for example, the issue of unforeseen events, *supra* note 23, or the issue of *exceptio non adimpleti contractus*, *supra* part I(C)(2) and *supra* note 80), although one may expect that rules of international law will routinely be called upon where the issue at stake is that of a specific aspect of the international liability of the State (such as the attributability of the conduct of its organs to a State or international standards of protection).

> apply the law of the Contracting State party to the dispute." This is a mandatory injunction which is common to all three language texts. The Tribunal may apply such rules of international law as may be applicable, in language in which the French text diverges slightly from its English and Spanish counterparts. Thus, the rules to be applied are not selected at the discretion of a tribunal, as in the earlier drafts, but are henceforth determined by operation of law.[112]

Admittedly, the first drafts provided for an even broader discretion for the tribunal. Yet, the evolution towards the final version of Article 42(1) was mainly justified by the concern regarding the applicability of the law of the host State as opposed to any other law freely selected by the arbitral tribunal.[113] The wording "shall" eventually safeguarded this option (while permitting a *renvoi* to another law through the conflict of laws rules of the law of the host State). As regards international law, the current wording of the choice of law provision in the second sentence of Article 42(1) still leaves it to the tribunal's discretion to determine whether and to what extent its rules apply.

It is further necessary to point to the Washington Convention's innovative approach in making a distinction between "rules of law" and "law." In the first sentence of Article 42(1), the Tribunal is bound by the choice of the "rules of law" ("règles de droit" in French and "normas de derecho" in Spanish) made by the parties. This nuance permits the parties to select a legal system such as the law of the host State or another law, but also general principles of law, *lex mercatoria* or international law.[114] The second sentence of Article 42(1) makes the distinction between the "law" of the host State ("droit de l'Etat" in French and "legislación del Estado" in Spanish) and the "rules" of international law ("principes" in French and "normas" in Spanish). This wording is reinforced by the fact that ICSID tribunals may apply "such" rules of international law "as may be applicable" ("en la matière" in French and "que pudieren ser aplicables" in Spanish), which is a strong indication of their discretionary power to select the rules of law they consider appropriate to govern any particular issue.

This freedom is in line with the general evolution of modern arbitration law and the discretion given to international arbitrators. In arbitrations

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[112] W. M. Reisman, *supra* note 65, at 363-64.

[113] *See supra*, part I(A).

[114] On this issue, *see* A. Broches, *supra* note 1, at 667; *see also* E. Gaillard, Thirty Years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules, 10 ICSID Rev.—FILJ 208 (1995), in particular at 215 *et seq.*

under the aegis of the ICC, the LCIA or the AAA for example, the arbitrators have considerable flexibility to select the rules of law applicable to the dispute in the absence of a choice by the parties: Article 17 of the 1998 ICC Arbitration Rules provides that the tribunal shall apply "the rules of law which it determines to be appropriate." Similarly, Article 22.3 of the 1998 LCIA Rules provides that a tribunal may have recourse to "the law(s) or rules of law which it considers appropriate." Article 28 of the AAA Rules, which results from a 1997 wording, uses the same language.[115] This flexibility as regards the applicable "rules of law" permits the tribunals constituted under the aegis of the ICC, the LCIA or AAA to have recourse to transnational principles as well as to general principles of law within the meaning of Article 38 of the Statute of the International Court of Justice.[116]

The approach adopted by the *Wena* Committee certainly puts ICSID arbitration in line with other forms of international arbitration and 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. Recognizing this flexibility, which is embodied in the second sentence of Article 42(1), would permit ICSID arbitration to develop in keeping with the evolution of the arbitrators' adjudicating function. In the 1970's, investment protection was achieved through the internationalization of the contracts entered into by private parties and States and of the corresponding commercial relationship.[117] In the wake of the explosion of treaty arbitration, in particular under the aegis of ICSID, arbitrators today are increasingly called upon to assess the validity of the acts of States who, on the basis of those treaties, undertake to ensure the promotion and the protection of foreign investments. In the absence of a choice of the applicable law and depending on the circumstances of each case, the arbitrators should have the freedom to resort to the rules of law they deem applicable in this respect. It would indeed be a paradox, against that background, not to fully recognize the role, consistent with the structure and language of the second sentence of Article 42(1), that international law can play in contemporary ICSID arbitration.

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[115] Article 33(1) of the 1976 UNCITRAL Rules of Arbitration provides, in a more conservative manner, that the tribunal shall apply "the law determined by the conflict of laws rules which it considers applicable."

[116] On this issue, *see, e.g.*, E. Gaillard, J. Savage (eds.), *supra* note 67, at paras. 1420 *et seq.*, in particular paras. 1443 *et seq.*

[117] On this issue, *see* P. Weil, Droit international et contrats d'État, *in* Écrits de droit international, Presses Universitaires de France (2000), at 351 *et seq.*