

Chapter 9

The Law Applicable in Investment Treaty Arbitration

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The inquiry into the law ‘applicable’ to a dispute seems, on its face, a fairly simple question: identifying the law that will govern the resolution of the dispute. Given the fundamental principle of party autonomy in international arbitration, the arbitrators’ inquiry is primarily guided by the determination of whether the parties themselves have chosen the law governing their dispute. It is only in the absence of such choice that the arbitrators must determine the law that will apply to the dispute. The framework of the analysis is therefore discernible. The choice of law process must first be distinguished from the arbitrators’ subsequent investigation concerning the determination of the *content* of the law that will apply and the manner in which such content must be evidenced.¹ Equally, it is distinct from the review, at the back end of the arbitral process, of the manner in which the arbitrators have *applied* or *failed to apply* such law to the merits of the dispute.² Finally, a further distinction must be made between

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1 On this question, *see, e.g.*, the Final Report prepared by Mark Friedman and Luca Radicati di Brozolo for the Committee for International Commercial Arbitration of the International Law Association on “The Ascertainment of the Content of the Applicable Law in International Commercial Arbitration” and adopted at the 73rd Conference of the International Law Association in Rio de Janeiro on August 21, 2008, *available at* www.ila-hq.org/en/committees/index.cfm/cid/19; the Report contains a number of developments on investment arbitration. *See also* James Crawford, *Treaty and Contract in Investment Arbitration*, THE 22ND FRESHFIELDS LECTURE ON INTERNATIONAL ARBITRATION, November 29, 2007, available on the Web site of the Lauterpacht Centre for International Law, at p. 2.

2 On this question, *see infra*, Part 6, Chapter 23, K. Yannaca-Small, *Annulment of ICSID Awards: Limited Scope but Is There Potential?* *See also* Emmanuel Gaillard, *The Extent of Review of the*

the substance of the dispute and the *procedure* governing the arbitration: choice of law is essentially concerned with the substance of the dispute, the conduct of the arbitration not being subject to any particular national legal system but allowing for a great degree of freedom for the parties (including their choice of the arbitration rules which will govern the arbitral process) and, in the absence of agreement between them, the arbitrators.³

That is not to say that choice of law is of no consequence. To the contrary, in investment treaty arbitration just as in international commercial arbitration, it is a fundamental process in that the outcome of the dispute may sometimes greatly depend on the rules determined to be applicable.

Being an arbitral process, investment treaty arbitration in no way differs from international commercial arbitration in that the principle of party autonomy is the primary rule governing the arbitration, including as regards the law applicable to the substance of the dispute. When the applicable law has been chosen by the parties, the arbitrators have a duty to apply such law and nothing but such law. It is only in the absence of a choice by the parties that the arbitrators are entitled to exercise a degree of discretion in the determination of the applicable law. Each of these situations will be examined

Applicable Law in Investment Treaty Arbitration, in ANNULMENT OF ICSID AWARDS, IAI SERIES ON INTERNATIONAL ARBITRATION NO. 1, at 223 *et seq.* (Emmanuel Gaillard & Yas Banifatemi eds., Juris Publishing 2004).

- 3 For a general presentation of the law governing the procedure under the common rules of international arbitration, see EMMANUEL GAILLARD ET AL., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 633 *et seq.* (Emmanuel Gaillard & John Savage eds., Kluwer 1999). See also, for the most recent trend, draft Article 15(1) of the new UNCITRAL Arbitration Rules adopted by the Working Group at its forty-sixth session and incorporated in the Draft revised Arbitration Rules discussed at the UNCITRAL forty-ninth session in Vienna on September 15–19, 2008, available on the UNCITRAL Web site: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”

For a different view on the determination of the ‘*lex arbitri*’ as “the law applicable to the conduct of the arbitration” in investment treaty arbitration, see, e.g., Campbell McLachlan, “Investment Treaty Arbitration: the Legal Framework,” Paper submitted at the ICCA Congress in Dublin (2008), pp. 30 *et seq.*

As regards the distinction between the law applicable to the merits and the law applicable to the question of jurisdiction: see, e.g., *Azurix Corp. v. The Argentine Republic*, Decision on Jurisdiction of December 8, 2003 (Arbitral Tribunal composed of Andrés Rigo Sureda, President; Elihu Lauterpacht, and Daniel Martins), 10 ICSID REPORTS 416 (2006), para. 48: “As pointed out by both parties, the relevant provision for determining the law applicable to this dispute is Article 42(1) of the Convention. However, the rules applying to the dispute under Article 42(1) address the resolution of disputes on the merits, and so will not necessarily be those which apply to the Tribunal’s determination of its jurisdiction under Article 41 at this stage of the proceedings.” See also *CMS Gas Transmission Company v. The Republic of Argentina*, Decision on Jurisdiction of July 17, 2003 (Arbitral Tribunal composed of Francisco Orrego Vicuña, President; Marc Lalonde, and Francisco Rezek), 42 ILM 788 (2003), paras. 88–89.

in turn, before considering whether the specific nature of investment protection treaties has implications in terms of choice of law process.

IDENTIFICATION OF THE LAW CHOSEN BY THE PARTIES

The parties' agreement to arbitrate may include the legal system or the rules of law that will govern the substance of their dispute. The main arbitration rules which may come into play in investment treaty arbitration recognize the parties' autonomy in this respect, the only differences being the reference to a particular system of law ('law') or to specific 'rules of law'. Article 42(1) of the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such *rules of law* as may be agreed by the parties." Article 33(1) of the UNCITRAL Arbitration Rules differs slightly in that the parties can designate the legal system that will govern their dispute: "[t]he arbitral tribunal shall apply the *law* designated by the parties as applicable to the substance of the dispute." Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, for its part, provides that "[t]he Arbitral Tribunal shall decide the merits of the dispute on the basis of the *law* or *rules of law* agreed upon by the parties." In line with these rules, the choice of law effectuated in investment treaties often covers a variety of models on the basis of the law of the host State and international law. Before examining these models, it is important to put in context the notion of choice of law by the 'parties' to an investment treaty arbitration.

Choice of Law in Context

One of the specific features of investment treaty arbitration is that the parties to the international instrument under consideration (a bilateral or a multilateral treaty containing investment protection rules), namely the contracting States, are to be distinguished from the parties to the dispute brought to arbitration on the basis of the instrument, namely one of those contracting States and an investor of the other contracting State. This distinction was at play in *AAPL v. Sri Lanka*, the first arbitration initiated on the basis of an investment treaty. In that case, the Arbitral tribunal seemed to have difficulty with the notion that a prior choice of law could be effectuated by the contracting States for the benefit of their respective investors. It therefore felt necessary to lay emphasis on the conduct of the parties to the arbitration amounting to an agreement on the applicable law during the course of the arbitration:

[. . .] the Parties in dispute have had no opportunity to exercise their right to choose in advance the applicable law determining the rules governing the various aspects of their eventual disputes.

In more concrete terms, the *prior choice-of-law* referred to in the first part of Article 42 of the ICSID Convention *could hardly be envisaged in the context of an arbitration case directly instituted in implementation of an international obligation undertaken between two States in favour of their respective nationals* investing within the territory of the other Contracting State.

Under these special circumstances, the choice-of-law process would normally materialize after the emergence of the dispute, by observing and construing the conduct of the Parties throughout the arbitration proceedings.

Effectively, in the present case, both Parties acted in a manner that demonstrates their mutual agreement to consider the provisions of the Sri Lanka/U.K. Bilateral Investment Treaty as being the primary source of the applicable legal rules. [. . .]⁴

On that basis, the *AAPL* tribunal concluded that the parties to the arbitration had agreed to the applicability of the Sri Lanka/United Kingdom bilateral investment treaty as “*lex specialis*” and of the international or domestic legal relevant rules referred to “as a supplementary source” by virtue of the provisions of the treaty itself.

The *AAPL* award has been criticized especially for the methodology used in determining the applicable law where the appropriate rule, in the absence of a choice of law in the bilateral investment treaty, would normally have been determined in accordance with the second sentence of Article 42(1) of the ICSID Convention.⁵ It shows in particular the conceptual difficulty for the Tribunal to envisage a prior choice of law “between two States in favor of their respective nationals.” There is, however, no such difficulty since the arbitration agreement contained in an investment treaty is deemed to be stipulated by the contracting States for the benefit of their investors.⁶ Any agreed mechanism in the arbitration agreement, including the law applicable to the dispute, is therefore deemed to be chosen directly by the parties to the arbitration. This assumption

4 Asian Agricultural Products Ltd. v. Sri Lanka, Award of June 27, 1990 (Arbitral Tribunal composed of Ahmed El-Kosheri, President; Berthold Goldman, and Samuel Asante), 4 ICSID REPORTS 256 (1997), paras. 19–20 (emphasis added).

5 See, in particular, Samuel Asante’s Dissenting Opinion, *ibid.*, p. 296. See also, for a criticism of the Tribunal’s conclusion as to the existence of an implicit choice of law where the bilateral investment treaty contained none, Emmanuel Gaillard, *Observations on the AAPL Award*, 119 JOURNAL DU DROIT INTERNATIONAL 217, 227–29 (1992), reproduced in EMMANUEL GAILLARD, *LA JURISPRUDENCE DU CIRDI* 336–38 (Pedone 2004) (“Un tel accord ne peut résulter de la simple concordance des écritures respectives des parties sur le fondement de leurs prétentions. Les arbitres doivent cependant faire preuve d’une certaine prudence dans la constatation d’un accord qui résulterait uniquement de la concordance des écritures. En particulier, le fait que les parties aient l’une et l’autre longuement discuté de l’interprétation d’un texte ne suffirait pas à traduire leur accord sur son applicabilité à la cause. Ce n’est que s’il résulte de leurs explications qu’elles ont entendu y voir une source de droit applicable qu’il est permis d’analyser la concordance de leurs écritures comme la manifestation de l’adoption de règles de droit au sens de l’article 42(1).”, *ibid.*, p. 337); CHRISTOPH SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 573–75 (Cambridge University Press 2nd ed. 2009).

6 The possibility was envisaged during the negotiation of the Washington Convention with respect to the situation 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, December 16–20, 1963, Document No. 25, in II CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, DOCUMENTS CONCERNING THE ORIGIN AND THE FORMATION OF THE CONVENTION 267 (ICSID Publication 1968) (“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.”).

is nothing more than the implementation of the dissociated nature of consent to arbitration in investment treaty arbitration: although consent to arbitration is dissociated in time, the parties to the arbitration are still presumed to have given their *common consent* to arbitration at the time the investor accepts the host State's general consent by filing the request for arbitration.⁷

This mechanism has been readily recognized in case law and is today well established.⁸ In *Antoine Goetz v. Burundi*, for example, the Tribunal had to determine whether the applicable law clause in the Burundi-Belgium investment treaty had to be considered as an express choice of law under Article 42 of the ICSID Convention. The Arbitral Tribunal specifically noted that:

Undoubtedly, the applicable law has not been determined here, strictly speaking, by the parties to this arbitration (Burundi and the investors), but rather by the parties to the Bilateral Treaty (Burundi and Belgium). As was the case with the consent of the parties [to the arbitration], the Tribunal deems nevertheless that Burundi accepted the applicable law as determined in the above provision of the Bilateral Treaty by becoming a party to this Treaty, and that claimants did the same by filing their request for arbitration based on the Treaty.⁹

7 See Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, in *REVUE DE L'ARBITRAGE* 853, 859 (2003): “[. . .] il s’agit d’une forme d’arbitrage dans lequel le consentement des parties à la convention d’arbitrage est dissocié. L’Etat émet une offre générale de contracter en spécifiant, dans l’instrument de protection des investissements concernés, que les litiges relatifs aux investissements couverts par cet instrument pourront être réglés par voie d’arbitrage. L’investisseur n’accepte cette offre qu’au moment de former la demande d’arbitrage. Les auteurs de la Convention de Washington avaient prévu, dès l’origine, la possibilité d’une telle dissociation. La convention d’arbitrage reposent, une fois conclue, sur la volonté commune des parties, cette première caractéristique ne nous paraît pas de nature à rendre compte, à elle seule, du particularisme de cette forme d’arbitrage.” (Emphasis added).

8 See, e.g., RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 266 (Oxford University Press 2008).

9 *Antoine Goetz et al. v. Republic of Burundi*, February 10, 1999 (Arbitral Tribunal composed of Prosper Weil, President; Mohammed Bedjaoui, and Jean-Denis Bredin), para. 94, French original in 15 *ICSID REV.* 457 (2000); English translation in XXVI *YEARBOOK COMMERCIAL ARBITRATION* 24, 36 (2001). The Tribunal also observed, noting the increasing “internationalization” of investor-state relations, that: “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.” (*ibid.*, paras. 68–69, at p. 31).

Variations on the Law of the Host State and International Law

Article 42(1) of the ICSID Convention gives the parties considerable freedom in that they can choose the ‘rules of law’ as opposed to an entire system of law that will govern their relationship, namely, any national legal system such as the law of the host State, selected rules of that system, rules common to certain legal systems, general principles of law, *lex mercatoria*,¹⁰ or international law.¹¹ In general, the reference to the law of the host State is more likely to occur in relationships arising out of a contract, where the investor’s rights and obligations may be governed by specific instruments or by the legal system of the host State more generally,¹² sometimes combined with a reference to international law. In this context, international law may apply either directly, possibly in conjunction with the law of the host State,¹³ or indirectly as incorporated into the selected domestic law.

10 On *lex mercatoria*, see in particular Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. 208 (1995), in particular at pp. 215 *et seq.*

11 On the parties’ freedom to choose the applicable rules of law pursuant to the first sentence of Article 42(1) of the Washington Convention, see generally Aron Broches, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application*, in XVIII YEARBOOK COMMERCIAL ARBITRATION 627, 667 (paras. 113–14) (1993); Ibrahim Shihata & Antonio Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID REV. 183, 188 *et seq.* (1994); Chitharanjan Felix 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, 54–55 (1977); CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, *supra* note 5, at pp. 557 *et seq.*

12 In the context of a dispute arising out of a contract and not an investment treaty, see, e.g., *Autopista Concesionada de Venezuela, C.A. (Aucoven) v. Bolivarian Republic of Venezuela*, Award of September 23, 2003 (Arbitral Tribunal composed of Gabrielle Kaufmann-Kohler, President; Karl-Heinz Böckstiegel, and Bernardo Cremades), 10 ICSID REPORTS 314 (2006), para. 94: the *Aucoven* Tribunal determined that Clause 5 of the Agreement represented the “rules of law” under the first sentence of Article 42(1) of the ICSID Convention and a “valid choice of law agreement providing for the application of Decree Law 138 and Executive Decree Nr. 502.” It also noted that the reference to these specific instruments did not “necessarily amount to a general choice of Venezuelan law”: had the parties to the Agreement so wished, they could have referred to Venezuelan law in general or to international law.

Compare, for example, with *Atlantic Triton v. Guinea*, where the agreement specifically provided for Guinean law to be applicable subject to the contractual protection from subsequent changes in the law (“The term ‘law’ in the present Agreement refers to Guinean law. However, Guinean law will be applicable only insofar as it is not incompatible with the terms of the present Agreement, and where it is not more restrictive than the law in force at the date of entry into force of the present Agreement.”), *Atlantic Triton v. Guinea*, Award of April 21, 1986 (Arbitral Tribunal composed of Pieter Sanders, President; Jean-François Prat, and Albert Jan van den Berg), 3 ICSID REPORTS 17, 23(1995).

13 See, e.g., *AGIP S.p.A. v. The Government of the People’s Republic of the Congo*, Award of November 30, 1979 (Arbitral Tribunal composed of Jørgen Trolle, President; René-Jean Dupuy, and Fuad Rouhani), 1 ICSID REPORTS 306, 318 (1993) (the law applicable was the law of Congo, “supplemented if need be by any principles of international law”); *Kaiser Bauxite v. Jamaica*,

Most investment treaties do not contain an express choice of law. Where such choice exists, the situations can broadly be categorized as follows.¹⁴ Almost always, the dispute is to be decided “in accordance with the provisions of the Agreement” itself.¹⁵ Frequently, the bilateral investment treaty is applicable in conjunction with “the principles of international law”¹⁶ or “the applicable rules of international law.”¹⁷ This is also the case for multilateral treaties containing investment protection rules such as the NAFTA¹⁸ and the Energy Charter Treaty.¹⁹ The choice of applicable law may include, in addition, the law of the host State in its entirety.²⁰ Some bilateral investment treaties

Decision on Jurisdiction of July 6, 1975 (Arbitral Tribunal composed of Jørgen Trolle, President; Michael Kerr, and Fuad Rouhani), 1 ICSID REPORTS 301 (1993) (the law applicable was the law of Jamaica and “such rules of international law as may be applicable excluding however any enactments passed or brought into force in Jamaica subsequent to the date of this agreement which may modify or affect the rights of the parties under the Principal Agreement or this Agreement [. . .]”).

- 14 Regarding BITs in general, *see* RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 128–29 (Martinus Nijhoff Publishers 1995). Concerning the reliance on a treaty containing a clause on the applicable law, *see* CHRISTOPH SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY*, *supra* note 5, at pp. 575–78.
- 15 *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 (with Romania), Peru (with Paraguay, Romania), Poland (with Estonia, France, Latvia, Lithuania), Portugal (with Venezuela, Turkey), Switzerland (with Mexico, Paraguay, Peru), United Kingdom (with Lebanon).
- 16 *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 15; *see also* BITs entered into by Bulgaria, the Czech Republic, Egypt, Poland, France, Germany, Italy, Panama, Peru, *supra* note 15.
- 17 *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, *supra* note 15; *see also* BITs entered into between Mexico and the Netherlands, Mexico and Spain, Mexico and Switzerland, the Netherlands and Zimbabwe, or between France and Poland.
- 18 Article 1131(1) of the North American Free Trade Agreement (NAFTA), entered into force on January 1, 1994, provides that: “[A] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”
- 19 Article 26(6) of the Energy Charter Treaty, entered into force on April 16, 1998, provides: “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.”
- 20 *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 15; *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),

refer to the treaty, the law of the host State and particular agreements between the parties, but not necessarily to the rules of international law.²¹

It is important to observe that the choice of the applicable law must be made clearly and unequivocally and cannot be implied without a clear intention of the parties to that effect.²² The question may arise as to whether a treaty provision setting forth that a number of sources of law must be “taken into account” amounts to a choice of the applicable law. The question was raised in *CME v. Czech Republic*, an arbitration conducted in accordance with the UNCITRAL Arbitration Rules and arising under the Netherlands/Czech bilateral investment treaty. Article 8(6) of the treaty provided as follows:

The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- the law in force of the Contracting Party concerned;
- the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
- the general principles of international law.²³

supra note 15. 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.

21 *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,” in the same way as the BIT between Argentina and the Netherlands (which includes a reference to “such rules of international law as may be applicable”); *see also* the BIT entered into between Belgium & Luxembourg and Mongolia. *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).

22 *See, e.g.*, *Compañía del Desarrollo de Santa Elena (CDSE) v. The Republic of Costa Rica*, Final Award of February 17, 2000 (Arbitral Tribunal composed of Yves Fortier, President; Elihu Lauterpacht, and Prosper Weil), 15 ICSID REV. 205 (2000), para. 63: “Article 42(1) of the ICSID Convention does not require that the parties’ agreement as to the applicable law be in writing or even that it be stated expressly. However, for the Tribunal to find that such an agreement was implied it must first find that the substance of the agreement, irrespective of its form, is clear. Having reviewed and considered Respondent’s oral and written argument on this question and analysed the documents to which we have been referred, including, in particular, the Helms Amendment and related documents, the Tribunal is unable to conclude that the parties ever reached a clear and unequivocal agreement that their dispute would be decided by the Tribunal solely in accordance with international law.” *See also* Berthold Goldman, *Le droit applicable selon la Convention de la BIRD 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* 133, 144 (Pedone 1969).

23 *CME Czech Republic B.V. v. The Czech Republic*, Final Award of March 14, 2003 (Arbitral Tribunal composed of Wolfgang Kühn, President; Stephen Schwebel, and Ian Brownlie), 9 ICSID REPORTS 264, 348 (2006), para. 91.

The tribunal considered this clause to be a proper choice of law provision, albeit in a flexible manner:

[. . .] the choice-of-law clause in the Dutch Treaty is broad and grants to the Tribunal a discretion, without giving precedence to the systems of law referred to. Art. 8(6) of the Treaty says: ‘The Arbitral Tribunal shall *decide on the basis of the law*, taking into account in particular though not exclusively: . . .’ (Emphasis supplied).

There is no ranking in the application of the national law of the host state, the Treaty provisions or the general principles of international law. Further there is no exclusivity in the application of these laws. [. . .] None of the precedents contained a choice of law clause similar to the clause in the Treaty, which instructs the Arbitral Tribunal to *take into account* (not: to apply) the above mentioned sources of law, in particular *though not exclusively*. [. . .]²⁴

In all situations where a choice of the applicable law exists unequivocally, the issue boils down to the arbitral tribunal’s duty to respect the choice of law validly made by the parties pursuant to the first sentence of Article 42(1) of the ICSID Convention.²⁵ In other words, any issue of interpretation by the tribunal would arise in relation to the parties’ intention, as opposed to an interpretation of the ICSID Convention itself.²⁶

24 *Ibid.*, para. 402. See also the judgment rendered by the Svea Court of Appeal following the Czech Republic’s application for annulment of the Partial Award of September 13, 2001: “The wording that the arbitral tribunal shall ‘take into account in particular although not exclusively’ must be interpreted such that the arbitrators may also use sources of law other than those listed. The four sources of law are not numbered, nor are they otherwise marked in such a manner that governing law in the relevant contracting state should primarily be applied and general principles of international law applied thereafter. The un-numbered list almost gives the impression that the contracting states have left to the arbitrators the determination, on a case by case basis, as to which source or sources of law shall be applied. If the case concerns an alleged violation of the Investment Treaty, it might be relevant first of all to apply international law, in light of the Investment Treaty’s purpose of affording protection to foreign investors by prescribing norms in accordance with international law.” The Svea Court observed that there was “no conclusion other than that the arbitral tribunal has complied with the provisions of the choice of law clause as such must be interpreted, *i.e.* applied relevant sources of law, primarily international law, and thus has not based its decision that the Republic violated the Treaty on a general assessment of reasonableness devoid of any basis in law.” Svea Court of Appeal, *The Czech Republic v. CME Czech Republic B.V.*, Judgment of May 15, 2003, 42 ILM 919, 965 (2003).

25 On the arbitrators’ duty to respect the choice of the parties in general, see Emmanuel Gaillard, *The Role of the Arbitrator in Determining the Applicable Law*, in *THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* 185 (Lawrence Newman ed., Juris Publishing 2003); in investment arbitration, see also the author’s observations under SPP v. Egypt in relation to the Tribunal’s failure to apply the law applicable under the first sentence of Article 42(1) of the ICSID Convention, in *EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI*, *supra* note 5, at pp. 379–83.

26 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 to or exactly the same as the second sentence of Article 42(1): see, for example, 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

These cases, however, are not the most frequent ones: a very large number of bilateral investment treaties do not provide for any choice of law.²⁷

DETERMINATION OF THE APPLICABLE LAW BY THE ARBITRATORS IN THE ABSENCE OF THE PARTIES' AGREEMENT

Practice shows that in the majority of cases, there was no choice of law provision in the arbitrations initiated on the basis of a bilateral investment treaty.²⁸ In such cases, the determination of the applicable law depends on the arbitration rules in accordance with which the arbitration is conducted.

The most recent statistics established by UNCTAD indicate that, out of a total of 317 known treaty-based arbitrations from 1987 to 2008, 63.4 percent were submitted to ICSID (including the ICSID Additional Facility), the remaining cases being conducted in accordance with the UNCITRAL Rules (26.2 percent), the rules of the Stockholm Chamber of Commerce and those of the ICC.²⁹ The statistics also show that non-ICSID fora tend to be selected increasingly by the parties (in particular after 2002), a trend that may increase in the coming years and that makes such other options under investment treaties as UNCITRAL or the Stockholm Chamber of Commerce all the more significant.

Under these various arbitration rules, although the differences tend to diminish as regards the arbitrators' freedom to determine the applicable law in the absence of the parties' agreement, one major difference exists between the ICSID system and the other fora available to the investors: the respective role of the law of the host State and the rules of international law. Under the second sentence of Article 42(1) of the ICSID Convention, in the absence of an agreement between the parties, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the

Party—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, 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.

27 The vast 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 at December 15, 2008 and to the best of the author's knowledge based on the BITs available, none of the 40 BITs entered into by the United States and which are in force contain a clause on the applicable law; a clause on the applicable law can be found in only 12 out of 91 BITs concluded by France and in force, in only 6 out of 91 BITs concluded by the United Kingdom and in force, and in only 8 out of the 114 available BITs concluded by Germany and in force.

28 See Antonio Parra, *Applicable Law in Investor-State Arbitration*, in I CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 3, 7–8 (Michael Rovine ed., Martinus Nijhoff Publishers 2008); the author indicates that out of 20 ICSID awards rendered on the merits on the basis of bilateral investment treaties as of June 19, 2007, 15 concerned treaties containing no choice of law provision; the remaining 5 bilateral treaties provided that the treaty itself, general international law principles, and the law of the host State applied.

29 United Nations Conference on Trade and Development (UNCTAD), IIA Monitor No. 1 (2009), *International Investment Agreements*, "Latest developments in investor-State dispute Settlement," available on the UNCTAD Web site, at pp. 2–3.

conflict of laws) and such rules of international law as may be applicable.” The rule is worded more broadly under Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, which provides that in the absence of a choice by the parties the “Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate,” without specifically designating the law of the host State or the rules of international law. Under Article 33(1) of the UNCITRAL Arbitration Rules, in the absence of a choice of law by the parties, “the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” Under this provision, the arbitrators have to go through the less flexible conflict of laws method³⁰ to determine which system of law is applicable as opposed to designating directly specific rules of law that may apply to specific questions.³¹

In practice, a determining question in the operation of these rules is what balance is found by the arbitrators, in the absence of a choice of the applicable law by the parties, between the law of the host State and international law. Unlike the UNCITRAL Arbitration Rules and the Arbitration Rules of the Stockholm Chamber of Commerce, in the ICSID system the arbitrators’ recourse to both the law of the host State and international law is mandatory. Until the decision rendered by the *ad hoc* Committee in *Wena v. Egypt*,³² both arbitral practice and legal writings essentially focused on the

30 For an analysis of this rule as leaving “a wide margin to the arbitral tribunal in the selection of the applicable conflict of laws rules, in contrast to the restriction to host State law and international law in Article 42(1) of the ICSID Convention”, see Campbell McLachlan, “Investment Treaty Arbitration: The Legal Framework,” *supra* note 3, at p. 22.

31 This provision is currently undergoing a revision process: see Draft Article 33(1) in the Draft revised Arbitration Rules discussed at the UNCITRAL forty-ninth session in Vienna on September 15–19, 2008, available on the UNCITRAL Web site (“[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law [variant 1: with which the case has the closest connection] [variant 2: which it determines to be appropriate].”). The Working Group’s commentary of this provision reads: “The Working Group agreed that the arbitral tribunal should apply the rules of law designated by the parties and that therefore the words ‘rules of law’ should replace the word ‘law’ in the first sentence of article 33 [. . .]. In relation to the second sentence of paragraph (1), diverging views were expressed as to whether the arbitral tribunal should be given the same discretion to designate ‘rules of law’ where the parties had failed to make a decision regarding the applicable law. It was suggested that the Rules should be consistent with article 28, paragraph (2) of the Model Law which refers to the arbitral tribunal applying the ‘law’ and not the ‘rules of law’ determined to be applicable. [. . .] The Working Group expressed broad support for wordings along the lines of variants 1 or 2 contained in the second sentence of paragraph (1), which were said to offer the opportunity to modernize the Rules by allowing the arbitral tribunal to decide directly on the applicability of international instruments. Variant 2 reflects a proposal made to provide the arbitral tribunal with a broader discretion in the determination of the applicable instrument.” (United Nations Commission on International Trade Law, Working Group II (Arbitration), Forty-ninth session (Vienna, September 15–19, 2008), “Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules”, Note by the Secretariat, August 6, 2008, Doc.A/CN.9/WG.II/WP.151/Add.1, pp. 14-15).

32 *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on Application for Annulment of February 5, 2002 (*Ad hoc* Committee composed of Konstantin Kerameus, President; Andreas Bucher, and Francisco Orrego Vicuña), 41 ILM 933 (2002).

primary role of the law of the host State, leaving a residual role to international law in situations where the law of the host State contained *lacunae* or was inconsistent with international law, or in situations where the law of the host State entered into collision with fundamental norms of international law.³³ The role of international law as a body of substantive rules directly accessible to the arbitrators without initial scrutiny into the law of the host State, which had been advocated by some,³⁴ was not fully espoused until the decision by the *ad hoc* Committee in the *Wena v. Egypt* annulment proceeding.

In that case, 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 investor submitted that there was an important distinction to be drawn between the lease contracts (for which the applicable law was 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.³⁵ 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 interplay between domestic and international law,³⁶ before determining the meaning of "and" as well as the role of international law under that provision:

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.³⁷

33 On these two lines of reasoning and an analysis of the negotiating history of the ICSID Convention with respect to Article 42(1), see Emmanuel Gaillard & Yas Banifatemi, *The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REV. 375 (2003).

34 See, regarding the question of the applicability of international law to issues involving the conduct of the host State, Elihu Lauterpacht, *The World Bank Convention on the Settlement of International Investment Disputes*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM, IUHEI 642, 659–61 (1968) (suggesting, with respect to "disputes arising out of contracts," that an ICSID tribunal should be able to consider whether a State party's conduct is consistent with its obligations under public international law). See also Emmanuel Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)—Chronique des sentences arbitrales*, in 114 J. DU DROIT INT'L 135, 157 (1987); Emmanuel Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)—Chronique des sentences arbitrales*, in 118 J. DU DROIT INT'L 165, 182–83 (1991).

35 *Wena v. Egypt*, Decision of February 5, 2002, *supra* note 32, at pp. 940–41.

36 *Ibid.*, at p. 941.

37 *Ibid.* (emphasis added). This holding is in sharp contrast with 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.'" (*Klöckner v. Cameroon*, Decision of May 3, 1985, 2 ICSID REPORTS 95, 122 (1994), para. 69, emphasis

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. A 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 find either a *lacuna* or an inadequacy of the law of the host State. On this basis, the *Wena* Committee validated the tribunal's recourse to international law, in particular the award of compound interest to the investor as the appropriate rule 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.³⁸

The *Wena* method implies a choice of law inquiry.³⁹ The designation of the rule of international law in that case was the result of the identification of the particular issue at hand (award of damages) and the consideration of the various rules that were susceptible to apply (rules under each of Egyptian law and international law). The Tribunal thus determined, after a choice of law inquiry, that the international law rule

in original), and also with the *ad 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." (*Amco Asia Corporation and others v. Republic of Indonesia*, Decision on the Application for Annulment, May 16, 1986, 1 ICSID REPORTS 509, 515 (1993), para. 20, emphasis added).

For a more recent recognition of this ruling, see also *CMS Gas Transmission Company v. The Republic of Argentina*, Award of May 12, 2005, 44 ILM 1205 (2005), para. 116 ("[. . .] a more pragmatic and less doctrinaire approach has emerged, allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies. It is no longer the case of one prevailing over the other and excluding it altogether. Rather, both sources have a role to play. [. . .]").

38 *Wena v. Egypt*, Decision of February 5, 2002, *supra* note 32, at pp. 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 for the investor), *Middle East Cement Shipping and Handling Co., S.A. v. Arab Republic of Egypt*, Award of April 12, 2002, 7 ICSID REPORTS 178 (2005), paras. 173–75. *Contra*, see *Aucon v. Venezuela*, *supra* note 12, paras. 393–96 (determining, in an arbitration initiated on the basis of a concession agreement, that international law does not "require" an award of compound interest and that the applicable Venezuelan law combined with the pertinent contractual provisions did not allow compound interest).

39 *Compare*, for a critical approach in terms of methodology, Campbell McLachlan, "Investment Treaty Arbitration, The Legal Framework," *supra* note 3, at p. 20: "It is doubtless correct, as the [*Wena*] *ad hoc* Committee observed, that the second sentence of Article 42(1) '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*.' But, it is submitted that the rule nevertheless still requires the tribunal to undertake a choice of law enquiry. The starting-point for the analysis, as in Private International Law, is the identification and characterisation of the particular *issue* to which the legal rule is to be applied, and the selection of the legal system which properly applies to the determination of that issue."

of compound interest was the proper rule in consideration of the State's wrongful act and of the principle of full compensation with respect to the loss of the claimant's investment.⁴⁰

The role of international law in investment treaty arbitration is essential; recognizing this role in no way undermines that of the law of the host where it would be the proper law. Indeed, by the very nature of investment treaty arbitration, certain issues can be resolved only through the application of international law;⁴¹ on the other hand, certain questions can be determined only pursuant to domestic law. The two systems of law may thus apply depending on each distinct issue to be determined on the merits. In terms of methodology, this is allowed by each of the second sentence of Article 42(1), Article 33 of the UNCITRAL Arbitration Rules or Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, which enable arbitral tribunals, in the exercise of their discretion and pursuant to a choice of law inquiry, to decide what rule of law (international or domestic) is the most appropriate to the determination of each specific question.

IMPLICATIONS OF THE SPECIFIC NATURE OF INVESTMENT TREATIES IN THE CHOICE OF LAW PROCESS: STANDARDS OF PROTECTION VERSUS LAW APPLICABLE TO THE SUBSTANCE

As previously noted, multilateral treaties such as the NAFTA and the Energy Charter Treaty and a number of bilateral investment treaties provide that the treaty itself, along with the rules of international law, apply to the resolution of disputes brought under those instruments. It is unquestionable that arbitral tribunals are also bound by the terms of the investment treaty as the instrument that provides the parties' rights and obligations and the treaty standards against which they will have to determine whether the international responsibility of the host State must be engaged. In this context, the question arises as to the role of the treaty in the choice of law mechanism. In other words, must a distinction be drawn between, on the one hand, a treaty's substantive protections—for example the obligation to treat an investment in a fair and equitable

40 See *Wena Hotels Ltd. v. Egypt*, Award of December 8, 2000 (Arbitral Tribunal composed of Monroe Leigh, President; Ibrahim Fadlallah, and Don Wallace), 41 ILM 896, 909 (2002), paras. 128–29 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 the Decision by the *ad hoc* Committee of February 5, 2002, *supra* note 32, at p. 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.”

41 On this question, see *infra*, the developments under the title “Implications of the Specific Nature of Investment Treaties in the Choice of Law Process: Standards of Protection versus Law Applicable to the Substance”.

manner, or the obligation to refrain from any measures of discrimination or arbitrary treatment, or the prohibition of expropriatory measures without due compensation—and, on the other hand, the treaty as containing the law applicable to the determination of whether such standards have been violated?

The role of the investment treaty in the choice of law mechanism was envisaged in *AAPL v. Sri Lanka*, where the Tribunal saw in the Sri Lanka/United Kingdom bilateral investment treaty the “substantive material rules of direct applicability” as well as seeing in it, by *renvoi*, other sources of law:

Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature. Such extension of the applicable legal system resorts clearly from Article 3(1), Article 3(2), and Article 4 of the Sri Lanka/U.K. Bilateral Investment Treaty.⁴²

The *AAPL* tribunal concluded that both parties had agreed to the applicability of the Sri Lanka/United Kingdom bilateral investment treaty as “*lex specialis*” and of the international or domestic legal relevant rules referred to “as a supplementary source” by virtue of the provisions of the treaty itself. A very similar reasoning was adopted by the Tribunal in *Azurix v. Argentina*,⁴³ and by the Tribunal in *LG&E v. Argentina*,⁴⁴

42 *Asian Agricultural Products Ltd. v. Sri Lanka*, *supra* note 4, para. 21.

43 *Azurix v. Argentina*, *supra* note 3, paras. 65–67: “The Tribunal notes first the agreement of the parties with the statement that *the BIT is the point of reference for judging the merits of Azurix’s claim*. The Tribunal further notes that, according to the Argentine Constitution, the Constitution and treaties entered into with other States are the supreme law of the nation, and treaties have primacy over domestic laws. [. . .] Azurix’s claim has been advanced under the BIT and, as stated by the Annulment Committee in *Vivendi II*, the Tribunal’s inquiry is governed by the ICSID Convention, by the BIT and by the applicable international law. While the Tribunal’s inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal’s inquiry into the alleged breaches of the Concession Agreement to which Argentina’s law applies, but is only an element of the inquiry because of the treaty nature of the claims under consideration.” (Emphasis added).

44 *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, Decision on Liability of October 3, 2006 (Arbitral Tribunal composed of Tatiana B. de Maekelt, President; Francisco Rezek, and Albert Jan van den Berg), 21 ICSID REV. 269 (2006), para. 85: “It is to be noted that the Argentine Republic is a signatory party to the Bilateral Investment Treaty, which may be regarded as a tacit submission to its provisions in the event of a dispute related to foreign investments. In turn, LG&E grounds its claim on the provisions of the Treaty, thus presumably choosing the Treaty and the general international law as the applicable law for this dispute. Nevertheless, these elements do not suffice to say that there is an implicit agreement by the Parties as to the applicable law, a decision requiring more decisive actions. Consequently, the dispute shall be settled in accordance with the second part of Article 42(1).” The Tribunal goes on to analyze the respective roles of domestic law and international law under Article 42(1), second sentence, before concluding, by specific reference to *AAPL* (at para. 97) that, in the absence of a “binding contractual agreement” between the parties, it must apply

although in the context of the absence of a choice of law provision under the United States-Argentina bilateral investment treaty. The Arbitral Tribunal in *Wena v. Egypt* had equally relied on the Egypt-United Kingdom bilateral investment treaty while relying on the second sentence of Article 42(1) of the ICSID Convention to complete the provisions of the treaty through the application of Egyptian law and international law.⁴⁵ The Tribunal in *ADC v. Hungary* also applied the bilateral investment treaty, on the basis of what it found to be the express terms of the treaty itself as completed by the rules of international law.⁴⁶

In all these cases, the relevant bilateral investment treaty was treated as the primary source of applicable law by each of the Arbitral Tribunals. The question, however, is not as straightforward as it would seem at first glance: when confronted with a choice of law provision containing a reference to the treaty itself, must the arbitral tribunal treat the provisions of such treaty as the ‘applicable law’ or, rather, as the provisions containing the respective rights and obligations of the parties to the dispute on the basis of which the claim is lodged? The same would be true of a contract in a purely

“*first the Bilateral Treaty*; second and in the absence of explicit provisions therein, general international law, and, third, the Argentine domestic law, particularly the Gas Law that governs the natural gas sector.” (paras. 98–99, emphasis added).

45 *Wena Hotels Ltd. v. Egypt*, Award of December 8, 2000, *supra* note 40, paras. 78–79: “As both parties agree, ‘this case all turns on an alleged violation by the Arab Republic of Egypt of the agreement for the promotion and protection of investments that was entered into in 1976 between the United Kingdom and the Arab Republic of Egypt.’ Thus, the Tribunal, like the parties (in both their submissions and oral advocacy), considers the IPPA to be the primary source of applicable law for this arbitration. However, the IPPA is a fairly terse agreement of only seven pages containing thirteen articles. [. . .] The Tribunal finds that, beyond the provisions of the IPPA, there is no special agreement between the parties on the rules of law applicable to the dispute. Rather, the pleadings of both parties indicate that, aside from the provisions of the IPPA, the Tribunal should apply both Egyptian law (*i.e.*, ‘the law of the Contracting State party to the dispute’) and ‘such rules of international law as may be applicable.’). The Tribunal notes that the provisions of the 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.” (Emphasis added).

46 Although the *ADC* Tribunal refers to the treaty as the applicable law under the first sentence of Article 42(1) of the ICSID Convention, it would appear that the express reference to the bilateral investment treaty under Article 6(5) of the treaty concerns disputes between the Contracting Parties and not disputes between an investor and a Contracting Party. See *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Hungary*, Final Award on Jurisdiction, Merits and Damages of October 2, 2006 (Arbitral Tribunal composed of Neil Kaplan, President; Charles Brower, and Albert Jan van den Berg), 18 *WORLD TRADE & ARB. M.* 285 (2006), para. 290: “In the Tribunal’s view, by consenting to arbitration under Article 7 of the BIT with respect to ‘Any dispute between a Contracting Party and the investor of another Contracting Party concerning expropriation of an investment . . .’ the Parties also consented to the *applicability of the provisions of the Treaty* [. . .]. Those provisions are Treaty provisions pertaining to international law. That consent falls under the first sentence of Article 42(1) of the ICSID Convention [. . .]. The consent must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty. [. . .]” (Emphasis added).

contractual context: the proper law of the contract is not the contract but the legal system in which the contract finds its validity. In other words, the question is whether treaty provisions must be treated as primary rules of conduct forming the basis of the claim or, in terms of choice of law, as secondary rules designed to ensure the proper ‘application’ of the primary rules, following the well-known distinction adopted by the International Law Commission in its codification of the law of State responsibility.⁴⁷

In individual cases, it could be argued that a treaty provision contains both a standard of conduct (for example, the prohibition of an expropriation or measures having an equivalent effect without due compensation) and rules regarding the operation of such standard in case of dispute (for example, the method of calculation of compensation due in case of expropriation, such as fair market value at the time of expropriation).⁴⁸ In such situations, the tribunal will be bound to ‘apply’ the treaty provision to the extent that it is part of the general framework of the parties’ rights and obligations. In terms of methodology, however, this does not make the treaty the ‘law applicable’ to the dispute brought under the treaty, or change the nature of the treaty provisions which contain substantive obligations that can be the subject of the parties’ dispute and provide the basis for a claim.

Beyond methodological differentiations, practical consequences may attach to the distinction between standards of protection and the law applicable to the substance of the dispute. Strictly speaking, in situations where there is a choice of law provision making reference to the treaty itself, the treaty’s provisions would normally constitute the standards against which the parties’ conduct is assessed by the tribunal, whereas the rules of international law would in any event constitute the ‘law applicable’ to the determination of the creation, scope, modification, extinction, interpretation and operation of such provisions, for example the rules on State responsibility which determine

47 On secondary rules in this context, see JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY. INTRODUCTION, TEXT AND COMMENTARIES 17* (Cambridge University Press 2002): “The law relating to the content and the duration of substantive State obligations is as determined by the primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework—those rules, denominated ‘secondary,’ which indicate the consequences of a breach of an applicable primary obligation.” See also at p. 75: “[. . .] it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other ‘sources’ of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.”

48 The treaty may contain other rules concerning, for example, the time at which the obligations under the treaty come into effect or whether such obligations may have retroactive effect, or the types of investment that are protected. In such situations, it may be argued, the rules in question concern the qualifying conditions under which the treaty will apply *ratione personae*, *ratione materiae* and *ratione temporis*, and presumably concern issues of jurisdiction rather than merits.

whether an international obligation has been breached and attach specific consequences to such breach or determine whether there are causes of exoneration, or the rules of treaty interpretation where the nature and extent of the parties' obligations under the treaty are in dispute.⁴⁹ Equally, where the treaty does not contain a choice of law rule, it is submitted that the proper 'rules of law' that can be determined as applicable by the arbitrators as regards the creation, scope, modification, extinction, interpretation, and operation of the treaty's substantive provisions will always be rules of international law.⁵⁰

This conclusion is not very different from that reached unambiguously by the *Vivendi* Annulment decision in relation to the distinction between claims arising out of a contract and claims arising out of a treaty:

[. . .] A state may breach a treaty without breaching a contract, and *vice versa*, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled 'Characterization of an act of a State as internationally wrongful':

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result

49 Compare with the Judgment of the International Court of Justice in the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of February 5, 1997, I.C.J. REPORTS 7 (1997), para. 47: "Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility."

50 Compare Antonio Parra, *Applicable Law in Investor-State Arbitration*, *supra* note 28, at p. 8: "Unlike the BITs in *Siemens* and the four other cases, most BITs, including those involved in the remaining 15 cases under consideration, lack specific provisions on applicable law. However, as indicated earlier, in all of the cases the claims were made in respect of alleged violations by the respective host States of their obligations under the BITs. The investor-State arbitration provisions of the BITs obviously authorize this type of claim; they typically do so by stating that they cover disputes over the obligations of the State under the BIT or disputes relating to alleged breaches of rights created or conferred by the BIT in respect of investments. Inevitably it would seem, the claims will fall to be decided in accordance with the provisions of the BIT and of international law as the BIT's governing law." (Emphasis added).

that the state of Argentina is internationally responsible for the acts of its provisional authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.⁵¹

The conclusion reached more recently in *MTD v. Chile* was similar. In that case, the parties disagreed on the law applicable with regard to foreign investment contracts, the Claimants arguing in favor of international law while Chile claimed that Chilean law applied. The Tribunal held that “[t]his being a dispute under the BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law” and that, as regards foreign investment contracts, “the parties have agreed to this arbitration under the BIT. This instrument being a treaty, the agreement to arbitrate under the BIT requires the Tribunal to apply international law.”⁵² The *ad hoc* Committee constituted after Chile’s application for annulment of the *MTD* award confirmed this conclusion:

[. . .] MTD’s claim is one for ‘an alleged breach of any right conferred or created by this Agreement with respect to an investment by such investor’ (BIT, Article 6(1) (ii)), and thus international law as the proper law of the BIT is applicable to that claim and to any defence thereto. The Respondent insists—and the Claimants do not disagree—that the Tribunal had to apply international law as a whole to the claim, and not the provisions of the BIT in isolation.

As noted above, the *lex causae* in this case based on a breach of the BIT is international law. However it will often be necessary for BIT tribunals to apply the law of the host State, and this necessity is reinforced for ICSID tribunals by Article 42(1) of the ICSID Convention. Whether the applicable law here derived from the first or second sentence of Article 42(1) does not matter: the Tribunal should have applied Chilean law to those questions which were necessary for its determination and of which Chilean law was the governing law. At the same time, the *implications* of some issue of Chilean law for a claim under the BIT were for international law to determine. In short, both laws were relevant.⁵³

This case shows, and the above analysis may explain, the progressive fading, in investment treaty arbitration, of the assumed strict frontier between an express choice of the applicable law by the parties and the absence of such choice, such that the

51 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on Annulment of July 3, 2002 (*Ad hoc* Committee composed of Yves Fortier, President; James Crawford, and José Carlos Fernández Rozas), 6 ICSID REPORTS 340 (2004), paras. 95–96.

52 *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, Award of May 25, 2004 (Arbitral Tribunal composed of Andrés Rigo Sureda, President; Marc Lalonde, and Rodrigo Oreámuno Blanco), 12 ICSID REPORTS 3 (2007), paras. 86–87.

53 *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, Decision on Annulment of 16 February 2007 (*Ad hoc* Committee composed of Gilbert Guillaume, President; James Crawford, and Sara Ordoñez Noriega), 13 ICSID REPORTS 500 (2008), paras. 61 and 72.

arbitrators' reference to the investment treaty as the 'applicable' instrument will inevitably lead to the determination of international law as the 'applicable law'. In other words, irrespective of whether or not an investment treaty refers to international law as the law applicable to the merits of the dispute, international law will always be the law governing the interpretation and the application of the treaty providing the basis for the arbitration, to the extent that what is at stake, in investment treaty arbitration, is the international responsibility of a State.