INTERNATIONAL ARBITRATION AND CHOICE OF LAW
UNDER ARTICLE 42 OF THE CONVENTION ON THE
SETTLEMENT OF INVESTMENT DISPUTES

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I. Introduction

The most ambitious attempt to date to create an institutional mechanism for the resolution of international investment disputes—conflicts between foreign private investors and host state governments—is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Convention provides for arbitration or conciliation under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), a body attached to the International Bank for Reconstruction and Development (World Bank). But in spite of the clear necessity for a widely-accepted means of resolving such conflicts, the success of ICSID arbitration

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2. It has been termed the major purpose of the Convention that the availability of such a mechanism will promote private investment and economic development in third-world countries by improving the investment climate for investors and host states alike. See Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 RECUEIL DES COURS 331 (Hague Academy of Int'l Law 1972).
remains, at best, qualified.

In the twelve years since the Convention entered into force, about half the world's states have become signatories.\(^3\) But in that same period only six disputes have been submitted to the Centre for arbitration; and none of these has yet been decided on the merits by an arbitral tribunal.\(^4\) Whether investors and host state politicians will perceive ICSID arbitration as a useful

3. As of June 30, 1977, 73 states had signed the Convention, of which 67 had deposited their instruments of ratification; ICSID, 11TH ANNUAL REPORT 1976-77, at 6 (1977). Other indicators of success are the facts that numerous bilateral treaties contain provisions relating to ICSID, \(id.\) at 20-28, that several states have promulgated implementing legislation, \(id.\) at 29-30, and that there is a growing practice of inserting submission clauses into international investment agreements, \(id.\) at 4. Furthermore, it may well be that the mere availability of compulsory international arbitration has contributed to fair dealing in the conclusion, performance, and renegotiation of investment agreements. See Smith & Wells, Conflict Avoidance in Concession Agreements, 17 HARV. INT'L L. J. 51 (1976); Szasz, A Practical Guide to the Convention on Settlement of Investment Disputes, 1 CORNELL INT'L L. J. 1 (1968).

There are, however, significant lacunae in state acceptance of ICSID, notably among Latin American countries. This is attributable to the region's historical insistence upon exclusive national jurisdiction over aliens, reflected in the Calvo doctrine. It was apparently not appreciated that the Convention would accomplish what the Latin American countries desired most: the preclusion of intervention by an alien's government on his behalf. See Rogers, Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas, 72 AM. J. INT'L L. 1 (1978); Szasz, The Investment Disputes Convention and Latin America, 11 VA. J. INT'L L. 256 (1971).

in institution or not, and whether ICSID will acquire any authority, the *sine qua non* for an institution lacking an effective power base, depends only in part upon legal elements. But to the extent that the latter play an independent role in these processes, the question of the applicable law may well be the most important one. Indeed, the Convention's choice-of-law provision, Article 42, has been termed its weakest link.


6. Temptations to rely upon naked power are likely to remain high. In the proceedings brought against Jamaica, *supra* note 4, Jamaica consistently failed to participate or to appoint its arbitrator. ICSID, 11TH ANNUAL REPORT 976-77, 36-40 (1977). Host governments may also rely on overt force. *See* N.Y. Times, Oct. 3, 1975, at 1, col. 6 (detention of investor's employees as hostages by Libyan government in course of dispute over oil concessions). On the other hand, perceptions of coercion by foreign investors still loom large in the minds of decision-makers in developing countries. *See, e.g.*, 2 ICSID, *CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES* 803 (1970) (history of Convention) (fears expressed during drafting of Convention) [hereinafter cited as HISTORY].

This article proposes that the future success of ICSID arbitration depends largely upon the tribunal's determination of what substantive law is to govern the proceedings. Scholarly attention to the choice-of-law problem is therefore imperative. It is particularly necessary in light of the fact that Art. 42 lends itself to an interpretation which might unduly restrict a tribunal's choice of applicable prescriptions, with the possible result that ICSID arbitration may appear unacceptable to the relevant decision-makers. This article explores the Convention's procedural solution to the problem of determining the applicable law and argues that that solution must be supplemented by considerations of the substantive goals.

8. Even if, as is to be hoped, the litigants forgo their right to let the awards be unpublished, Art. 48(5), the small number of cases and the specific facts and precise questions submitted to arbitration are likely to limit the development of a coherent theory on the subject by the ICSID tribunals themselves. The systematic exploration of the applicable law under Art. 42 is, therefore, peculiarly the province of scholars. The Convention generally has been discussed fairly extensively in the literature, and a number of writers have addressed themselves specifically to Art. 42. The extant commentary, however, remains less than fully responsive to all the issues raised by Art. 42. Such commentary includes: J. CHERIAN, INVESTMENT CONTRACTS AND ARBITRATION: THE WORLD BANK CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES 75-92 (1975); 2 G. DELAUME, TRANSNATIONAL CONTRACTS §§ 14.04-14.07 (1978); Amerasinghe, Dispute Settlement Machinery in Relations between States and Multinational Enterprises, 11 INT'L LAW. 45 (1977); Masood, Law Applicable in Arbitration of Investment Disputes under the World Bank Convention, 15 J. INDIAN L. INST. 311 (1973); Broches, supra note 2, at 348; Firth, The Law Governing Contracts in Arbitration under the World Bank Convention, 1 N.Y.U. J. INT'L L. & POL. 253 (1968); Kahn & Fell, The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes, 44 INDIANA L. J. 1 (1968); Lauterpacht, The World Bank Convention on the Settlement of International Investment Disputes, in FACULTE DE DROIT DE L'UNIVERSITE DE GENEVE, RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM 652 (1968).
which the Convention is intended to serve. These are
two-fold: to foster international cooperation for
economic development,9 and, implicitly, to strengthen
ICSID arbitration as an integrative international
institution. It is submitted that broad and complex goals
such as these can be achieved only if the range of the
normative prescriptions which may be brought to bear on
a dispute is as wide as possible, and if the arbitrators
have the authority to design solutions which are persuasive
to other decision-makers. The ICSID Convention's choice-
of-law clause, properly understood, can meet these
requirements.

II. The Establishment of ICSID

The necessity for an internationally constituted
forum for the settlement of disputes between private
persons and governments arising out of transnational
investments has long been recognized.10 Considering

9. The "broad aim" of the Convention "is to foster inter-
national cooperation for economic development." ICSID, 11TH
ANNUAL REPORT 1976-77, at 3 (1977). See also § 9, Executive
Directors' Report (accompanying the Convention), 2 HISTORY, supra
note 6, at 1073. See also Broches, supra note 2, at 348 (terming it
a major purpose of the Convention that the availability of a
dispute-settling mechanism promote private investment in developing
countries by improving the investment climate for investors
and host state alike). This common purpose of the signatories
may be deemed a general principle recognized by them. Such
principles are considered to be applicable by the tribunal. See
remarks by Guarino (Italy) at Geneva Meeting, 2 HISTORY, supra note
6, at 419.

10. See, e.g., Fatouros, The Quest for Legal Security of
Foreign Investments, 17 RUTGERS L. REV. 257, 293 (1963); Snyder,
Foreign Investment Protection: The Dispute Solving Aspect, 3 COLUM.
J. TRANSNAT'L L. 127 (1965); Sohn, Proposal for the Establishment
of a System of International Tribunals, in INTERNATIONAL TRADE
the matter for simplicity's sake solely from the perspective of an investor in search of a remedy against the host government, the latter's courts will appear at best biased, and at worst as participants in the very process of deprivation of which he complains. The same objection may be leveled against nationally constituted arbitration bodies. The courts of the investor's own state, assuming there are no obstacles to their assuming jurisdiction, will frequently be of no avail because of his adversary's sovereign immunity. Diplomatic protection, even if it were a matter of right, is subject to considerations of political expediency in its manner of exercise. The pursuit of the investor's claim by his government before the International Court of Justice is in many instances likely to founder upon a denial of standing.

11. E.g., the voiding of the Sapphire arbitration award (infra note 20) by the Iranian courts when enforcement was sought on the ground that Iranian law, determined to be inapplicable by the arbitrator, had not been applied. See 9 INT'L LEGAL MATERIALS 1118 (1970).

12. E.g., the establishment of a special tribunal by the government of Chile to determine the compensation owed to investors after the nationalization of American copper interests under conditions which negated the very possibility of compensation. See Vicuna, Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile, 67 AM. J. INT'L L. 711, 716-17 (1973) (defending the procedure as lawful).

13. E.g., the Soviet-Israeli Oil Arbitration (Jordan Investment Ltd. v. Soyuzneftexport (1958)), 53 AM. J. INT'L L. 800 (1959) (Soviet All-Union Foreign Trade Arbitration Board affirmed as lawful the cancellation by a Soviet state trading agency of a contract on the ground of force majeure (failure of Soviet government to issue export licence), using the fiction of separate identities of the Soviet government and its state trading agencies).

14. West Germany seems to be the only country where it is seriously contended that a citizen has the right to demand that his government take up his claim against a foreign state. See Berger, Die Internationale Zentrale fuer Beilegung von Investitionsstreitigkeiten, 11 AUSSENWIRTSCHAFTSDIENST DES BETRIEBSBERATERS 434 (1965).

15. See the Barcelona Traction, Light & Power Company Case, [1970] I.C.J. 3 (denying standing to government pressing a claim on behalf of its nationals who were investors in a company chartered in a third country).
Informal third party settlements are likely to be available only in rare instances. Not surprisingly arbitration has long appeared as an appropriate mechanism to fill this need. It can take place under the auspices of the Permanent Court of International Arbitration\(^\text{17}\) or of private organizations such as the International Chamber of Commerce\(^\text{18}\) and similar institutions, or it can be established \textit{ad hoc}. But none of these solutions

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17. The Permanent Court of Arbitration made provisions for the settlement of disputes between parties of whom only one is a state in 1962; \textit{see} 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1042–43 (1971).


has proved itself wholly satisfactory in practice, whether for reasons of limited standing, access, fears of bias, political considerations, problems of enforcement, or for other reasons. ICSID arbitration, by contrast, redresses many of these perceived deficiencies of other models of dispute resolution.\footnote{\textsuperscript{21}}

The Convention was sponsored by the International Bank for Reconstruction and Development, which began its preparatory work in 1961. After successive drafts and amendment by the interested participants a final text of the Convention was adopted in 1965.\footnote{\textsuperscript{22}}


\footnote{\textsuperscript{22}} The \textit{travaux preparatoires} of the Convention were published in 1970. See HISTORY, supra note 6 (vol. I: ANALYSIS OF DOCUMENTS; vol. II: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION; vol. III: DOCUMENTS RELATIFS A L'ORIGINE ET A L'ELABORATION DE LA CONVENTION; vol. IV: DOCUMENTOS RELATIVOS AL ORIGEN Y A LA FORMULACION DEL CONVENIO). The drafting history of the Convention was as follows: A Working Paper (draft convention) dated June 5, 1962, was prepared by the General Counsel of the World Bank and transmitted to the Bank's Executive Directors (Document 6, 2 HISTORY, supra note 6, at 19). Meeting as a Committee of the Whole, the Executive Directors redrafted the Working Paper (Document 21, \textit{ibid.} at 133) and subsequently produced the Preliminary Draft of October 15, 1963 (Document 24, \textit{ibid.} at 184). The Preliminary Draft was debated at regional consultative meetings of legal experts in Addis Ababa (Dec. 16-20, 1963), Santiago, Chile (Feb. 3-7, 1964), Geneva (Feb. 17-22, 1964), and Bangkok (April 27-May 1, 1964), hereinafter referred to as Addis Ababa (etc.) Meeting (Documents 25, 27, 29, 31; \textit{ibid.} at 236, 298, 367, 458, respectively). Taking account of these regional meetings, the Bank's staff prepared the First Draft of September 11, 1964 (Document 43, \textit{ibid.} at 610). This draft was considered by a Legal Committee consisting of representatives of the Bank's member states and then replaced by the Revised Draft of December 11, 1964 (Document 123, \textit{ibid.} at 911). After final consideration by the Executive Directors, the present text of the Convention was adopted (Document 145, \textit{ibid.} at 1041). See 1 \textit{ibid.} at 2-10 (synopsis of drafting history).
Under the final version of the Convention, signatories and nationals of other signatories may agree to submit legal disputes arising out of investment contracts to compulsory conciliation or arbitration. Once agreed upon, the right to arbitration cannot be unilaterally defeated. The distinguishing features of the Convention are the creation of a procedurally self-contained mechanism, the possibility for an individual to proceed directly against a state in an international forum, the individual's government's renunciation of its right to extend diplomatic protection to its national, and the host government's obligation to respect an arbitral award as it would a judgment of a domestic court. The Convention established the International Centre for Settlement of Investment Disputes, attached to the World Bank. ICSID consists of a Secretariat and a governing body, the Administrative Council, composed of one representative of each signatory and chaired by the president of the Bank. The Secretariat maintains panels of conciliators and arbitrators. Arbitration proceedings are instituted, and arbitration panels constituted, upon the submission of a dispute by either party to an investment agreement. When such a dispute arises each party chooses one arbitrator, and the two persons so selected in turn decide upon a third member of the tribunal. All decisions of the arbitrators are by majority rule.

Despite extensive debate and amendment, several matters of significance are not resolved in the Convention. For example, it has only recently been established that refusal of one party to attend or participate in arbitral proceedings does not defeat the jurisdiction of the tribunal. Other

23. See generally Amerasinghe, Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes, 5 J. MARITIME L. & COMM. 211 (1974); Broches, supra note 2.

areas of uncertainty include questions of personal and subject matter jurisdiction, modes of submission of disputes, the relation between ICSID arbitration and other remedial measures, and the possibility and effect of subrogation by an investor's state. Perhaps the most important of these unsettled areas is the question of the applicable law.

25. There is room for uncertainty as to the conditions under which a corporation would no longer qualify as a national of another state and hence not be entitled to resort to ICSID arbitration. See Art. 25(2) (defining "national"); Broches, supra note 2, at 356.

26. ICSID tribunals have jurisdiction over "legal" disputes arising out of "investment" relationships under Art. 25, but both of these terms are left undefined. See Executive Directors' Report, 2 HISTORY, supra note 6, at 1078.

27. It is unclear whether investment legislation accepting ICSID arbitration amounts to a submission of all future disputes arising between the host state and an investor availing himself of such legislation. Compare Executive Directors' Report, 2 HISTORY, supra note 6, at 1077 (considering legislative declaration of submission effective) with Rodley, Some Aspects of the World Bank Convention on the Settlement of Investment Disputes, 4 CAN. Y.B. INT'L L. 43, 49-50 (1966).

28. E.g., arbitration, either between investor and host state or between states, required under bilateral investment treaties. See Berger; supra note 14, at 443-44.

29. Subrogation by a state reimbursing its national under a foreign investment insurance program was included in the original draft of the Convention but was ultimately deleted. See 2 HISTORY, supra note 6, at 1017-18. Hence it has been said that ICSID arbitration is not available to an investor's state which has reimbursed the investor under an insurance program and has become subrogated to the investor. Broches, La Convention et l'assurance-investissement: Le probleme dit de la subrogation, INVESTISSEMENTS ETRANGERS ET ARBITRAGE ENTRE ETATS ET PERSONNES PRIVEES, LA CONVENTION B.I.R.D. DU 18 MARS 1965, at 161 (1969). But this may not dispose of the problem. See Rodley, supra note 27, at 53; Berger, supra note 14, at 443-44.
III. Choice of Law Under the Convention: 
History and Construction of 
Article 42

The law applicable to international investments can either be defined substantively (in terms of a preferred public order) or procedurally (in terms of binding constitutive processes). Substantive solutions have been proposed and continue to be advocated, but the drafters of the Convention did not attempt to address the controversial subject of the substantive law of international investment. Determined to assure the widest possible acceptability for their proposal, they opted for a procedural solution: Article 42 determines who shall be competent to decide what prescriptions shall be applicable. It provides:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

The heart of the provision is paragraph (1). Paragraph (2), which prohibits a finding of non liquet, adds little that would not be understood in any

30. See Schwarzenberger, supra note 7, at 313.

31. See Ryans & Baker, supra note 5 (finding support for substantive law of international investment among businessmen surveyed).
Cuban event. Paragraph (3), which authorizes a decision \textit{ex aequo et bono} at the parties' option, is a common provision in conventions of this kind\textsuperscript{33} and raises few problems.\textsuperscript{34} It is, in any event, unlikely to be used very often.\textsuperscript{35} Its major significance lies in the fact that it removes any doubts that ICSID arbitrators are bound to apply law and not to exercise arbitral equity unless specifically authorized to do so.

\textsuperscript{32} See Lauterpacht, \textit{Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order}, in \textsc{Symbolae Verzijl} 196, 200 (1958)(prohibition of non liquet is one of the most undisputable rules of international law). The non liquet prohibition was included in the first Working Paper, 2 \textit{History}, supra note 6, at 41. It elicited no comments beyond the remark by Broches (Chairman) that such provisions are commonly included in conventions of this kind, Santiago Meeting, \textit{id.} at 330.


\textsuperscript{34} The authorization to decide \textit{ex aequo et bono} was already included, in only editorially different form, in the first Working Paper, 2 \textit{History}, supra note 6, at 41. \textit{Ex aequo et bono} was defined as a decision in accordance with what is just and equitable in the circumstances, rather than by application of rules of law. Comment, Preliminary Draft, \textit{id.} at 215. The drafters of the Convention rejected proposals to empower the tribunal to decide \textit{ex aequo et bono} on its own motion. Chairman's Report, \textit{id.} at 570. It remained unsettled whether, in deciding \textit{ex aequo et bono}, reasons had to be stated (contra, remarks by Lowenfeld (U.S.), Santiago Meetings, \textit{id.} at 330) and whether a decision \textit{ex aequo} would necessarily prevent the forum from applying law (compare remarks by Allott (U.K.), Geneva Meeting, \textit{id.} at 420, with those by Melchor (Spain), \textit{id.} at 419).\textsuperscript{36}

\textsuperscript{35} The competence of international tribunals to decide \textit{ex aequo et bono} has hardly ever been invoked. See Scheuner, \textit{Decisions ex aequo et bono by International Courts and Arbitral Tribunals}, in \textit{International Arbitration}, supra note 7, at 275-76. See also Sohn, \textit{Arbitration of International Disputes Ex aequo et bono}, \textit{id.} at 330. But see the Societe Europeenne Case (Societe Europeenne d'Etudes et d'Enterprises v. Yugoslavia (1956), 86 \textsc{Journal Du Droit International} 1075 (1959) (arbitrators empowered to act as amiables compositeurs)).
A. The Range of Relevant Prescriptions

The prescriptions potentially applicable to an investment relationship include national and international rules as well as custom, whether evidenced by the practice of states or of business firms. During the drafting of Art. 42, repeated efforts were made to restrict the range of the prescriptions applicable to investment disputes. Significantly, these efforts remained unsuccessful. They took two basic forms: (1) demands to exclude the applicability of international law, or, failing that, to define it restrictively, and (2) demands to make the host state's law exclusively applicable unless otherwise stipulated by the parties, or even notwithstanding their stipulation.

The last mentioned proposal failed to elicit support and was summarily rejected. In opposition to the demand for exclusive applicability of the host state's law, it was pointed out that, as far as different municipal legal systems might be pertinent to a dispute, ordinary conflict principles should not

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36. See remarks by Serb (Yugoslavia), Legal Committee, 2 HISTORY, supra note 6, at 801. Although similar in effect to demands to make the host state's law exclusively applicable, the denial of the applicability of international law to transnational investments must be distinguished from denials of the applicability of particular national rules. See remarks by Broches, Committee of the Whole, id. at 985 (explaining objections to application of national law other than the host state's law as relics of the regime of capitulations, and thus as distinct from objections to international law).

37. See statements by Brinas (Philippines), Legal Committee, 2 HISTORY, supra note 6, at 800 (international law applicable only where discrimination is alleged); Guarino (Italy), Geneva Meeting, id. at 419 (international law means prohibition of discrimination and obligation to act in good faith); Broches, Chairman's Report on Regional Meetings, id. at 571 (international law applicable only where violated by national law).

38. See formal proposals by China (Taiwan), Thailand, and Turkey, 2 HISTORY, supra note 6, at 652-53, 660, 663, respectively. See also remarks by Cunha (Brazil) in the Legal Committee, id. at 801; by Adarkar (India), Bangkok Meeting, id. at 505; proposed amendment by Tsai (China), id. at 513; remarks by Askari (Iran), id. at 516.

39. See statement by Lopez (Panama), Legal Committee, 2 HISTORY, supra note 6, at 803.

40. See statement by Broches (Chairman), id.
be precluded. The opponents thus forwarded the claim that states other than the host state expected to see their own prescriptive competence recognized. The express invocation of the host state's conflict rules in the language which was eventually adopted establishes that other states are indeed competent to issue prescriptions. The fact that Art. 42 refers to the law of states other than the host state only indirectly through the medium of the latter's conflict rules may indicate a restriction upon the invocability of the law of other states, but such a restriction, should it indeed exist, would not detract from the recognition of other states as competent to prescribe, at least in principle.

The demand to deny the applicability of international law was resisted with the argument that since the investor's state was waiving its right to protect its nationals abroad, the investor should be given the protection of international law. Such protection was indeed qualified in that the tribunal was empowered to invoke only such international law "as may be applicable," given that no similar constraints were attached to theputative relevance of the host state's law. But mere limitations upon the circumstances under which international rules may be invoked do not amount to a denial of

41. See remarks by Broches (Chairman), Legal Committee, id. at 800.
42. See also statement by Broches (Chairman), Legal Committee, id. at 985 (host state law would apply in the normal case—implying affirmation of prescriptive competence of other states).
43. Art. 27(1) provides:
No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
44. See remarks by Gourevitch (U.S.), Legal Committee, 2 HISTORY, supra note 6, at 803; Bertram (Germany), Geneva Meeting, id. at 421. See also remarks by Broches (Chairman) and Brown (Tanganyika), Addis Ababa Meeting, id. at 259 (investor enabled by Convention to press his claim on same basis as his state).
prescriptive competences as such.

B. Party Choice and Preemption of the Applicable Law

The first sentence of Art. 42(1) makes clear that the parties themselves are primarily competent to determine the law applicable to their relationship. It is equally clear that the parties are not confined to selecting any one legal system as a whole.\(^{45}\) Such a constraint might have been implied had the drafters chosen to allow the parties to determine "the law."\(^{46}\) However, the language, "rules" of law, indicates that they may select not merely a national legal system, but also general principles, international law, or specific rules of different systems, as well as such rules of an international law merchant as they may deem desirable.\(^{47}\) Such extensive party autonomy corresponds to past practice as reflected in the provisions actually included in investment agreements\(^{48}\) as well as in the determinations of the applicable law by ad hoc

\(^{45}\) But see the language of model clauses suggesting the practice of selecting a legal system \textit{in toto}. ICSID, Model Clauses Recording Consent to the Jurisdiction of the International Centre for Settlement of Investment Disputes (Document ICSID/5) 17-18 (mimeographed, undated). See also Amerasinghe, \textit{Model Clauses for Settlement of Foreign Investment Disputes}, 28 ARB. J. (n.s.) 232 (1973).

\(^{46}\) See the original Working Paper, 2 HISTORY, supra note 6, at 41, and subsequent drafts, \textit{id. at} 157, 214, 630.

\(^{47}\) See Kahn & Fell, supra note 8, at 18; Masood, supra note 8, at 317. See also Kahn, \textit{The Standard Investment Agreement: Text and Comment}, 4 GA. J. INT'L & COMP. L. 39, 52 (1974) (noting importance of trade practices as sources of law). Art. 6 of the Standard Agreement provides: "Relations between the parties are governed by this agreement, by the professional usages generally admitted in the textile industry, by the law of the host country and by the principles of international law applicable to investments."

\(^{48}\) References to good faith and to customary professional or industry practices are customarily included in investment agreements. See Delaume, \textit{Des stipulations de droit applicable dans les accords de prêt et de développement économique et de leur role}, [1968] REVUE BELGE DE DROIT INT'L 336 (survey of 80 investment agreements). See also the standard agreement cited in note 47 supra.
While Art. 42(1) clarifies the wide scope of the parties' autonomy, it remains silent on the question of whether the tribunal could invoke prescriptions other than those selected by the parties. It is anticipated that in the "normal situation" the parties will have made such a selection, typically by agreeing on one of the broad model choice of law clauses suggested by ICSID. But the Convention does not make clear whether such a choice is to be considered preemptive—i.e., exclusive—by the arbitral tribunal. The preemption issue thus might arise in situations where the parties have made a blanket invocation of a particular legal system, but where other international decision-makers assert strong claims that in the instant controversy their own prescriptions rather than those of the decision-maker designated by the parties, should be controlling.

49. For example, in the Sapphire Case, supra note 20, the tribunal relied upon the parties' invocation of the principle of good faith in order to deny the exclusivity of the stipulated host state law and to derive an applicable prescription from the agreements between the Iranian government and other oil companies. See Kahn & Fell, supra note 8, at 9, 30; Lalive, Un recent arbitrage Suisse entre un organisme d'etat et une societe privee etrangere 19 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 273 (1962).

50. Some of the draftsmen evidently considered the parties' determination preemptive. See 2 HISTORY, supra note 6, at 267 (parties entitled to agree on exclusion of international law), and remarks by Broches in the Committee of the Whole, id. at 985. See also Broches, Settlement of Investment Disputes, in INTERNATIONAL ARBITRATION, supra note 7, at 17.

51. See note 44 supra.
The opening language of Art. 42, "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties," leaves no doubt that the parties themselves are primarily competent to invoke the prescriptions which the tribunal shall apply, a regulation which corresponds to other arbitration rules. But this does not necessarily imply exclusive competence. Although some of the draftsmen evidently considered the parties' determination preemptive, this allocation of competence does not preclude the invocation by the tribunal of prescriptions in addition to those invoked by the parties.

The tribunal's competence to invoke additional prescriptions is expressly granted by the non liquet prohibition for those circumstances where the law designated by the parties is obscure or silent on the point at issue. It is less clear whether the tribunal is competent to invoke further prescriptions where the parties' choice appears to be comprehensive.

Arguably, the absence of an explicit specification as to how the parties shall designate the applicable law might be construed to require an express choice, absent which the tribunal would remain competent to invoke whatever rules it might deem applicable. Such a broad reading of Art. 42(1) however, is hardly tenable. Not only is deference to the parties' choice central to the scheme of Art. 42, but the drafters clearly indicated that a generally

52. See, e.g., Art. 10(1), Int'l L. Comm., Model Rules on Arbitral Procedure, supra note 33.
53. See remarks by Broches (Chairman), Addis Ababa Meeting, 2 HISTORY, supra note 6, at 267 (stating that it was for the parties in their agreement to exclude the application of international law). See also remarks by Broches, Committee of the Whole, id. at 985.
54. Such an argument finds support in the French text of the Convention which speaks of the rules "adopted" (adoptees) by the parties, 3 HISTORY, supra note 6, at 837. But see Broches, supra note 2, at 389 (French text implies no different meaning than English phrase "agreed").
55. See, e.g., Broches, supra note 50, at 16.
worded or even implicit agreement would suffice.56 Most commentators are of the same opinion, and past practice is largely in accord.57 But to say this much does not dispose of the question whether on a particular issue before the tribunal the parties' general invocation of law necessarily preempts the tribunal's invocation of an alternative competing prescription, whether one of international law, domestic legislation, or law merchant, which is addressed specifically to the issue in question.

The language of Art. 42(1) suggests that the parties' choice is not automatically preemptive. The provision's requirement that the "rules" of law agreed by the parties shall apply, rather than "the law" agreed upon, which language was found in earlier drafts, suggests that only when the parties' choice amounts to the invocation of a particular prescription is the tribunal unalterably bound by the command of Art. 42(1) that it "shall decide" in accordance with the parties' determination.58

56. See remarks by Broches (Chairman) at Addis Ababa Meeting, 2 HISTORY, supra note 6, at 267; Rodocanachi (France) at Geneva Meeting, id., at 418; Chairman's report on Regional Meetings, id. at 570.
57. See, e.g., Masood, supra note 8, at 318. But see Broches, supra note 2, at 389.
58. The change in language was made in order to convey the idea that the parties should be free to tell the tribunal which issues required its solution and which had already been solved by agreement between them. Remarks by Broches (Chairman), Legal Committee, 2 HISTORY, supra note 6, at 803 (proposing revised language). It thus seems to have been the expectation of the draftsmen that the parties would select particular rules of law tied to their submission of distinct issues to the tribunal. See also Masood, supra note 8, at 316-18 (the term "rules" of law obliges the parties to specify their choice with clarity and specific relevance to particular issues). But see the Model Clauses, note 45 supra. In the light of past arbitration practice, it must be assumed that the inclusion of such a clause would leave the tribunal at liberty to invoke additional prescriptions, See notes 47, 48 supra,
Such interpretation corresponds to past practice. Tribunals have frequently treated the parties' general designation as not precluding the applicability of other specific rules. They have generally interpreted the parties' choice of law clauses liberally so as to enable the tribunal to invoke rules not expressly designated, such as international law, general principles, or the law of third states, even where the parties had made determinations which seemed to be comprehensive. If the drafters of Art. 42 had intended a significant departure from past expectations about the competence of international arbitration tribunals, such intent would reasonably require an explicit designation of what constitutes an agreement sufficiently specific to preclude the tribunal's invocation of additional rules.

Once it is accepted that the parties' choice of law is not necessarily preemptive, more difficult questions arise: Under what conditions should the parties' designation be denied preemptive force, and by what criteria should the tribunal make its own substitute selection? In certain circumstances it is clear that the tribunal should both reject an apparent selection by the parties and apply an alternative rule. The fundamental criterion for such substitution is the legal competence of the parties to make the particular choice of law. For example, the parties may not by stipulation circumvent peremptory norms of international law. In a conflict between a

59. See Kahn & Fell, supra note 8, at 8; Firth, id, at 268-70. For example, in The Kronprins Gustaf Adolf (United States v. Sweden) (1932), the compromis called for the determination whether the conduct complained about conformed to certain treaties, but the arbitrator nonetheless held general international law applicable. 6 ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 1931-1932, 372, 374 (1938).

rule selected by the parties and international *ius cogens*, the latter must prevail. Furthermore, in cases where the parties have agreed that the law of the investor's state (or for that matter of any state other than the host state) shall apply, there will nonetheless be aspects of their investment relationship which would be subject to the host state's law notwithstanding their agreement. Art. 42(1) resembles a conflict rule pertaining to contracts, and the parties' competence to invoke rules of law as they see fit can only extend to the contractual part of their relationship. Given the complexity of most investment enterprises, some aspects of the relationship will be subject to the host state's administrative, labor, monetary, regulatory or penal law. These areas of prescriptive competence are conventionally viewed as inherently reserved by the state, and therefore are not subject to contractual waiver. In such circumstances, even a specific agreement to the contrary by the parties must be ignored.

There are further occasions where it is clear that the parties' determination should not be controlling, but where the host state's law is not automatically applicable. The Convention leaves no doubt that the parties' autonomy is confined to the choice of rules which will not run counter to the *ordre public* of the state where enforcement will ultimately have to be sought. The signatories consented to treat an arbitral award as binding and enforceable as if it were a judgment of their domestic courts. Since it was understood that a state should not be entitled to veto enforcement as contrary to its *ordre public*, the tribunal is

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62. Art. 54(1).
63. See statement by Lieftinck in the Committee of the Whole, 2 HISTORY, supra note 6, at 991. Nor may a state unilaterally refuse to participate in arbitration by purporting to withdraw certain matters from the jurisdiction of the tribunal. See Schmidt, supra note 21.
compelled to deny a choice of law which might produce such a situation. Since the state where enforcement will be sought will typically be the host state, this limitation is most likely to become operative where the parties have chosen the host state's law and agreed to stabilize it in time, as they are entitled to do, and where subsequent changes in the host state law have rendered the chosen rules incompatible with its current *ordre public* and hence unenforceable. The tribunal would then find itself in a position analogous to the situation envisioned in Art. 42(2) where the chosen law has lacunae or is obscure, thus empowering the tribunal to determine the applicable law for itself despite the parties' ostensible choice.

The appropriate procedure for undertaking this determination is implied by the *non liquet* prohibition of Art. 42(2). The *locus classicus* prescribing the procedure to be followed is Art. 1 of the Swiss Civil Code, which provides that if neither statute nor custom yields a prescription, the judge shall decide according to the rule which he would adopt as a legislator, taking into account accepted doctrine and precedent. The arbitral tribunal must therefore

64. Consider the refusal by the Iranian courts to grant enforcement of the Sapphire arbitration award, *supra* note 20, on the ground that Iranian law, determined by the arbitrator to be inapplicable, had not been applied, 9 INT'L LEGAL MATERIALS 1118 (1970). The tribunal had relied upon the parties' invocation of the principle of good faith in order to deny exclusivity to the stipulated host state (Iranian) law and to derive an applicable prescription from the agreements in existence between Iran and other oil companies. See Lalive, *supra* note 49.

65. See, e.g., Model Clauses, *supra* note 45 (providing for agreement that applicable law should be that in force at a specified time).

determine which "legislature" would be competent to prescribe in the instant case. In accordance with the party autonomy principle of Art. 42(1), the tribunal should adopt the parties' determination of the competent prescribing authority, as implied by the parties' choice of governing law. Thus the tribunal would place itself in the role of the prescribing authority which was competent to prescribe the rule which the parties wished to invoke. It would then determine which rule (given that the one actually designated by the parties is denied applicability) this authority would invoke.

Finally, the most important instances in which the tribunal remains competent to invoke prescriptions other than those agreed by the parties are certain circumstances which call for the application of international law, but which do not rise to the level of *ius cogens.* In such cases the tribunal may reject an explicit choice by the parties of a particular domestic legal system in order to give effect to norms of international law. For example, an investor may suffer injury at the hands of the host state which does not breach the investment agreement but which nonetheless is a violation of the duties under public international law which every state owes to an alien within its territory.

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The signatories to the Convention cannot have intended on the one hand to confer upon their nationals investing abroad the competence to preclude the applicability of international law to their transactions with a foreign state, and on the other hand, to waive their right to extend diplomatic protection to such nationals. In past practice, it had never been accepted that an investor who consented to be treated as a national of the host state and waived his right to invoke the diplomatic protection of his own state could thereby effectively preclude the applicability of international law.

69. Art. 27(1), quoted in note 43 supra (waiver by investor's state of right to extend diplomatic protection). This waiver was agreed to in consideration of the fact that the Convention made a forum available where individuals could press their claims directly against the state. See, e.g., Report of the Executive Director, § 33, 2 HISTORY, supra note 6, at 1080; statement by Broches, Committee of the Whole, id. at 59. In effect, this waiver amounts to a recognition by the signatories of the international validity of a Calvo clause. See RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 202(1) (1965). It cannot be assumed, however, that the signatories wished to extend the reach of such a submission by an individual to the host state law beyond those boundaries which had been claimed for it in the past. These limits were drawn between obligations stipulated between the parties and governed by their contract alone, and other injuries beyond those arising out of violation of such stipulated obligations; to the former, the Calvo clause applies, while to the latter, it is inapplicable.

70. "If an alien, as a condition of engaging in economic activity in the territory of a state, agrees with the state that he is to be treated as if he were a national in respect to such activity, and that his only remedy for injury in this respect is that available under the law of the state, such agreement [is] commonly called a 'Calvo Clause.'" RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), § 202(1). Such clauses may preclude access to any forum other than those which may be provided by the host state, with or without a simultaneous waiver of substantive rights which the individual may have under international law. See, e.g., Art. 18 of the contract in the North American Dredging Company Case, 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 917 (1967). But even where such a clause is phrased exclusively in procedural terms, an agreement to avail oneself only of domestic fora may make substantive international law unavailable,
Since the Convention intends not to deviate from this tradition, but rather to place the investor in as good a position as his own state in pressing claims based upon public international law, the tribunal is competent and indeed obliged to invoke such rules as may be applicable to redress such injuries.

It is only with respect to the investment agreement itself that the investor is competent to bargain. And the host state may not repudiate its duties under international law by means of such a bargain. Therefore, in determining whether international law is applicable despite the parties' failure to invoke it, the tribunal would initially inquire whether the investment agreement was intended to cover the injury in question. If not, the arbitrators would determine whether an international law violation had taken place. If the tribunal found that the parties' agreement purported to exclude the application of

71. "While an individual alien may agree not to seek international remedies with respect to certain economic rights, it would be productive of grave injustice if an alien were allowed to sign away completely his rights under international law. It would appear to be a general principle of law recognized by the principal legal systems of the world that a citizen cannot by agreement waive the protection of the constitution or basic law of the country of which he is a national. No more should an individual have the capacity to give up entirely the protection of that body of law which is superior to the laws and constitutions of municipal legal systems." Explanatory Note to Art. 22 (5), Convention on the International Responsibility of States for Injuries to Aliens, in F. GARCÍA-AMADOR, L. SOHN & R. BAXTER, supra note 68, at 292.

72. See remarks by Gourevitch (U.S.) in the Legal Committee, 2 HISTORY, supra note 6, at 803; Gould (S. Africa) and Bertram (Germany) at Geneva Meeting, id. at 420-21; Broches (Chairman) and Brown (Tanganyika) at Addis Ababa Meeting, id. at 259.

73. See remarks by Herndl (Austria) at Geneva Meeting, id. at 421 (describing the question of the extent to which parties should have the right to determine whether national or international law should be applicable as a delicate one, and suggesting that international law might in any event be applicable to the international aspect of the dispute).
international law to the claimed injury, it would then ask whether the parties were competent to bargain in this respect. If not, international law would be deemed applicable and the inquiry would proceed to a determination whether such law had been violated.

C. Applicable Law in the Absence of Choice by the Parties

In the absence of an invocation of applicable rules by the parties, the Convention itself through Art. 42(1) directly invokes the host state's law, and empowers the tribunal to invoke rules of international law. This arrangement raises three preemption problems. First, to invoke a domestic law other than that of the host state seems to be exclusively within the discretion of the host state, acting through its conflict rules, and not within the tribunal's own competence. Secondly, the unqualified language that "the Tribunal shall apply the law of the Contracting State" makes it appear that the invocation of the host state's law is mandatory. Combined with the fact that the qualifying phrase "as may be applicable" syntactically modifies only "international law" but not "the law of the Contracting State," this language seems to deny the tribunal the option of applying host law selectively by disregarding particular rules as not applicable. Finally, the same language permits the inference that host state law shall preempt the applicability of international law, so that the tribunal may invoke international law only to the extent that the particular point at issue is not covered by the law of the host state.74 However, no such preemption by the host state's law was in fact recognized by the drafters, and a close analysis of Art. 42(1) shows that the tribunal is competent to determine which of the host state's rules are applicable and which are not, and to invoke other national and international rules.

74. See remarks by Lokur (India), Lara (Costa Rica), and Florenzano (Ivory Coast) in the Legal Committee, id. at 802-3.
In express terms, Art. 42(1) would seem to allow the tribunal to apply prescriptions of a national law other than that of the host state only if it is called for by the latter's conflict rules. However, such a reading has implications which suggest that the tribunal's competence cannot have been intended to be so limited. For example, the host state's conflict rules would normally not authorize the invocation of the regulatory or administrative law of another state (such as that of the investor), yet the other state may well have a legitimate claim that such rules, addressed to its nationals acting abroad, be respected by other states. It would be inconsistent with the very nature of an international tribunal to prohibit it from according deference to such claims.

The draftsmen in fact recognized that under certain circumstances, as in particular kinds of transactions, states other than the host state might have a paramount claim to have their own law applied. They regarded the express invocation of the host state's law merely as an acknowledgment of the usual situation which would prevail in most cases. Thus the question whether non-host state law may be invoked independently of the host state's conflict rules is a casus omissus and may not, by reasoning that expressio unius est exclusio alterius, be answered in the negative.

The drafting history of Art. 42(1) leaves little doubt that the drafters intended to give to the tribunal the competence to invoke non-host state law.

75. See remarks by Broches (Chairman) at Bangkok Meeting, 2 HISTORY, supra note 6, at 506 (host state law inappropriate in certain types of agreements, such as know-how agreements). See also Kahn & Fell, supra note 8, at 20 (host state law inappropriate for loans).

76. See statement by Broches (Chairman) in the Legal Committee, 2 HISTORY, supra note 6, at 985 (suggesting that demands for exclusive application of host state law were intended merely to rebut the possibility of investor extraterritoriality).
The original language 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.77

The section dealing with the law to be applied in the absence of an agreement by the parties was later extensively rewritten and amplified. "International law" for purposes of Art. 42 was defined in accordance with Art. 38 of the Statute of the International Court of Justice.78 It was further clarified that "national" and "international" law should not be understood as mutually exclusive sets of rules.79 In an intermediate draft, the language "rules of law, whether national or international," which might have supported an inference of this kind, was therefore replaced by the unambiguous words "rules of national and international law."80 Subsequently,

77. Art. VI § 5(l), Working Paper, 2 HISTORY, supra note 6, at 41. With only slight editorial changes this text became the Preliminary Draft, Art. IV § 4(l), id. at 214.

78. Art. 38(1) of the Statute of the I.C.J. provides:
The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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. 79. See proposal by Deguen (France), Geneva Meeting, 2 HISTORY, supra note 6, at 421; statement by Broches (Chairman), Legal Committee, id. at 800; Committee of the Whole, id. at 986.

80. First Draft, id. at 630.
spokesmen for capital-importing states voiced concern that the term "national law" might be used to oust the applicability of the host state's law. In response to these concerns, and in partial accommodation of farther-reaching demands that the host state's law be given exclusive applicability, the present language expressly invoking the host state's law was adopted. Thus, the more restrictive language which was eventually adopted resulted from the negotiating pressures under which the present version was drafted in the midst of a contentious debate, rather than from any substantive purpose. The language of Art. 42(1) should therefore be construed no more restrictively, as compared to the earlier drafts, than is necessary in order to achieve this limited purpose of the drafters.

The inference that the host state shall be exclusively competent to invoke the law of other states and that the tribunal is denied such competence is also dispelled by the signatories' consent to treat an arbitral award as equivalent to a domestic court judgment. The same considerations that earlier led to the conclusion that this consent negated an intent to make the parties exclusively competent to invoke applicable rules apply with equal persuasiveness here. To the extent that enforcement of an award might be sought in a state other than the host state--most likely the investor's state--the tribunal should apply the law of the latter if its non-application might result in a violation of its ordre public, as enforcement may not be denied on such ground. Art. 42(1) should therefore be

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81. See statements by Bilgen (Turkey), Geneva Meeting, id. at 418, and by Melchor (Spain), id. at 419; proceedings in the Legal Committee, id., at 804 (adopting present language).

82. See note 38 supra.

83. The Legal Committee approved the present presumption in favor of the host state's law by a vote of 31 to 1. 2 HISTORY, supra note 6, at 804.

84. See note 62 supra.

85. See pp. 109-10 supra.

86. See note 63 supra.
construed so as to permit the tribunal, concurrently with the host state, to invoke applicable rules of other states.

Two other possible preemptive implications of Art. 42(1)—that the host state's law applies in toto, and that international law applies only interstitially—both rest upon the fact that invocation of the host state's law does not contain the disclaimer, "as may be applicable," which is attached to the tribunal's authorization to invoke international law. The drafting history, however, dispels both of these inferences. The question was not expressly raised whether the tribunal should be competent to invoke host state law selectively to the extent that the arbitrators found it applicable. In earlier drafts, however, the problematical qualifying phrase clearly referred to both sets of rules, national and international, that the tribunal was invited to invoke. 87

As was indicated previously, the circumstances leading to the adoption of the present language show that the purpose of the redrafting was to clarify that the claim of the host state to have its law invoked could not be ousted by reliance on the language "national law." 88 Consequently, when read in light of the earlier drafts, Art. 42(1) should be understood to subject both host state law and international law to the qualifying provision. This reading makes the tribunal squarely competent to invoke the host state's law selectively—to invoke "such rules ... as it shall determine to be applicable." 89

The interpretation of Art. 42(1) advanced here places the host state's law and international law on an equal footing, without any predetermination as to which represents an a priori stronger claim. 90

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87. Working Paper, 2 HISTORY, supra note 6, at 41, and subsequent drafts, id. at 157, 214, 630.
88. See pp. 116-117 supra.
89. See note 63 and text accompanying note 77 supra.
90. See also Broches, supra note 2, at 390 (asserting equal status of national and international law).
This reading further suggests the proper arbitral procedure to be followed in order to determine the governing law in the absence of choice by the parties. The tribunal would look first and foremost to the host state's law but would apply international law where it is called for by the host state's law, or where it directly governs the point at issue, as by virtue of a treaty. Where the host state's law is inconsistent with international law, the latter would displace the former.91

Of course this approach is adequate only with respect to controversies arising out of violations of the investment agreement itself. It fails to address the problem of the proper law applicable to injuries incurred in the course of the investment relationship, but which do not violate the investment agreement. In such circumstances the controlling principle is that the investor was intended to be placed, vis-a-vis his host state, in as good a position as he would be in if he could call on the diplomatic protection of his own state.92 To the extent, therefore, that the investor suffers a wrong which, absent the Convention, would be subject to redress from state to state, international law would be applicable93 while the host state's law would be entirely irrelevant.

As a result, in situations where the parties have chosen domestic law as well as those in which no choice was made, the circumstances to which international law would nonetheless be exclusively applicable

91. Id. at 392-93; Broches, supra note 50, at 17.

92. See note 69 supra.

93. This conclusion finds further support in the fact the international law is defined, for purposes of Art. 42, in the broadest terms. See note 78 supra. The broad scope of the definition is not mitigated by the fact that it includes the cautionary notation that "allowance [should be] made for the fact that Article 38 was designed to apply to inter-State disputes." The qualifier merely states the obvious fact that certain international law prescriptions, such as those of diplomatic intercourse, by their nature have no bearing upon private investments.
must be determined by a close analysis of the scope of the investment agreement. A likely instance where the need for such determination would arise would be a detrimental change in the host state's law subsequent to the placing of the investment. The rights of the parties would generally be subject to the host state's law as it may exist from time to time. However, if the changes in the host state's law were to amount to confiscation or another international tort--such as where their effect were discriminatory--international law would apply to such violation, even if the substance of the new host state law did not otherwise conflict with international law.

The tribunal's broader authority in determining the applicable law in disputes where the parties have failed to designate the applicable law as compared to those where they have done so creates a correspondingly wider range of circumstances where the substantive policy goals of the Convention should enter into the tribunal's determination. As in instances where there is a choice of law by the parties, policy considerations would enter the determination of the parties's permissible scope of bargaining, the substance of international rules, and

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94. Such was the case in the various cases brought under the Convention against the Jamaican government. See Schmidt, supra note 21. However the issue of applicable law was never reached, as the dispute was withdrawn from arbitration by the parties. See note 4 supra.

95. See Goldman, supra note 61, at 153-54.

96. Among the major goals of the Convention is the facilitation of private investment in developing countries to the mutual advantage of both parties. See note 9 supra.

97. The drafters apparently expected that the substance of the international rules which the tribunals might apply would be variable and subject to the arbitrators' creativity. See remarks by Broches in the Legal Committee, 2 HISTORY, supra note 6, at 802 (proposed Art. 42 merely restates the practice of arbitration tribunals in the past), replying to suggestion by Wanasundera (Ceylon), id. at 801-2, that elaboration of international law was needed, for otherwise the signatories would be in the dark concerning the rules which might be invoked.
the filling of obscurities or lacunae in the host state's law in accordance with the non liquet prohibition of Art. 42(2). In addition, the policy goals espoused by the Convention would affect the tribunal's determination whether any other domestic law (or rules thereof) may be applicable as well as which, if any, rules of the host state may be disregarded as not applicable.

IV. Conclusion

Controversies over the proper law applicable to a particular issue or dispute are most likely to occur precisely in those areas where the substantive determinations made by Art. 42 are indeterminate. In such circumstances Art. 42 dictates no particular result. Rather its contribution lies in the fact that it provides a procedural mechanism whereby the arbitral tribunal may in each case select the rules of law appropriate to govern the controversy.

Under a proper interpretation of Art. 42, the authority of the tribunal to make such determinations is a broad one, which fact imposes a considerable responsibility upon the tribunal. The result in each case must be guided by a policy-oriented consideration of each possible prescription, considering not only whether it satisfies a reasonable demand of the particular participants but more fundamentally whether it contributes to the general goals of the Convention.

If the interpretation of Art. 42 advanced here seems to destroy much of the certainty which the provision appears to establish,98 it does enable ICSID arbitrators to respond creatively to the genuine needs and expectations of the parties and thus to proceed in the tradition of international arbitration at its best.99 The rules to be applied

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98. See Executive Directors' Report, 2 HISTORY, supra note 6, at 1073 (stressing the importance of certainty of the law which the tribunal will apply to investment disputes).
99. See Schwarzenberger, supra note 7, at 319 (stressing creative role of arbitrators).
in a specific case must be "proper" in the sense of being acceptable to an audience of international decision-makers which embraces many more participants than the parties to the dispute at hand. Otherwise, ICSID arbitration may fall into disuse, and its potential as a counterforce to the fragmentation of the world economic order will go unrealized.