THE GUIDE TO **INVESTMENT TREATY PROTECTION AND ENFORCEMENT**

Editors
Mark Mangan and Noah Rubins QC

The Guide to Investment Treaty Protection and Enforcement

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As the unofficial 'official journal' of international arbitration, we sometimes spot gaps in the literature before others. Recently it dawned on us that, despite the number of books on investment law, there was nothing focused resolutely on the practical side of those disputes. So we decided to make one.

The book you are reading – *The Guide to Investment Treaty Protection and Enforcement* – is the result. It follows the concept of investment protection through its whole life cycle – from treaty negotiation to conclusion of a dispute. It aims to tell the reader what to do, or think about, at every stage along the way, with an emphasis, for readers who counsel or clients in investment matters, on what 'works'.

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We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you, all – especially the various arbitrators who supplied boxes for us at short notice. We are in your debt.

And last, special thanks to our two editors – Mark Mangan and Noah Rubins – who went above and beyond, somehow finding time in their busy lives not only to devise the original concept with us but also to shape it with detailed chapter outlines and personal review of chapters as they were submitted, and to my Law Business Research colleagues in production for creating such a polished work.

David Samuels
Publisher, GAR
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CHAPTER 11

Applicable Law in Investment Treaty Arbitration

Stefan Riegler, Dalibor Valinčić and Borna Dejanović[1]

Introduction

The issue of applicable law in investment treaty arbitration, despite its long development, remains an unsettled point. The very nature of investment protection, based on a web of treaties between sovereign states, renders it difficult to establish common characteristics pertaining to the applicable law in resolving investment treaty disputes.

This chapter sets out general principles related to the issue of applicable law in investment treaty arbitration. It begins with a discussion of the application of the principle of party autonomy to the issue of applicable law, before addressing the methods used by tribunals in resolving conflicts of law.

The chapter then focuses on the three main sources of law in investment treaty arbitration: first, the predominant role of investment treaties, second, the prominent role of general international law, and third, the impact of municipal law.

Finally, the authors explain how conflicts between applicable laws are resolved in investment arbitration proceedings, as well as illustrate the potential consequences of a tribunal's failure to properly identify and correctly apply the relevant laws.

1 Stefan Riegler and Dalibor Valinčić are partners and Borna Dejanović is a senior associate at Wolf Theiss.

Party autonomy – the fundamental tenet in investment treaty arbitration

Respect for party autonomy is a fundamental principle governing the conduct of investment arbitration proceedings, including determinations of the applicable law. Thus, in general, the primacy in the determination of applicable law is given to the laws or the rules of law agreed upon by the disputing parties, and tribunals are deemed bound by such choice of law.[2]

The International Centre for Settlement of Investment Disputes (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',[3] while the ICSID Convention Additional Facility Rules stipulate that '[t]he Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute'.[4]

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, likewise, stipulate that '[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute'.[5] In the same vein, the International Chamber of Commerce (ICC) Arbitration Rules and the Stockholm Chamber of Commerce (SCC) Arbitration Rules provide that '[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute'[6] and that '[t]he Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties',[7] respectively. The Vienna International Arbitral Centre Rules of Investment Arbitration, which entered into force on 1 July 2021, similarly provide that '[t]he arbitral tribunal shall decide the dispute in accordance with the law or rules of law agreed upon by the parties'.[8]

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2 Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), p. 192.

3 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, open for signature on 18 March 1965, entered into force on 14 October 1966 (the ICSID Convention), Article 42(1).

4 ICSID Convention Additional Facility Rules, Article 54(1).

5 United Nations Commission on International Trade Law Arbitration Rules, adopted in 1976, as revised in 2010 and 2013 (the UNCITRAL Arbitration Rules), Article 35(1).

6 Rules of Arbitration of the International Chamber of Commerce, adopted in 2012, as amended in 2017 and 2021 (the ICC Arbitration Rules), Article 21(1).

7 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, adopted in 2017 (the SCC Arbitration Rules), Article 27(1).

8 Rules of Investment Arbitration of the Vienna International Arbitral Centre (the Vienna Investment Arbitration Rules), Article 27(1).

Many, although not all,[9] investment protection treaties lay down an explicit choice of law. Those treaties that do stipulate the laws that apply often set out that the dispute is to be resolved in accordance with the provisions of the treaty itself. However, due to the specific role that the underlying treaty usually has in investment arbitration, the treaty is considered to be the main source of law, even if it does not contain such a self-reference.

Alongside the treaty itself, investment treaties often provide for two additional sources of law. Many treaties designate the applicability of international law, while a smaller number of treaties also contain references to municipal law.[10]

If a treaty does not provide for a choice of law, the disputing parties may otherwise reach an agreement of the applicable law or laws. As a general rule, the choice of law does not have to be stated expressly or in writing.[11] But, it must still be made clearly and unequivocally, showing a clear intention of the parties.[12] A tribunal may, for example, derive an agreement on the choice of law based on the parties' submissions in the arbitration proceedings.[13]

What if neither the treaty nor the parties have determined the applicable law?

Occasionally, treaties do not stipulate a choice of law clause and the parties fail to otherwise agree on the applicable law. It may also happen that, notwithstanding a valid choice of law, certain incidental issues arising in the dispute fall outside

9 Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), p. 200.

10 Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, pp. 409–410.

11 Rupert Reece, Alexis Massot, et al., 'Chapter 7: Searching for the Applicable Law in WTO Litigation, Investment and Commercial Arbitration', in Jorge A Huerta-Goldman, Antoine Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration*, Global Trade Law Series, Volume 43, pp. 208–213.

12 Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), pp. 198–199; see also *Compañía del Desarrollo de Santa Elena (CDSE) v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, Paragraph 63.

13 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, Paragraphs 20–24.

the scope of its application. In such scenarios, the tribunal is entrusted with the task of identifying and determining the law or laws to be applied, with a margin of discretion in this exercise.

Arbitration rules applied in investment treaty disputes may provide guidance to the tribunal on how to determine the applicable law. The ICSID Convention stipulates that 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'.[14] The ICSID Convention Additional Facility Rules state that '(a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable' shall be applied.[15]

An early question relating to the ICSID Convention was whether there is any preference in the application of either the host state's municipal law or international law. The initial approach was that the ICSID Convention had stipulated only a subordinate and subsidiary role to the international law. Consequently, tribunals put more focus on the law of the host state, while international law was applied only in a corrective or complementary role in the case of gaps in the host state law or where the host state law was not compliant with the fundamental principles of international law. This has been most illustratively depicted in the *Amco* and *Klöckner* cases.[16]

That early jurisprudence, however, concerned investment contract arbitrations and not investment treaty arbitrations. The approach changed following the annulment decision in the *Wena* case, a treaty-based arbitration, where the annulment committee held that the substantive provisions of international law can be applied independently and in conjunction with the host state's law, even where

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14 ICSID Convention, Article 42(1). These rules provide for prospective application of the substantive law of a third state, neither the host state nor the state where the investor is domiciled, as the host state's conflict of law rules should be considered. See Rupert Reece, Alexis Massot, et al., 'Chapter 7: Searching for the Applicable Law in WTO Litigation, Investment and Commercial Arbitration', in Jorge A Huerta-Goldman, Antoine Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration,* Global Trade Law Series, Volume 43, p. 211.

15 ICSID Convention Additional Facility Rules, Article 54(1).

16 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad Hoc Committee Decision on the Application for Annulment, 16 May 1986, Paragraph 20; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Ad Hoc Committee Decision, 3 May 1985, Paragraph 69. See also Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), p. 202.

no lacunae or inconsistencies were found in the municipal law.[17] While other tribunals have followed the reasoning that international law does not only have a corrective or supplementary role,[18] there are still ongoing debates on the proper application of international law as a substantive law in treaty disputes.[19]

Other dominant arbitration rules provide even greater discretion to arbitral tribunals. If there is no choice of law agreement, the UNCITRAL Arbitration Rules stipulate that 'the arbitral tribunal shall apply the law which it determines to be appropriate',[20] and the ICC Arbitration Rules state that 'the arbitral tribunal shall apply the rules of law which it determines to be appropriate',[21] while the SCC Arbitration Rules recommend a blend of the two, stating that 'the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate'.[22] References to 'rules of law', instead of a plain 'law', may be deemed to provide for more substantial freedom for application of not only an entire legal system, but also a specific limited set of rules. The Vienna Investment Arbitration Rules set out even an arguably broader guidance to the tribunals in the absence of the parties' agreement on the applicable law, stipulating that in such cases 'the arbitral tribunal shall apply the applicable law or rules of law which it considers appropriate, including any relevant treaties, relevant national laws of any State, any relevant international custom and general principles of law'.[23]

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17 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, Paragraphs 37–46.

18 See, e.g., *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Paragraphs 115–123; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, Paragraphs 231–240.

19 See Emmanuel Gaillard and 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); see also Monique Sasson, 'Chapter 10: The Applicable Law and the ICSID Convention', in Crina Baltag, *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016), pp. 273–300.

20 UNCITRAL Arbitration Rules, Article 35(1). See also UNCITRAL Arbitration Rules, Article 35(2), stating that the tribunal shall decide in accordance with the terms of the contract and take the usages of trade into account.

21 ICC Arbitration Rules, Article 21(1). See also ICC Arbitration Rules, Article 21(2), stipulating that the tribunal shall take account of the provisions of the contract and the relevant trade usages.

22 SCC Arbitration Rules, Article 27(1). See also SCC Arbitration Rules, Article 27(2), stipulating that the designation of the municipal law of a state shall be deemed to refer to the substantive law, not to the conflict of law rules.

23 Vienna Investment Arbitration Rules, Article 27(2).

Tribunals have affirmed that, in the absence of an agreement on the applicable law, they can apply both municipal and international law.[24] In this sense, it is the tribunal's task to determine whether and to what extent issues are subject to the application of only municipal or international norms.

In determination of the law applicable to the substance of the dispute, or to incidental questions, tribunals should – as a general rule – take appropriate consideration of the parties' positions. However, some tribunals have held that, in determining, interpreting and applying the law or laws, they are not restricted to the parties' submissions. The civil law principle of *iura novit curia* – or, tailored to arbitration, *iura novit arbiter* – essentially allows the tribunal to consider sources of law not suggested by the parties, as well as to form its own opinion on the applicable law.[25] In applying this principle, a tribunal should generally not surprise the parties with its own legal theory that was not subject to a debate and that the parties could not have anticipated. Such an approach is well acknowledged in international law and confirmed by the International Court of Justice (ICJ).[26] Investment arbitration tribunals often rely upon it,[27] and such reliance is supported by the views of annulment committees.[28]

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24 *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, Paragraphs 178–179; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015, Paragraph 91; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, Paragraph 117.

25 See Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, pp. 208–212.

26 *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, 25 July 1974, I.C.J. Reports, 1974, p. 9, Paragraphs 17–18.

27 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, Paragraph 92; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, Paragraph 118; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, Paragraph 141.

28 See, e.g., *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, Paragraph 295; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, Paragraph 84; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Ad Hoc Committee Decision, 14 June 2010, Paragraph 23.

An investment treaty as the primary source of law applicable to the dispute

The primary source of substantive law in investment arbitration is the investment treaty itself, supplemented by both general international law and municipal law of the host state.[29] Treaties often provide for various means of substantive protection to the investor, such as the host state's obligation to provide fair and equitable treatment[30] and full protection and security,[31] or to refrain from expropriating the investment without due compensation[32] or discriminatory or arbitrary treatment.[33]

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29 See Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, p. 400, particularly referring to the determinations of the tribunals in *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, Paragraph 181 and *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, Paragraphs 138–140.

30 See, e.g., Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, signed on 25 August 1998, entered into force on 23 February 2001, Article 2(3) stipulating that '[e]ach Contracting State shall in any case accord investments of the other Contracting State fair and equitable treatment'.

31 See, e.g., Agreement between the Government of the Republic of Croatia and the Government of Canada for the Promotion and Protection of Investments, signed on 3 February 1997, entered into force on 30 January 2001, stating that: '[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party . . . (b) full protection and security'.

32 See, e.g., Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments, signed on 6 May 2009, entered into force on 22 January 2012, Article VI, prescribing that '[i]nvestments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and provided that such expropriation is accompanied by prompt, adequate and effective compensation'.

33 See, e.g., Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 March 1994, entered into force on 16 November 1996, Article II(3)(b), setting out the commitment by which '[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments'.

When interpreting treaties, tribunals resort to the means of interpretation provided for in the 1969 Vienna Convention on the Law of Treaties (VCLT).[34] Tribunals should interpret the treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[35] In practice, tribunals scrutinise the ordinary meaning of the terms of the treaty, sometimes by invoking references in dictionaries.[36] Tribunals also consider the context in which substantive provisions appear, construing the relevant rule in conjunction with other treaty standards, as well as the object and purpose of the treaty, which may be found in the preamble.[37]

In addition to the above, tribunals also consider subsequent agreements between the parties, subsequent practice in relation to the relevant treaty, and the rules of international law applicable to the parties.[38] If there still appear to be ambiguities, or unreasonable interpretations arise, as well as for purposes of verifying the results, tribunals may resort to supplementary means of interpretation, including the treaty's preparatory work and the circumstances leading to its conclusion.[39]

In interpreting the treaty, tribunals frequently examine analogous case law and follow the reasoning taken by other tribunals, acknowledging that adherence to interpretations established in other cases contributes to the harmonious development of investment law and the certainty of the rule of law.[40] As Dolzer

34 Vienna Convention on the Law of Treaties (VCLT), open to signature on 23 May 1969, entered into force on 27 January 1980, Articles 31 and 32. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), pp. 28–30.

35 VCLT, Article 31(1), unless the parties intended to assign a special meaning to a specific term (VCLT, Article 31(4)).

36 See, e.g., *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, Paragraph 319.

37 See, e.g., *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 296–309; *Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, Paragraph 197.

38 VCLT, Article 32(3).

39 id., Article 32. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 31.

40 *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, Paragraphs 17–33; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, Paragraph 90; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, Paragraph 62; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, Paragraph 50; *Duke Energy Electroquil Partners &*

and Schreuer held, '[d]rawing on the experience of past decision-makers plays an important role in securing the necessary uniformity and stability of the law', especially since '[a] coherent case law strengthens the predictability of decisions and enhances their authority'.[41] Although previous awards do not carry binding precedential value and tribunals are not bound by foregoing arbitral practice, case law indeed plays a prominent role in developing consistent interpretations of the content of equivalent substantive standards of protection, which are often agreed by the states in investment treaties. With that said, arbitrators and tribunals may of course take different views,[42] which may lead to tribunals departing from earlier jurisprudence.[43]

Investment treaties almost invariably contain substantive rules that the tribunal is bound to apply. However, treaties rarely include a comprehensive set of rules governing all relevant aspects of the dispute. As the *AAPL* tribunal concluded, a 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'.[44]

Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008, Paragraphs 116–117; *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, Paragraphs 99–100.

41 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 33.

42 *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, Paragraph 187, referring to the divergent view on the role of case law by Professor Brigitte Stern.

43 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, Paragraph 97; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, Paragraph 64; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, Paragraphs 76–77.

44 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, Paragraph 21.

Similar conclusions were reached by the *Azurix* and the *LG&E* tribunals.[45] The *ADC* tribunal directly applied the underlying treaty, arguing that the treaty's express terms provide for its substantive rules of law to be applied to the dispute, but as may be complemented by rules of general international law and customary international law.[46]

In this respect, the content and the nature of substantive rules and standards provided for in investment treaties are still being developed, especially since they should be construed and applied in conjunction with other sources of international law. For instance, the fair and equitable treatment standard has sometimes been equated with the international minimum standard of treatment under customary international law,[47] while sometimes it has been considered as an autonomous and evolving treaty standard,[48] the latter approach even leading to discussions about whether it should form a self-standing rule of customary international role.[49]

Further, application of investment treaty provisions themselves can sometimes broaden the scope and the content of the substantive rules governing a dispute. Some treaties contain a 'most-favoured nation clause', mandating the host state not to subject investments or investors protected under such a treaty to treatment less favourable than what the host state accords to investors of third states. If investors of third states are granted a more favourable protection under the treaty covering their investment, then the substantive provisions of such a treaty may be imported and applied in disputes based on a treaty containing the most-favoured nation clause. Tribunals, for instance, have imported from other treaties more

45 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, Paragraphs 65–68; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, Paragraphs 85–87.

46 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, Paragraph 290.

47 North American Free Trade Agreement between Canada, the United States and Mexico, signed on 17 December 1992, entered into force on 1 January 1994 (NAFTA), Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA, 31 July 2001.

48 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, Paragraphs 7.4.1–7.4.12.

49 See Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?', *ICSID Review – Foreign Investment Law Journal*, 2016, Volume 31, Issue 2.

favourable conditions for just compensation[50] or extensive obligations to provide fair and equitable treatment.[51]

Other sources of international law as a source of applicable law in investment disputes

The application of substantive rules of a treaty alone may be sufficient for a tribunal to resolve a dispute. However, substantive provisions provided for by treaties are hardly ever self-sufficient to cover every single aspect of an investment treaty dispute, mandating consideration and application of other sources of law.

Frequently, both bilateral[52] and multilateral[53] treaties stipulate that disputes are to be settled in accordance with the 'rules' or the 'principles' of international law.[54] Some treaties, such as the Energy Charter Treaty, even contain a combined reference to both rules and principles of international law.[55] The tribunal in *Suez* concluded, based on the treaties that instructed the tribunal to apply principles of international law, that 'international law may apply to every extent relevant', ultimately concluding it would apply 'any relevant rules of international law'.[56]

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50 See, e.g., *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003.

51 See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

52 See, e.g., Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, signed on 20 April 2015, entered into force on 11 October 2017, Article 34(1), stating that '[a] Tribunal established under this Section shall decide the issues in dispute consistently with this Agreement and applicable rules of international law'; see also Agreement between the Government of the Republic of Croatia and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investment, signed on 2 December 1994, entered into force on 1 June 1996, Article 9(4), stipulating that '[t]he arbitration tribunal shall decide in accordance with principles of international law'.

53 See, e.g., NAFTA, Article 1131, stipulating that '[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.

54 See Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, p. 55.

55 The Energy Charter Treaty, signed on 17 December 1994, entered into force on 16 April 1998, Article 26(6), stipulating that '[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'.

56 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, Paragraph 63; see

It is generally understood that the references to international law should cover the full range of its sources, as specified in Article 38(1) of the Statute of the ICJ, including (1) general or particular international conventions establishing rules expressly recognised by the states, (2) international custom, as evidence of a general practice accepted as law, (3) the general principles of law recognised by civilised nations, and (4) judicial decisions and scholarly writings, as subsidiary means for the determination of rules of law.[57]

Some treaties specifically stipulate that the customary international law and general principles of law are to be applied, such as the China–Colombia Bilateral Investment Treaty (BIT), stating that the tribunal may base its decision 'on the general principles of law, and on the principles evidenced by general state practice and accepted as law and *opinio juris*'.[58]

With respect to the customary international law, tribunals frequently apply, for instance, the principles of attribution and state responsibility,[59] the consequences of the state of necessity,[60] or the standard of compensation for wrongful expropriation,[61] affirming the view that customary international law plays an

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also Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, p. 58.

57 Statute of the International Court of Justice, Article 38(1). See International Bank for Reconstruction and Development, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States', in *The History of the ICSID Convention*, Volume II-2, p. 962; see also Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 545–639.

58 Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the People's Republic of China, Article 9.11, signed on 22 November 2008, entered into force on 2 July 2013.

59 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, Paragraph 89; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraph 190; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, Paragraphs 276–328.

60 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (also known as Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic)*, ICSID Case No. ARB/01/3, Award, 22 May 2007, Paragraphs 294–313, and Decision on the Application for Annulment of the Argentine Republic, Paragraphs 355–395; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Paragraphs 304–331, and Ad Hoc Committee Decision on the Application for Annulment of the Argentine Republic, 25 September 2007, Paragraphs 101–150.

61 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, Paragraphs 8.2.1–8.2.11.

important role in investment treaty arbitration.[62] Likewise, tribunals often invoke upon the general principles of law, such as the good faith principle,[63] the burden of proof[64] and the principle of estoppel,[65] demonstrating their relevance in investment arbitrations.[66]

Treaty provisions are often applied in conjunction with the rules of international law, such as the rules on treaty interpretation and state responsibility, even if the underlying treaty does not explicitly refer to such rules.[67] In this respect, under Article 31(3)(c) of the VCLT, the substantive rules of a treaty have to be interpreted and applied by taking the relevant rules of international law into account to the extent applicable, with an aim of integrating the entire system of international law into the legal framework created by the treaty.[68] In that vein, there were

62 See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 606–607; see also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 17.

63 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Paragraph 142; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, Paragraphs 230–239.

64 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, Paragraph 83; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, Paragraph 121; *Alpha Projektholding GmbH v. Ukraine,* ICSID Case No. ARB/07/16, Award, 8 November 2010, Paragraph 236.

65 *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award, 30 March 2010, Paragraphs 348–354; *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, Paragraphs 7.1.1–7.1.3.

66 See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 607–610; see also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), p. 18.

67 Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, pp. 417–418, referring to Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Second Edition (Oxford University Press, 2018).

68 See Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?', *ICSID Review – Foreign Investment Law Journal*, 2016, Volume 31, Issue 2, pp. 264–269; see also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Catalogue, Oxford University Press, 2012), pp. 17–18.

views that, simply by consenting to investment arbitration, the investor and the host state agreed to apply general international law, including customary international law.[69]

Controversies have revolved around the application of EU law as substantive law in investment treaty arbitration proceedings. In some cases, tribunals have indeed considered that EU law, being a constituent component of a national legal system, should be considered, interpreted and applied, if and where required.[70] However, subsequent developments, especially the determination that intra-EU investment arbitrations are incompatible with EU law,[71] generated a number of uncertainties in relation to the application of EU law, including with respect to arbitrations under extra-EU BITs. These uncertainties were, for the most part, generated by the view that the application of EU law in investment arbitrations is entrusted to tribunals that are not part of the judicial system of the EU and cannot seek preliminary rulings on the interpretation of EU law from the Court of Justice of the European Union (CJEU). Since investment arbitration tribunals are deemed not to have authority to refer questions to the CJEU, which is deemed to be the ultimate arbiter on the proper interpretation and application of EU law under the EU system, their operation arguably threatens the autonomy of EU law.

Municipal law as a broadly applicable and relevant source of applicable law

As discussed above, the underlying treaty and other sources of international law are predominantly applied as a source of substantive law in investment disputes. But that is not to say municipal law has no relevance. To the contrary, many treaties specifically stipulate that municipal law, primarily that of the host state, applies in a dispute. Likewise, the parties to the dispute may, explicitly or implicitly, agree

69 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, Paragraph 89; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, Paragraph 290.

70 See, e.g., *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, Paragraph 100; *Electrabel SA v. Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Paragraphs 4.192–4.199.

71 *Slovak Republic v. Achmea BV*, Case C-284/16, Judgment of the Grand Chamber of the Court of Justice of the European Union, 6 March 2018. This decision prompted the termination of intra-EU BITs; see Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed on 5 May 2020, entered into force on 29 August 2020.

to the applicability of municipal law. Further, even if there is no reference to municipal law in the treaty, the parties' agreement (if any) or the relevant arbitration rules may still be relevant, and the specifics of the case might trigger its application to the extent determined to be required or necessary.

Where choice of law provisions may be found, references to municipal law mainly appear to be included in addition to international law, while only seldomly are they included independently or to the exclusion of international law.[72] This might imply a subsidiary role reserved for municipal law in investment disputes. Recent trends appear to show a tendency of allowing tribunals to consider municipal law, but distinguishing it from the principal norms applicable to the dispute.[73]

Sometimes, certain specific or incidental issues need to be resolved by applying municipal law, irrespective of the existing choice of the treaty or international law as the applicable law.[74] For instance, the application of municipal law may be warranted for determining whether the rights comprising the investment, which the investor seeks to protect, actually exist.[75] This aspect is even more relevant as the prospective liability of the host state is closely interrelated with the scope and the nature of the rights forming part of the investment.[76]

Moreover, certain treaties provide protection only to investments made 'in accordance with the [host state's] laws', limiting the scope of application of the treaty and the host state's consent.[77] In such cases, the legality of the investment

72 Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, pp. 411–414.

73 id., p. 417.

74 id., pp. 404–406.

75 *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, Paragraph 112; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, Paragraphs 142–145.

76 See Zachary Douglas, 'Applicable Laws', in *The International Law of Investment Claims* (Cambridge University Press, 2009), pp. 63–64.

77 See, e.g., Agreement between the Government of the Republic of Bosnia and Herzegovina and the Government of Malaysia for the Promotion and Protection of Investments, singed on 16 December 1994, entered into force on 27 May 1995, Article 1(2)(a), linking the notion of the 'investments' vested with protection under the treaty to only those investments that 'are made in accordance with the laws, regulations and national policies of the Contracting Parties'.

is assessed under the municipal law of the host state, irrespective of the law applicable to the main issues in dispute.[78]

To invoke the protection of an investment treaty, the investor needs to have the nationality of its home state – the other state party to the treaty. This issue must be resolved with reference to the national law of the state whose nationality the investor claims to have.[79] Tribunals sometimes also have to resort to the municipal law of different states, in cases where the investor is asserted to have dual or multiple nationality.[80] Likewise, the issues pertaining to the investor's legal status and capacity, as well as corporate actions and corporate governance, are governed by the municipal law of its home state.[81]

Municipal law may also be relevant in the application of 'umbrella clauses'.[82] To determine whether a contractual commitment has validly been established, as well as to assess the issues related to its execution, tribunals may resort to the municipal law of the host state, or such other laws that may apply in relation to the contractual relationship.[83]

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78 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, Paragraphs 105–114; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, Paragraphs 118–123; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Paragraphs 318–320; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, Paragraphs 83–86.

79 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, Paragraphs 195–201; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, Paragraph 55.

80 See, e.g., *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019; *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt (formerly Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt)*, ICSID Case No. ARB/02/9, Award, 27 October 2006, Section 3.4.1.

81 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988, Paragraphs 104–105; *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation*, ICSID Case No. ARB/92/2, Award, 4 May 1994, Paragraphs 26–29.

82 See, e.g., Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Article X(2), stating that '[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party'.

83 See, e.g., *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

These examples clearly demonstrate the importance of municipal law in investment treaty arbitration. Because the arbitrators may not have the experience in dealing with issues pertaining to the relevant municipal law, primarily of the host state,[84] tribunals often rely on the interpretation of national law by various legal authorities from that jurisdiction. However, difficulties may arise if, for instance, the investor claims that the host state impaired its investment by serious misapplication of the applicable national law, which may limit the tribunal in relying on the authoritative interpretation of national law in the jurisprudence of national courts or other authorities.

Resolving conflicts of laws and the prospective consequences of misapplying the law

Treaties sometime explicitly provide for multiple sources of law, without setting out the hierarchy between them in cases of prospective conflicts, thereby requiring tribunals to determine the ranking in their application to specific issues in dispute.[85] The *CME* tribunal, deciding on the basis of the Czech Republic–Netherlands BIT,[86] concluded that the treaty's choice of law provision did not rank the precedence between various sources of law, and did not provide an exclusive choice of law, implying that it may even apply additional sources of law.[87] In

84 For some guidance on the strategy that parties' counsel may resort to in relation to identifying and interpreting the applicable laws in international arbitration, see Gabrielle Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions', *Arbitration International*, 2005, Volume 21, No. 4, pp. 631–638.

85 See, e.g., Agreement between the Republic of France and Argentina on the Promotion and Reciprocal Protection of Investments, signed on 3 July 1991, entered into force on 3 March 1993, Article 8(4), stipulating that the tribunal shall base its decision on (1) the provisions of the BIT, (2) the legislation of the host state party to the dispute, including conflict of laws rules, (3) the terms of any private agreements concluded on the subject of the investment, and (4) the relevant principles of international law.

86 See, e.g., Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 1 October 1992, Article 8(6), stipulating that '[t]he arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: – the law in force of the Contracting Party concerned; – the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; – the provisions of special agreements relating to the investment; – the general principles of international law'.

87 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, Paragraphs 396–413. See also Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 3, p. 409; Yas Banifatemi, 'The Law Applicable in Investment Treaty

such scenarios, the tribunal's task is to determine which rules should apply to a specific issue in dispute, especially in the cases of a dispute between the parties on the point of applicable laws and their hierarchy.[88]

Both the treaty and general international law are often applied seamlessly in investment treaty arbitration proceedings. However, in certain specific circumstances, differences between the substantive rules provided for by a treaty and the applicable rules of general international law may arise. If the treaty conflicts with a peremptory norm of general international law, general international law should prevail.[89] However, such conflicts are unlikely in relation to investment treaties. Outside such unlikely scenarios, tribunals have held that the treaty, as the principal source of law, should have primacy in application.[90]

Potential conflicts may also arise in the application of the treaty or international law and municipal law. In some cases, they may apply concurrently and in parallel.[91] In the case of a conflict between an investment treaty and the relevant municipal law, the underlying treaty should be deemed to be the prevailing source of law. An important part of the rule for resolution of such conflict is a well-established rule that states cannot invoke the provisions of municipal law as justification for their failure to perform a treaty.[92] By the same token, conflicts between municipal law and general international law, including customary law, are resolved under the maxim that municipal law may not violate and be incompliant with international law.[93]

Arbitration', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), pp. 198–199.

88 *Total SA v. Argentine Republic*, ICSID Case No ARB/04/1, Decision on Annulment, 1 February 2016, Paragraphs 196–197.

89 VCLT, Article 53.

90 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, Paragraphs 333–354, and Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, Paragraphs 186–210.

91 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Paragraphs 116–117; *Adriano Gardella S.p.A. v. Côte d'Ivoire*, ICSID Case No. ARB/74/1, Award, 29 August 1977, Paragraph 4.3; *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, Paragraph 4.64.

92 VCLT, Article 27.

93 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, Paragraph 107; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 200, Paragraphs 92–93; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award of the Tribunal, 23 September 2003, Paragraphs 105, 207; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision

The tribunal's task of identifying the proper law or laws applicable to the matter in dispute, as well as of appropriately applying such law, is of paramount importance. Any errors made by the tribunal discharging its mandate in this respect may entail a significant corollary. The tribunal may either fail to identify and apply the proper law, or commit an error of law of such substantial magnitude that may be construed as a complete disregard of the applicable law.[94] The failure to identify properly and apply the law may be qualified as a manifest excess of the tribunal's powers and a derogation from its mandate, which may result in the annulment of the tainted arbitral award.[95]

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on Liability, 3 October 2006, Paragraph 94; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 19 October 2009, Paragraph 218. See also Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, 'Applicable Law', in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 617–630.

94 See Dafina Atanasova, 'Conflict of treaty-norms in investment arbitration', University of Geneva, Thesis, 2017, pp. 64–65.

95 ICSID Convention Arbitration Rules, Article 52(1)(b). See also *Venezuela Holdings, B.V., et al. (formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (also known as Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic)*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010.

APPENDIX 1

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Stefan Riegler is a member of the dispute resolution team and heads the arbitration practice. Stefan specialises in advising companies on commercial disputes, especially in the energy, construction and infrastructure sectors; he is also experienced in handling corporate, post-M&A and banking disputes. Stefan has acted as counsel and arbitrator under major arbitration rules, as well as in ad hoc arbitration proceedings. Stefan is a member of the board of the Austrian Arbitration Association and of the board of the Vienna International Arbitral Centre, as well as a member of the International Chamber of Commerce Commission on Arbitration.

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Dalibor Valinčić heads the dispute resolution team in Zagreb. He focuses on investment and commercial arbitration and has extensive experience in energy law. Dalibor combines an international perspective, which comes from advising clients from several different countries, with a very good local rapport. He has successfully represented investors in multimillion-dollar arbitrations under the rules of both the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law. His commercial arbitration experience includes representing and advising clients in arbitrations under the Vienna International Arbitration Centre Rules, the International Chamber of Commerce (ICC) Rules and the local Zagreb Rules. His sector experience covers industries such as oil and gas, hospitality and food manufacturing. Dalibor holds an LLB from the University of Zagreb Law School and an LLM (with distinction) in international and comparative dispute resolution from Queen

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The *GAR Guide to Investment Treaty Protection and Enforcement* is a new guide on the practical side of investor–state disputes. It tracks the concept of investment protection throughout its life cycle – from negotiation of the treaty to enforcement of an award and everything in-between. In doing so, it seeks to guide the reader in what to do and think – how to strategise – at every stage of a dispute, focusing on what works. The content is further enriched with a series of contributions from arbitrators, on topics du jour.

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