



# Jurisdiction and Applicable Law in Investment Treaty Arbitration

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*This article first discusses the law governing a tribunal's jurisdiction. Jurisdiction is governed primarily by the instrument(s) bestowing jurisdiction. In the case of treaty arbitration, this will be the treaty offering consent to arbitration. On certain points, like the legality of the investment and the investor's nationality, that treaty will refer to domestic law. A second part deals with the varying scope of jurisdiction exercised by investment treaty tribunals. It ranges from a wide jurisdiction over all disputes arising from investments to jurisdiction only over certain narrowly defined disputes. There is no clear correlation between these jurisdictional clauses and provisions on applicable law in the relevant treaties. A third part looks at situations in which the tribunal's jurisdiction and the applicable law derive from different sources. This is the case, in particular, where the tribunal applies substantive standards that existed before the entry into force of the treaty providing for jurisdiction.*

*Cet article traite du droit applicable à la compétence des arbitres. La compétence étant déterminée principalement par le biais d'un instrument attributif, dans le cas de l'arbitrage d'investissement, cela aura lieu à travers le traité offrant la possibilité de consentir à l'arbitrage. Sur certains points, tels que la légalité de l'investissement et la nationalité de l'investisseur, le traité se réfèrera au droit national. La deuxième partie de l'article aborde la compétence variable des tribunaux en matière d'investissement. Elle peut s'appliquer à tous les différends concernant l'investissement ou seulement à certaines questions bien définies. Toutefois, il n'y a pas de corrélation évidente entre ces clauses attributives de compétence et les dispositions sur le droit applicable aux traités concernés. En dernier, la troisième partie se penche sur les cas où la compétence du tribunal et le droit applicable ont des sources distinctes. Cela peut se produire, notamment, lorsque le tribunal applique des standards préexistants à l'entrée en vigueur du traité attribuant la compétence.*

## I. INTRODUCTION

In investment treaty arbitration jurisdiction is generally based on an offer of consent to arbitration made by the states parties to a treaty. Most often the treaty is a bilateral investment treaty (“BIT”). That offer may be accepted by nationals of another state party to the treaty, often simply by starting arbitration proceedings. At the same time, the claimants typically rely on the substantive standards guaranteed by the treaty. Therefore, at first sight, the two aspects, jurisdiction and applicable substantive law, appear intimately linked. A closer look reveals that jurisdiction and applicable law, while clearly correlated in a number of ways, are by no means always coextensive.

In particular, it would be mistaken to assume that because a tribunal derives its jurisdiction from a particular treaty the law to be applied is necessarily made up of that treaty’s substantive standards of protection. In other words, a tribunal’s basis of jurisdiction does not determine the law to be applied by it.

The scope of a tribunal’s jurisdiction varies considerably from one treaty to another. Sometimes jurisdiction goes beyond the substantive standards provided by the respective treaty. Sometimes jurisdiction coincides with them. Sometimes jurisdiction does not even extend to all of the treaty’s standards of protection. In some situations the substantive law to be applied by a tribunal is to be found entirely outside the treaty that constitutes the basis for its jurisdiction.

Just as the basis of a tribunal’s jurisdiction does not determine the law it has to apply, the law applicable in a case does not determine the tribunal’s jurisdiction. The law governing jurisdictional issues is independent of the law applicable to the merits of a case.

This article first discusses the law governing issues of a tribunal’s jurisdiction. Jurisdiction is governed primarily by the instrument(s) bestowing jurisdiction. In the case of treaty arbitration, this will be the treaty offering consent to arbitration. On certain points, like the legality of the investment and the investor’s nationality, that treaty will refer to domestic law.

A second part deals with the varying scope of jurisdiction exercised by investment treaty tribunals. It ranges from a wide jurisdiction over all disputes arising from investments to jurisdiction only over certain narrowly defined disputes. There is no clear correlation between these jurisdictional clauses and provisions on applicable law in the relevant treaties.

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## II. THE LAW APPLICABLE TO JURISDICTION

### A. The Law Governing Jurisdiction

In most investment treaty arbitrations respondents raise jurisdictional objections that must be dealt with before the tribunal can proceed to the merits. Not infrequently, this leads to the question of the law applicable to issues of jurisdiction. At times respondents have argued that this would be the same as the law applicable to the merits.

Tribunals have held consistently that questions of jurisdiction are not subject to the law applicable to the merits of the case. Questions of jurisdiction are governed by their own system which is defined by the instruments containing the parties' consent to jurisdiction.<sup>1</sup>

In *CMS v Argentina*, the Respondent sought to rely on its national company law to contest the standing of shareholders in a company. The Tribunal rejected this attempt and said:

[T]he applicable jurisdictional provisions are only those of the [ICSID] Convention and the BIT, not those which might arise from national legislation.<sup>2</sup>

More generally, with respect to the law governing jurisdiction the *CMS* Tribunal said:

Article 42 [of the ICSID Convention] is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from

1 *Ceskoslovenska Obchodni Banka AS v Slovakia*, Decision on Jurisdiction (24 May 1999) at para 35, International Centre for Settlement of Investment Disputes (ICSID), 14 ICSID Rev 251; *Enron Corp v Argentina*, Decision on Jurisdiction (14 January 2004) at para 38, ICSID, ORIL IIC 93; *Noble Energy Inc v Ecuador*, Decision on Jurisdiction (5 March 2008) at paras 56-57, ICSID, ORIL IIC 320; *CMS Gas Transmission Company v Argentina*, Decision on Jurisdiction (17 July 2003) at paras 42, 88, ICSID, ILM 788 [CMS]; *Siemens AG v Argentina*, Decision on Jurisdiction (3 August 2004) at paras 29-31, ICSID, 44 ILM 138 [Siemens]; *Azurix Corp v Argentina*, Decision on Jurisdiction (8 December 2003) at paras 48-50, ICSID, 43 ILM 262; *Camuzzi International SA v Argentina*, Decision on Jurisdiction (11 May 2005) at paras 15-17, 25-27, 57, ICSID, ORIL IIC 283; *AES Corp v Argentina*, Decision on Jurisdiction (26 April 2005) at paras 34-39, ICSID, 12 ICSID Rep 308; *Berschader v Russian Federation*, Award (21 April 2006) at paras 93-97, Arbitration Institute of the Stockholm Chamber of Commerce, ORIL IIC 314 [Berschader]; *Jan de Nul NV v Egypt*, Decision on Jurisdiction (16 June 2006) at paras 65-68, ICSID, ORIL IIC 144; *Saipem SPA v Bangladesh*, Decision on Jurisdiction (21 March 2007) at paras 68-70, 78-82, ICSID, 22 ICSID Rev 100 [Saipem SPA]; *Inmaris Perestroika Sailing Maritime Services GMBH v Ukraine*, Decision on Jurisdiction (8 March 2010) at para 54, ICSID, ORIL IIC 431 [Inmaris Perestroika]; *Burlington Resources Inc v Ecuador*, Decision on Jurisdiction (2 June 2010) at paras 101-103, ICSID, ORIL IIC 436; *Railroad Development Corp v Guatemala*, Second Decision on Jurisdiction (18 May 2010) at para 111, ICSID, ORIL IIC 432; *Mobil Corporation Venezuela Holdings BV v Venezuela*, Decision on Jurisdiction (10 June 2010) at paras 71-85, ICSID, ORIL IIC 435; *Alpha Projektholding GMBH v Ukraine*, Award (8 November 2010) at paras 225-227, ICSID, ORIL IIC 464; *Cemex Caracas Investments BV v Venezuela* (30 December 2010) at paras 67-139, ICSID, ORIL IIC 470; *Duke Energy International Peru Investments No 1 v Peru*, Decision on Annulment (1 March 2011) at paras 125-144, ICSID, ORIL IIC 483; *Alps Finance and Trade AG v Slovakia*, Award (5 March 2011) at paras 193-199, Ad Hoc Tribunal-United Nations Commission on International Trade Law (Ad Hoc UNCITRAL), ORIL IIC 489; *M Meerapfel Söhne AG v Central African Republic*, Award (12 May 2011) at paras 139-147, ICSID, Case No ARB/07/10; *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility (4 August 2011) at para 430, ICSID, ORIL IIC 504 [Abaclat]; *Quiborax SA v Bolivia*, Decision on Jurisdiction (27 September 2012) at paras 47-52, ICSID, ORIL IIC 563 [Quiborax]; *Electrabel SA v Hungary*, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) at para 4.17, ICSID, ORIL IIC 567; *Teinver SA v Argentina*, Decision on Jurisdiction (21 December 2012) at paras 227-228, ICSID, ORIL IIC 570 [Teinver]; *Ambiente Ufficio SPA v Argentina*, Decision on Jurisdiction and Admissibility (8 February 2013) at paras 134, 153, 233-246, 257, 514-515, ICSID, ORIL IIC 576; *Burimi SRL v Albania*, Award (29 May 2013) at paras 92-165, ICSID, ORIL IIC 593; *Philip Morris Brands Sàrl v Uruguay*, Decision on Jurisdiction (2 July 2013) at para 30, ICSID, ORIL IIC 597; *KT Asia Investment Group BV v Kazakhstan*, Award (17 October 2013) at para 85, ICSID, ORIL IIC 615; *Churchill Mining PLC v Indonesia*, Decision on Jurisdiction (24 February 2014) at para 86, ICSID, ORIL IIC 634; *Planet Mining Pty Ltd v Indonesia*, Decision on Jurisdiction (24 February 2014) at para 86, ICSID, ORIL IIC 635.

2 *CMS*, *supra* note 1 at para 42.

the decision on jurisdiction, governed solely by Article 25 of the [ICSID] Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions.<sup>3</sup>

Article 25(2)(b) of the ICSID Convention employs the concept of foreign control as a jurisdictional element. The Tribunal in *Compagnie d'Exploitation du Chemin de Fer Transgabonais v Gabon* found that the concept of control under Article 25(2)(b) was not to be interpreted just by looking at the law of the host State:

La notion de contrôle ne se réfère pas au droit interne de l'Etat d'accueil. Il faut lui conserver son autonomie, car elle sert à la détermination de la compétence du CIRDI. Le droit interne peut seulement servir d'indication.<sup>4</sup>

The Tribunal in *Daimler v Argentina* aptly summarized the issue of the law applicable to jurisdiction in the following terms:

For purposes of the Tribunal's jurisdiction [...] the proper law to be applied is the German-Argentine BIT itself, in concert with the ICSID Convention, as interpreted in the light of general principles of international law.<sup>5</sup>

Therefore, it is clear that, independent of any law chosen by the parties with respect to the merits of their claims, jurisdictional issues, including the existence of an investment, the presence of an eligible investor and the parties' consent to arbitration, must be determined by reference to the legal instruments establishing jurisdiction and by general international law.

## B. Domestic Law and Jurisdiction

Some questions that are relevant to a tribunal's jurisdiction are governed by domestic law. In investment treaty arbitration this is usually the consequence of a reference to domestic law in the treaty providing for jurisdiction.

For instance, many treaties require that in order to qualify as an investment, the operation must be in accordance with the host State's law. BITs frequently include the formula "in accordance with host State law" or a similar phrase in their definitions of the term 'investment'.<sup>6</sup> The consequence of such a definition is that an investment that is not in compliance with host State law is not covered by the definition of 'investment' and will not benefit from protection under the treaty. Clauses in these treaties providing for arbitration between the host State and the investor typically refer to investments as defined in the treaty. Therefore, failure to comply with host State law has the consequence that there is no valid consent to arbitration under the treaty.<sup>7</sup>

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3 *CMS, supra* note 1 at para 88.

4 *Compagnie d'Exploitation du Chemin de Fer Transgabonais v Gabon*, Decision on Jurisdiction (19 December 2005) at para 35, ICSID, 26 ICSID Rev 173.

5 *Daimler Financial Services v Argentina*, Award (22 August 2012) at para 50, ICSID, ORIL IIC.

6 For detailed discussion see Christina Knahr, "Investments 'In Accordance with Hosts State Law'" (2007) 4:5 TDM; Ursula Kriebaum, "Chapter V: Investment Arbitration – Illegal Investments" (2010) Austrian Arbitration Yearbook 307.

7 *Salini Costruttori SpA v Morocco*, Decision on Jurisdiction (23 July 2001), ICSID, 42 ILM 606; *Consorzio Groupement LESI-DIPENTA v Algeria*, Award (10 January 2005) at para II. 24 (iii), ICSID, ORIL IIC 149; *Gas Natural SDG SA v Argentina*, Decision on Jurisdiction (17 June 2005) at paras 33-34, ICSID,

The treaty conferring jurisdiction directs the tribunal to apply host state law to the question of the investment's legality. In turn, the investment's legality determines its protection under the treaty, including access to arbitration. Therefore, the treaty's criterion of legality serves as a gateway for the application of host state law.

In *Metal-Tech v Uzbekistan* the Tribunal described the link between the host state's law and jurisdiction in the following terms:

[T]he Tribunal comes to the conclusion that corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan. As a consequence, the investment has not been "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made" as required by Article 1(1) of the BIT.

373. Uzbekistan's consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes "concerning an investment." Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute.<sup>8</sup>

Practice shows that tribunals have developed several criteria to contain the potentially far-reaching consequences of importing host state law into the law applicable to jurisdiction by way of the legality requirement. These criteria include the severity of the violation,<sup>9</sup> the question whether the domestic rules involved were part of the host state's investment regime<sup>10</sup> and whether the illegality related to the making of the investment or merely to its conduct.<sup>11</sup>

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ORIL IIC 115; *Bayindir Insaat Turizm Ticaret ve Sanayi AŞ v Pakistan*, Decision on Jurisdiction (14 November 2005) at paras 105-110, ICSID, ORIL IIC 27; *Mytilineos Holdings SA v Serbia*, Decision on Jurisdiction (8 September 2006) at paras 137-157, ICSID, ORIL IIC 345 [*Mytilineos*]; *Saipem SPA, supra* note 1 at paras 79-82, 120-124; *Aguas del Tunari SA v Bolivia*, Decision on Jurisdiction (21 October 2005) at paras 139-155, ICSID, ORIL IIC 8; *Desert Line Projects LLC v Yemen*, Award (6 February 2008) at para 104, ICSID, ORIL IIC 319 [*Desert Line*]; *Nordzucker AG v Poland*, First Partial Award (10 December 2008) at para 167, Ad Hoc UNCITRAL [*Nordzucker*]; *SGS Société Générale de Surveillance SA v Paraguay*, Decision on Jurisdiction (12 February 2010) at paras 118-123, ICSID, ORIL IIC 525 [*SGS*]; *Railroad Development, supra* note 1 at para 140; *Alasdair Ross Anderson v Costa Rica*, Award (19 May 2010) at paras 50-59, ICSID, ORIL IIC 437; *Fakes v Turkey*, Award (14 July 2010) at para 115, ICSID, ORIL IIC 439 [*Fakes*]; *Quiborax, supra* note 1 at para 255.

8 *Metal-Tech v Uzbekistan*, Award (4 October 2013) at paras 372-373, ICSID, ORIL IIC 619 [*Metal-Tech*].

9 *Rumeli Telekom AS v Kazakhstan*, Award (29 July 2008) at para 168, ICSID, ORIL IIC 344; *Desert Line, supra* note 7 at para 104; *Metalpar SA v Argentina*, Decision on Jurisdiction (27 April 2006) at para 84, ICSID, ORIL IIC 164; *Mytilineos, supra* note 7 at paras 151-157; *Inmaris Perestroika, supra* note 1 at paras 144-145; *Vanessa Ventures Ltd v Venezuela*, Award (16 January 1913) at para 167 [*Vanessa*]; *Tokios Tokelès v Ukraine*, Decision on Jurisdiction (29 April 2004) at para 86, ICSID, 20 ICSID Rev 205 [*Tokios Tokelès*]. See also *Alpha Projektholding, supra* note 1 at paras 292-297.

10 *Fakes, supra* note 7 at para 119;

11 *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, Decision on Jurisdiction (30 April 2010) at paras 173-183, Ad Hoc UNCITRAL; *Gustav F W Hamester GmbH & Co KG v Ghana*, Award

Another issue with jurisdictional implications that is governed in large part by domestic law is the investor's nationality. The claimant's nationality is an essential requirement for jurisdiction under treaties. The nationality of a natural person is determined primarily by the law of the State whose nationality is claimed.<sup>12</sup> In *Soufraki v UAE* the Tribunal reaffirmed the primary relevance of national law to questions of nationality. The Tribunal also emphasized that it had jurisdiction to scrutinise whether the nationality requirements under domestic law were fulfilled:

It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. [...] But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge.<sup>13</sup>

Another issue that is governed by domestic law is the existence of the proprietary rights underlying the investment. That question is discussed in more detail below.<sup>14</sup>

These examples demonstrate that the rules governing the jurisdiction of a tribunal are subject to their own regime of applicable law that is independent of the law governing the merits of a case. In most cases that law will be determined by the instruments providing for arbitration. In investment treaty arbitration most often this is a BIT and the ICSID Convention. On some questions, such as the investment's legality, the investor's nationality and the existence of property and similar rights, the relevant treaty refers to domestic law.

### III. DOES JURISDICTION DETERMINE THE APPLICABLE LAW?

#### A. The Scope of Jurisdiction

The scope of jurisdiction as determined by treaty clauses providing for consent to arbitration varies. Under some treaties jurisdiction for investor-State disputes is limited to disputes arising out of the interpretation and application of the treaty's substantive standards. For instance, in Article 11(1) of the El Salvador-Spain BIT consent to arbitration extends to "any dispute [...] concerning matters regulated by this Agreement".<sup>15</sup> Similarly, Article 17(1) of the Japan-Cambodia BIT provides for jurisdiction over a dispute concerning "an alleged breach of any right conferred by

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(18 June 2010) at paras 127, 129, ICSID, ORIL IIC 456; *Fakes*, *supra* note 7 at para 119; *Quiborax*, *supra* note 1 at para 266; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, Decision on Jurisdiction (19 December 2012) at para 260, ICSID, Case No ARB/07/26; *Teinver*, *supra* note 1 at paras 317-323; *Vanessa*, *supra* note 9 at 167; *Metal-Tech*, *supra* note 8 at paras 185-193, 267, 370.

12 *Champion Trading Company v Egypt*, Decision on Jurisdiction (21 October 2003) at s 3.4.1, ICSID, [2004] 19 ICSID Rev 275 at 282-289 (International Centre for Settlement of Investment Disputes); *Siag v Egypt*, Decision on Jurisdiction (11 April 2007) at paras 195-201, ICSID, ORIL IIC 288; *Micula v Romania*, Decision on Jurisdiction (24 September 2008) at paras 86, 101, ICSID, ORIL IIC 339.

13 *Soufraki v UAE*, Award (7 July 2004) at para 55, ICSID, ORIL IIC 131.

14 See s II.E. below.

15 For an application of this provision see: *Inceysa Vallisoletane SL v El Salvador*, Award (2 August 2006) at paras 163-164, ICSID, ORIL IIC 134.

this Agreement”.<sup>16</sup> Austria’s Model BIT offers arbitration for disputes concerning an alleged breach of an obligation “under this Agreement”.<sup>17</sup> Canada’s Model Foreign Investment Promotion and Protection Agreement (FIPA) provides for investor-state arbitration in respect of claims alleging breaches of certain listed substantive provisions of the treaty.<sup>18</sup>

The Guatemala-Spain BIT, applicable in *Iberdrola v Guatemala*,<sup>19</sup> provided for jurisdiction “concerning matters governed by this Agreement”.<sup>20</sup> The Tribunal contrasted this limited jurisdictional clause with comprehensive clauses contained in other treaties:

[T]he Treaty contrasts with other bilateral investment treaties signed by Guatemala and by Spain, which extend arbitral jurisdiction to “any dispute”, “every dispute”, “the disputes”, “the differences” or “every class of disputes or of differences” as regards the extent of protection. The language of the Treaty is restricted [...] which means that the Republic of Guatemala did not give general consent to submit any kind of dispute or difference related to investments made in its territory to arbitration, but only those related to violations of substantive provisions of the treaty itself.<sup>21</sup>

Under Article 1116 of the NAFTA the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself.<sup>22</sup> Also, under Article 26(1) of the Energy Charter Treaty (ECT) the scope of the consent is limited to disputes “which concern an alleged breach of an obligation [...]under Part III [of the ECT]”.<sup>23</sup>

This concordance of jurisdiction with the treaty’s substantive standards is by no means the norm. Many BITs, in their consent clauses, contain phrases such as “all disputes concerning investments” or “any legal dispute concerning an investment”. For instance, China’s Model BIT offers arbitration for “[a]ny legal dispute [...] in connection with an investment [...]”. The French Model BIT refers to “[t]out différent relatif aux investissements”. Germany’s Model BIT simply refers to “[d]isputes concerning investments”. Italy’s Model BIT refers to “[a]ny dispute [...] on investment”. Russia’s Model BIT covers “[d]isputes [...] in connection with an investment”. The United Kingdom Model BIT offers two versions. One version, marked as [Preferred], refers to “any legal dispute [...] concerning an investment”. Another version, marked as [Alternative], refers to “[d]isputes [...] concerning an obligation [...] under this Agreement”.<sup>24</sup>

These provisions do not restrict a tribunal’s jurisdiction to claims arising from alleged violations of the BITs’ substantive standards. By their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself and would include

16 See Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) at 374 [Brown].

17 *Ibid* at 38.

18 *Ibid* at 105.

19 *Iberdrola Energia SA v Republic of Guatemala*, Award (17 August 2012), ICSID, ORIL IIC 559.

20 *Ibid* at para 296.

21 *Ibid* at para 306 [footnotes omitted].

22 *United Parcel Service of America Inc v Canada*, Award on Jurisdiction (22 November 2002) at para 34, ICSID, ORIL IIC 265.

23 *Kardassopoulos v Georgia*, Decision on Jurisdiction (6 July 2007) at paras 249-252, ICSID, ORIL IIC 294 [Kardassopoulos].

24 Brown, *supra* note 16 at 172, 276, 316, 340, 614, 743.

disputes that arise from a contract and other rules of law in connexion with the investment.

In *Salini v Morocco*, Article 8 of the BIT between Italy and Morocco defined ICSID's jurisdiction in terms of "[t]ous les différends ou divergences [...] concernant un investissement". The Tribunal noted that the terms of this provision were very general and included not only a claim for violation of the BIT but also a claim based on contract:

Article 8 obliges the State to respect the jurisdictional choice arising by reason of breaches of the bilateral Agreement and of any breach of a contract which binds it directly.<sup>25</sup>

In *Vivendi v Argentina*, Article 8 of the BIT between France and Argentina offered consent for "[a]ny dispute relating to investments". In its discussion of the BIT's fork in the road clause, the *ad hoc* Committee said:

Article 8 deals generally with disputes "relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party". [...] Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT [dealing with State/State dispute settlement], which refers to disputes "concerning the interpretation or application of this Agreement", or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 "a claim that another Party has breached an obligation under" specified provisions of that Chapter.<sup>26</sup>

This position has not remained uncontested. In *SGS v Pakistan* Article 9 of the BIT between Switzerland and Pakistan referred to "disputes with respect to investments". The Tribunal found that the phrase was merely descriptive of the factual subject matter of the disputes and did not relate to the legal basis of the claims or cause of action asserted in the claims. Therefore, the Tribunal held that it had no jurisdiction with respect to contract claims which did not also constitute breaches of the BIT's substantive standards.<sup>27</sup> In other words, the Tribunal was of the view that, despite the wide jurisdictional clause, it could not go beyond the BIT's substantive standards.

Other tribunals have declined to follow that decision.<sup>28</sup> In *SGS v Philippines* Article VIII(2) of the Switzerland/Philippines BIT offered consent to arbitration for "disputes with respect to

25 *Salini*, *supra* note 7 at para 61.

26 *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, Decision on Annulment (3 July 2002) at para 55, ICSID, 19 ICSID Rev 1, ORIL IIC 446.

27 *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, Decision on Jurisdiction (6 August 2003) at para 161, ICSID, 18 ICSID Rev 307, 42 ILM 1290.

28 *Tokios Tokelés*, *supra* note 9 at para 52; *Siemens AG*, *supra* note 1 at para 205. See also the discussions in *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, Decision on Jurisdiction (29 November 2004) at paras 97-101, ICSID, 20 ICSID Rev – FILJ 148, 44 ILM 569, ORIL IIC [*Salini*]; *Impregilo SpA v Islamic Republic of Pakistan*, Decision on Jurisdiction (22 April 2005) at paras 57, 82, 102, 188, ICSID, ORIL IIC 133 [*Impregilo*]; *Parkerings-Compagniet AS v Republic of Lithuania*, Award (11 September 2007) at paras 261-266, ICSID, 22 ICSID Rev 446, ORIL IIC 302 [*Parkerings*].



investments”. The Tribunal found that the clause in question was entirely general, allowing for the submission of all investment disputes. This would go beyond disputes concerning the application of the BIT’s substantive standards and would include contractual disputes.<sup>29</sup>

This view was endorsed in *Pakerings v Lithuania*. The Tribunal in that case said:

The phrase “any dispute [...] in connection with the investment” as provided by Article IX (1) of the BIT is a general provision that provides the basis for an international Arbitral Tribunal’s competence over any disputes related to an investment.<sup>30</sup>

Other tribunals have also accepted that comprehensive jurisdictional clauses allow claimants to rely on substantive provisions beyond those of the treaty containing the jurisdiction clause.<sup>31</sup> In *SGS v Paraguay*<sup>32</sup> Article 9 of the Paraguay-Switzerland BIT referred to “disputes with respect to investments [...]”. The Tribunal noted the inclusive nature of a provision of this type:

Article 9 provides for the resolution of “disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party,” [...] There is no qualification or limitation in this language on the types of “disputes with respect to investments” that a Swiss investor may bring against the Republic of Paraguay.<sup>33</sup>

As previously noted, the BIT’s dispute resolution provisions (Article 9) are not on their terms limited to claims for breach of the BIT itself. Article 9(1) arguably extends the Treaty dispute settlement process to all manner of “disputes related to investments”.<sup>34</sup>

The Award in *Metal-Tech v Uzbekistan*<sup>35</sup> once more corroborated the fact that a comprehensive jurisdiction clause allows the investor to go beyond the standards of protection contained in the treaty that confers jurisdiction. The Tribunal said in respect of the Israel-Uzbekistan BIT:

Indeed, Article 8 of the Treaty contains the consent of the Contracting Parties to submit to ICSID any “any legal dispute [...] concerning an investment of the latter in the territory of the former.” Article 8 is thus a broad dispute resolution clause not limited to claims arising under the standards of protection of the BIT.<sup>36</sup>

The practice of tribunals, as summarized above, overwhelmingly supports the conclusion that a tribunal, whose jurisdiction is based on an offer of consent in a treaty, will not be restricted to applying the substantive protections of that treaty if the clause circumscribing its jurisdiction is

29 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, Decision on Jurisdiction (29 January 2004) at paras 131-135, ICSID, 8 ICSID Rep 518, 19 Intl Arb Rep C1, 16(3) World Trade & Arb Mat 91, ORIL IIC 224 [*Philippines*].

30 *Pakerings*, *supra* note 28 at para 261.

31 See e.g., *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, Decision on Annulment (19 October 2009) at paras 71-72, ICSID, ORIL IIC 396; *Alpha Projektholding*, *supra* note 1 at para 243.

32 *SGS*, *supra* note 7.

33 *Ibid* at para 129.

34 *Ibid* at para 183.

35 *Metal-Tech*, *supra* note 8.

36 *Ibid* at para 378.

broad and refers to investment disputes in general terms. Under a wide jurisdictional clause of this nature the tribunal is authorised to entertain claims based on other sources of law, such as domestic law, other treaties and customary international law.

An intermediate position between restriction to the treaty's substantive standards and jurisdiction for all investment disputes is taken by BITs of the United States. It refers to the BIT's substantive standards but adds investment agreements and investment authorizations as possible bases for a claim. For instance, Article VII of the Argentina-US BIT offers consent for investment disputes which are defined as follows:

[A] dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.<sup>37</sup>

The consent clause in Article 24 of the 2012 US Model BIT is similar. It covers breaches of the classical substantive standards in Articles 3-10, of an investment authorization, or of an investment agreement.<sup>38</sup>

Some treaties, especially those of former communist countries, do not even extend jurisdiction to all claims based on the BITs' substantive standards. Rather, they restrict consent to claims arising from expropriations. For instance, Article 7 of the Cyprus-Hungary BIT provides for submission to arbitration of:

Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation of an investment [...]

In order to establish jurisdiction under a consent clause of this kind, a tribunal must first establish the existence of an expropriation. Tribunals applying consent clauses of this type were restricted to finding whether an expropriation had occurred and, if so, to awarding compensation.<sup>39</sup>

In *ST-AD v Bulgaria*,<sup>40</sup> Article 4(3) of the Bulgaria-Germany BIT provided for international arbitration in the case of a disagreement over the amount of compensation in case of an expropriation.

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37 For applications of this clause see *Continental Casualty Company v Argentina*, Decision on Jurisdiction (22 February 2006) at para 68, ICSID, ORIL IIC 77 [*Continental Casualty*]; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, Interim Award (1 December 2008) at paras 203-209, UNCITRAL, ORIL IIC 355.

38 Brown, *supra* note 16 at 821.

39 *Berschader*, *supra* note 1 at paras 151-158; *Telenor Mobile Communications AS v Hungary*, Award (13 September 2006) at paras 18(2), 25, 57, 81-83, ICSID, 21 ICSID Rev, ICC 248; *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, Award (2 October 2006) at para 12, ICSID, ORIL IIC 1 [*ADC*] (surprisingly, in this case the Tribunal made a finding of breach of other standards that were outside its jurisdiction: see para 445); *Saipem SPA*, *supra* note 1 at paras 70, 129-133; *Tza Yap Shum v Peru*, Decision on Jurisdiction (19 June 2009) at paras 129-188, ICSID, ORIL IIC 382; *Austrian Airlines v Slovakia*, Award (9 October 2009) at paras 92-107, UNCITRAL, ORIL IIC 434; *Emmis International Holding v Hungary*, Award (16 April 2014) at paras 142-145, 147, ICSID, Case No ARB/12/2 [*Emmis*].

40 *ST-AD GmbH (Germany) v The Republic of Bulgaria*, Award on Jurisdiction (18 July 2013), Permanent Court of Arbitration (PCA) Case No 2011-06 (ST-BG) [*ST-AD*].

The Claimant argued that “as long as the BIT provides certain protections, those protections are necessarily also covered by the [treaty’s] dispute settlement provision.” The Tribunal rejected that argument and said that the Claimant was restricted to claims in connection with compensation for expropriation. It made the following general statement on the difference between the treaty’s substantive protection and access to protection through arbitration:

The scope of the substantive protections granted in an international treaty does not have to be, and is not in this particular BIT, coextensive with the scope of the dispute settlement mechanisms, in particular the scope of investor-state arbitration. It is indeed not because a State has given its consent to grant certain substantive rights to the investors of another State that it automatically flows from such consent that the State also gives its consent for these investors to sue the State directly in an international arbitration. For such right to come into existence, specific consent has to be given within the treaty. The State can shape this consent as it sees fit, by providing for the basic conditions under which it is given, or, in other words, the conditions under which the “offer to arbitrate” is made to the foreign investors.<sup>41</sup>

The different provisions on the scope of jurisdiction of investment tribunals contained in these treaties have obvious implications for the substantive law to be applied by them. Under the narrowest clauses only one particular aspect of the treaty’s substantive standards is within a tribunal’s ambit of authority. Other treaties provide for jurisdiction over disputes arising from any of the treaty’s standards. Under yet another group of treaties tribunals are authorised to adjudicate any investment dispute even if it includes claims beyond the treaties’ substantive protections. This may require the tribunal to apply various aspects of domestic law and general international law.

## B. Treaty Provisions on Applicable Law

Some investment treaties contain provisions on the law to be applied by investment tribunals. The most important provision on applicable law in investment arbitration is Article 42(1) of the ICSID Convention:

(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.

Under this provision the choice is primarily with the parties to the dispute. The subsidiary rule refers to host state law and to applicable rules of international law.

In the case of non-ICSID arbitration, the relevant UNCITRAL and ICC Rules (Art 21(1)) also direct that a tribunal primarily apply the law designated by the parties. In the absence of a choice the tribunal is to apply the law that it determines to be appropriate.<sup>42</sup>

Some treaties offering consent to arbitration contain their own rules on applicable law. A rule on applicable law in a treaty that offers consent to arbitration becomes part of the arbitration

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41 *ST-AD*, *supra* note 40 at para 361.

42 *UNCITRAL Arbitration Rules*, GA Res 65/22, UNCITRAL, 2010, Supp No 17, UN Doc A/65/465 (2010), art 35(1); *ICC, Rules of Arbitration* (2012), art 21(1).

agreement. Acceptance by the investor of the offer of consent to jurisdiction in the treaty includes the acceptance of the clause on applicable law, leading to an agreed choice of law. Tribunals have confirmed that treaty clauses of this type were the basis for an agreement on choice of law between the host State and the investor.<sup>43</sup>

In *Siemens v Argentina* the Tribunal held that a choice of law provision in the applicable BIT led to an agreement by the parties pursuant to Article 42(1) first sentence of the ICSID Convention. The Tribunal said:

By accepting the offer of Argentina to arbitrate disputes related to investments, Siemens agreed that this should be the law to be applied by the Tribunal. This constitutes an agreement for purposes of the law to be applied under Article 42(1) of the Convention.<sup>44</sup>

The majority of BITs do not contain rules on applicable law. In the case of ICSID arbitration, that leads to the application of the residual rule of Article 42(1) referring to host state law and to applicable rules of international law.

A minority of treaties contain clauses that indicate the applicable law. These clauses are not uniform. In their simplest form, they refer to the treaty itself and to relevant rules of international law. For instance, Article 40(1) of the Canada Model FIPA provides:

A Tribunal established under this section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.<sup>45</sup>

Other treaty clauses are more elaborate. Often they incorporate references to the BIT itself, to the law of the State party to the dispute, including its rules on the conflict of laws, and to the rules and principles of international law. Some BITs add a reference to any agreement relating to the particular investment.

For instance, the BIT between Argentina and Italy, contains the following rule on applicable law in Article 8(7):

The arbitration tribunal will decide on the basis of the laws of the Contracting Party involved in the dispute – including its rules on the conflict of laws – and of the provisions of the Agreement, of clauses of any particular agreements relating to the investment, as well as on the basis of the applicable principles of international law.<sup>46</sup>

Upon closer examination the difference between these rules on applicable law is not as stark as may appear at first sight. The default rule under Article 42(1) of the ICSID Convention captures most if not all elements contained in the more elaborate formulae on applicable law contained in other treaties. It covers the law of the host state (including its rules on the conflict of laws). It covers the substantive rules of the treaty conferring jurisdiction. It covers other relevant treaties and it covers general (customary) international law.

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43 *Goetz and Five Belgian Shareholders of AFFIMET v Burundi*, Award (10 February 1999) at para 94, ICSID, 15 ICSID Rev 457, ORIL IIC 16.

44 *Siemens*, *supra* note 1 at para 76.

45 Brown, *supra* note 16 at 121.

46 *Abaclat*, *supra* note 1 at 100.

The only significant difference between the various rules on applicable law in treaties lies in the absence of a reference to host state law in some of them. The narrower clauses refer only to the treaty itself and to applicable rules of international law.

### C. Is there a Correlation between the Scope of Jurisdiction and Applicable Law?

One might expect that the rules on applicable law in treaties would correspond to their rules on jurisdiction. It would seem logical to find the simpler version of the choice of law clause in treaties that offer jurisdiction only for claims based on the treaty itself and the more elaborate version in treaties that offer jurisdiction for all investment disputes. Where jurisdiction exists only for violations of some or all of the treaty's own standards one would expect a restrictive choice of law clause. In a treaty that offers jurisdiction for any investment dispute one would expect a more comprehensive choice of law. A look at the relevant treaties does not bear out this expectation. The relevant treaties do not show a consistent correspondence between the scope of jurisdiction offered by them and the rules on applicable law. Under some treaties jurisdiction and applicable law appear to coincide. But in other treaties there is no meaningful correlation.

Under some treaties a narrow jurisdictional clause is indeed matched by a simple choice of law clause. For instance, the Model BIT of Austria in Article 13 offers jurisdiction only for violations of the substantive standards of the respective treaties. Accordingly, its provision on applicable law (Article 18(1)) refers to "this agreement and applicable rules and principles of international law."<sup>47</sup> Similarly, Article 17(1) of Japan's BIT with Cambodia offers consent to arbitration only for disputes "arising out of, an alleged breach of any right conferred by this Agreement". The corresponding rule on applicable law in Article 17(14) refers to "this Agreement and applicable rules of international law."<sup>48</sup>

The NAFTA and the ECT also fall into this group. As pointed out above, consent to arbitration under Article 1116 of the NAFTA is limited to claims arising from alleged breaches of the NAFTA itself. The NAFTA, in its Section dealing with the settlement of investment disputes, contains the following provision on applicable law:

#### ARTICLE 1131

##### *Governing Law*

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.  
[...]<sup>49</sup>

Similarly, under the Energy Charter Treaty Article 26 limits jurisdiction to disputes concerning the alleged violation of the ECT itself. Accordingly, Article 26(6) of the ECT contains the following rule on applicable law:

A tribunal established under paragraph (4) shall decide the issues in dispute in accordance

47 Brown, *supra* note 16 at 38, 44.

48 *Ibid* at 374, 385.

49 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, 32 ILM 605* (entered into force 1 January 1994) [NAFTA].

with this Treaty and applicable rules and principles of international law.<sup>50</sup>

By contrast, other treaties offering jurisdiction only for cases of alleged breaches of the treaty, use a more comprehensive formula on choice of law. For instance, Article 10 of the Argentina-Netherlands BIT of 1992, after providing for ICSID arbitration “regarding issues covered by this agreement” adds the following choice of law clause:

7. The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.<sup>51</sup>

The same applies to the BIT between Argentina and Italy,<sup>52</sup> to the BIT between El Salvador and Spain<sup>53</sup> and to the BIT between Guatemala and Spain.<sup>54</sup> The jurisdictional provisions in these treaties are all restricted to claims based on violations of their substantive standards. Yet they contain comprehensive clauses on applicable law that cover the host state’s domestic law, the provisions of the BIT and of other treaties, particular agreements relating to the investment and principles of international law.

Another group of BITs that limit jurisdiction to alleged violations of the treaty itself, do not contain provisions on applicable law. Examples for treaties of this kind are Article 8 [Alternative] of the United Kingdom Model BIT,<sup>55</sup> as well as the BITs between Bolivia and the United Kingdom (Article 8), the BIT between the United Kingdom and Venezuela (Article 8) and the BIT between Denmark and Venezuela (Article 9). In ICSID arbitration this means that the default rule of Article 42(1) operates. That provision refers the tribunal to host state law and to applicable rules of international law.

Treaties that offer wide jurisdiction, which is not restricted to the BITs’ substantive standards, are equally inconsistent when it comes to provisions on applicable law. Italy’s Model BIT in Article X(1) covers “[a]ny dispute [...] on investment”. Yet its rule on choice of law in Article X(4) is limited to “the provisions contained in this Agreement, as well as the principles of international law recognized by the two Contracting Parties.”<sup>56</sup>

Other treaties that offer wide jurisdiction use a more comprehensive formula for the

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50 *Energy Charter Treaty, September 2004*, 2080 UNTS 95, 34 ILM 360 (1995) [ECT]. See Kardassopoulos, *supra* note 23 at para 146.

51 Many BITs, especially of Latin American countries, contain similar clauses. See *Fedax v Venezuela*, Award (9 March 1998) at para 30, ICSID, 37 ILM 1391, 5 ICSID Rep 200.

52 *Fra la Repubblica Italiana e la Repubblica Argentina sulla Promozione e Protezione degli Investimenti*, 22 March 1990 (entered into force 14 October 1990) arts 8(1), 8(7).

53 *Acuerdo para la promoción y Protección Recíproca de las Inversiones entre el Reino de España y la Republica de El Salvador*, 14 February 1995 (entered into force 20 February 1996) arts 11(1), 11(3).

54 *Acuerdo entre El Reino de España y la República de Guatemala para la Promoción Recíproca de Inversiones*, 9 December 2002 (entered into force 21 March 2004) arts 11(1), 11(3).

55 Brown, *supra* note 16 at 743.

56 *Ibid* at 340-341. Under the Italian Model BIT this choice of law clause only applies to UNCITRAL arbitration.

applicable law.<sup>57</sup> China's Model BIT in Article 9 offers arbitration for "[a]ny legal dispute [...] in connection with an investment [...]". The same Article contains the following direction on the applicable law:

The arbitral award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law.<sup>58</sup>

Similarly, Article 10(1) of the Argentina-Germany BIT covers quite generally "disputes [...] relating to investments", followed by the direction in Article 10(5) that the tribunal should decide

on the basis of this Treaty, and, as the case may be, on the basis of other treaties in force between the Contracting Parties, the internal law of the Contracting Party in whose territory the investment was made, including its rules of private international law, and on the general principles of international law.

The largest number of treaties that provide for wide jurisdiction does not offer any guidance on applicable law. This includes the French Model BIT (Article 8)<sup>59</sup>, Germany's Model BIT (Article 10)<sup>60</sup>, Russia's Model BIT (Article 8)<sup>61</sup> and the [Preferred] variant of the United Kingdom Model BIT (Article 8).<sup>62</sup> Examples for actual treaties that provide for general jurisdiction but do not contain a direction on the governing law include the Switzerland-Philippines BIT (Article VIII), the Switzerland-Pakistan BIT (Article 9) and the Czech Republic-Israel BIT (Article 7). In the case of ICSID arbitration this means that the residual rule of Article 42(1) will apply. This residual rule directs the tribunal to apply host state law and applicable rules of international law.

Only the US Model BIT shows a careful coordination between jurisdiction and applicable law. As set out above, the US Model BIT of 2012 offers consent to arbitration for claims of breaches of:

- (A) the treaty's substantive obligations
- (B) an investment authorization, or
- (C) an investment agreement.<sup>63</sup>

Under Article 30, when a claim is based on the treaty's substantive obligations "the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules

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57 See also *Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur l'Encouragement et la Protection Réciproques des Investissements*, 3 July 1991 (entered into force 3 March 2003) arts 8(1), 8(4); *Acuerdo para la promoción y Protección Recíproca de Inversiones entre el Reino de España y la Republica Argentina*, 3 October 1991 (entered into force 29 September 1992) arts X(1), X(5).

58 Brown, *supra* note 16 at 172.

59 Brown, *supra* note 16 at 276.

60 *Ibid* at 316.

61 *Ibid* at 614.

62 *Ibid* at 743.

63 US Model BIT (2012), art 24(1).

of international law.”<sup>64</sup> By contrast, when a claim is based on an investment authorization or an investment agreement, the US Model BIT closely follows Article 42(1) of the ICSID Convention: the applicable law may be agreed by the parties. In the absence of an agreement the tribunal shall apply “the law of the respondent, including its rules on the conflict of laws; and such rules of international law as may be applicable.”<sup>65</sup>

#### D. Applicable Rules of International Law

Since all variants of the clauses on applicable law include international law, its applicability appears unproblematic, in principle. An open question is the meaning of *applicable* rules of international law. Under a wide interpretation this could mean any rules of international law that are invoked in the course of the arbitration and which are significant to the claims put forward.<sup>66</sup> Apart from the treaty conferring jurisdiction, this includes multilateral treaties governing a variety of aspects of international law like UNESCO Conventions,<sup>67</sup> conventions for the protection of the environment,<sup>68</sup> the United Nations Convention against corruption<sup>69</sup> and human rights treaties.<sup>70</sup>

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64 US Model BIT (2012), art 30(1).

65 *Ibid*, art 30(2). Article 10.22 of the CAFTA-DR contains an almost identical provision. *Dominican Republic- Central America- United States Free Trade Agreement*, 5 August 2004, (entered into force 1 January 2009).

66 See generally International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, ILC, 58<sup>th</sup> Sess, Supp No 10, UN Doc A/CN.4/L.702 (2006). More specifically, see RA Lorz, “Fragmentation and Consolidation and the Future Relationship Between International Investment Law and General International Law” in Freya Baetens, ed, *Investment Law within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013) 482 at 482.

67 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, Award (20 May 1992) at paras 75-78, 150-159, 191, ICSID, Case No ARB/84/3; *Parkerings*, *supra* note 30 at paras 382, 383, 385, 389, 392, 394.

68 *SD Myers v Government of Canada*, First Partial Award (13 November 2001) at paras 105-107, 210-215, NAFTA, 40 ILM 1408, 15(1) World Trade and Arb Mat 184, ORIL IIC 249.

69 *World Duty Free Company Limited v Kenya*, Award (4 October 2006) at paras 143-145, ICSID, ORIL IIC 277.

70 *Toto Costruzioni Generali SpA v Lebanon*, Decision on Jurisdiction (11 September 2009) at paras 157-160, ICSID, ORIL IIC 391; *Frontier Petroleum Services Ltd v Czech Republic*, Final Award (12 November 2010) at para 328, PCA, ORIL IIC 465; *Lauder v Czech Republic*, Award (3 September 2001) at para 200, UNCITRAL, ORIL IIC 205; *ADC*, *supra* note 39 at para 447; *Rompotrol Group NV v Romania*, Decision on the Participation of a Counsel (14 January 2010) at para 20, ICSID, ORIL IIC 413; *Mondev International Limited v United States*, Award (11 October 2002) at para 143, ICSID, 42 ILM 85, 6 ICSID Rep 192; *Técnicas Medioambientales Tecmed SA v Mexico*, Award (29 May 2003) at para 122, ICSID, ICSID Rep 130, 43 ILM 133; *Saipem SPA*, *supra* note 1 at paras 130, 132; *Azurix*, *supra* note 1 at para 311; *International Thunderbird Gaming Corporation v The United Mexican States*, Award (26 January 2006) (Thomas W Wälde, dissenting at para 27), NAFTA, ORIL IIC 136; *Société Générale v Dominican Republic*, Award on Jurisdiction (19 September 2008) at para 93, UNCITRAL, ORIL IIC 366; *Perenco Ecuador Limited v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on Provisional Measures (8 May 2009) at para 70, ICSID, ORIL IIC 375; *Total SA v Argentina*, Decision on Liability (27 December 2010) at para 129, ICSID, ORIL IIC 484 [*Total SA*]; *El Paso Energy International Company v Argentina*, Award (31 October 2011) at para 598, ICSID, ORIL IIC 519 at para 598; *IBM World Trade Corporation v Ecuador*, Decision on Jurisdiction (22 December 2003) at para 72, ICSID, ORIL IIC 132.



Under a narrow interpretation the applicable rules would be only those that have a direct bearing on investment law. This would exclude the application of treaties protecting human rights.<sup>71</sup>

The controversy over the meaning of ‘applicable rules of international law’ is echoed in the debate about the meaning of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. That provision requires that in the interpretation of a treaty account should be taken of “any relevant rules of international law applicable in the relations between the parties.” In the *Oil Platforms* case<sup>72</sup> the majority of the International Court of Justice took an integral approach to the concept of “relevant rules of international law”. It held that the international law on the use of force was relevant to the interpretation of a Treaty of Amity, Economic Relations and Consular Rights.<sup>73</sup> This view was opposed by dissenting judges who found that Article 31(3)(c) of the VCLT could not be read as incorporating the totality of substantive international law.<sup>74</sup>

Systemic rules of international law are applicable under either interpretation. These include customary rules of international law on state responsibility,<sup>75</sup> on the consequences of a state of necessity,<sup>76</sup> and the proper standard of compensation for illegal acts.<sup>77</sup> Most important are the provisions of the Vienna Convention on the Law of Treaties, especially Articles 31-33 dealing with the interpretation of treaties.

#### E. The Role of Domestic Law

As described above, some rules on applicable law in investment treaties refer only to the treaty itself and to international law. The absence of a reference to host state law in these treaty clauses is particularly conspicuous where jurisdiction is not limited to claims based on the treaty’s standards but extends to any dispute concerning an investment. Under such a wide jurisdictional clause the tribunal is likely to be confronted with questions of host state law, especially where claims arising from contracts are involved.

Even in cases where jurisdiction is limited to claims alleging the violation of a treaty’s substantive standards an incidental application of domestic law is often called for. The most obvious situation of this kind arises where there is a dispute about the existence of rights that the investor seeks to protect. Whether these rights are property rights, rights arising from contracts or other intangible rights, they typically exist by virtue of a domestic legal system. Therefore, the preliminary question of the existence of the rights in dispute cannot be answered without resort to

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71 *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability (27 October 1989), Ad Hoc UNCITRAL, 95 ILR 183 at 203; *Bernhard von Pezold v Zimbabwe*, Procedural Order No 2 (26 June 2012) at paras 57-60, ICSID, ORIL IIC 549.

72 *Oil Platforms (Iran v United States)*, Judgment Merits (2003) ICJ, ICJ Rep 161 [*Oil Platforms*].

73 *Ibid* at para 41.

74 *Ibid* at paras 45-46 (Higgins J); *ibid* at paras 22-23 (Buergenthal J).

75 *Tulip Real Estate Investment and Development Netherlands BV v Turkey*, Award (10 March 2014) at paras 276-328, ICSID, ORIL IIC 641.

76 *CMS Gas Transmission Company v Argentina*, Award (12 May 2005) at paras 302-331, ICSID, ORIL IIC 65; *CMS Gas Transmission Company v Argentina*, Decision on Annulment, (25 September 2007) at paras 101-150, ORIL IIC 303.

77 *In the Arbitration between Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Resubmitted Case, Award (20 August 2007) at paras 8.2.2-8.2.7, ICSID, ORIL IIC 307.

a domestic system of law, most often the host state's law. Therefore, even if a claim is based on the violation of a BIT or other treaty, domestic law is likely to be relevant.<sup>78</sup>

In *Libananco v Turkey*, the Claimant alleged a violation of the Energy Charter Treaty. That treaty's rule on applicable law covers the ECT itself and applicable rules and principles of international law.<sup>79</sup> It does not refer to domestic law. Nevertheless, the Tribunal had no doubt that it had to apply the host state's law to the issue of whether the property rights under dispute did, in fact, exist:

[I]t is common ground between the Parties that Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an "Investment"<sup>80</sup>

*Emmis v Hungary*<sup>81</sup> concerned a dispute about the non-renewal of a broadcasting license. The Tribunal operated under two BITs: Hungary's BITs with the Netherlands and with Switzerland. Both BITs only foresaw jurisdiction in respect of disputes concerning expropriations. The BIT with the Netherlands contains a choice of law clause that refers to the BIT and other treaties as well as international law.<sup>82</sup> The BIT with Switzerland does not contain a provision on applicable law.

The decisive question before the Tribunal was whether, after the expiry of their old broadcasting license, the Claimants had any proprietary right that was capable of being expropriated.<sup>83</sup> The Tribunal had no doubt that this question had to be answered by reference to Hungarian law.<sup>84</sup> It said:

[T]he existence and nature of any such rights must be determined in the first instance by reference to Hungarian law, before the Tribunal proceeds to decide whether any such rights can constitute investments capable of giving rise to a claim for expropriation for the purpose of its jurisdiction under the Treaties and the ICSID Convention.<sup>85</sup>

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78 *EnCana Corporation v Ecuador*, Award (3 February 2006) at para 184, London Court of International Arbitration, ORIL IIC 91; *Bayview Irrigation District No 11 v Mexico*, Award (19 June 2007) at para 118, ICSID, ORIL IIC 290; *Alpha Projektholding, supra* note 1 at para 347; *BG Group Public Limited Company v Argentina*, Final Award (24 December 2007) at paras 102, 117, ORIL IIC 321; *Total SA, supra* note 70 at para 39.

79 *ECT, supra* note 50 at 26(6).

80 *Libananco Holdings Co Limited v Turkey*, Award (2 September 2011) at para 112, ICSID, ORIL IIC 506. See also paras 385 *et seq.*

81 *Emmis, supra* note 39.

82 Article 10(2) of the Hungary-Netherlands BIT, dealing with investor-state arbitration, incorporates Article 9(6), dealing with state-state arbitration. Article 9(6) states: "The arbitral tribunal shall decide on the basis of respect for the law, including particularly the present Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law." *Agreement between the Kingdom of the Netherlands and the Hungarian People's Republic for the Encouragement and Reciprocal Protection of Investments, 2 September 1987* (entered into force 1 June 1988) [*Hungary-Netherlands BIT*].

83 *Ibid* at paras 45-46.

84 *Ibid* at para 48.

85 *Ibid* at para 149.

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law.<sup>86</sup>

The Tribunal did not enter into any discussion of the applicable law but found that it was its task to determine the contents of the domestic law in question subject to the guidance of the municipal courts:

Where the Tribunal is presented with a question of municipal law essential to the issues raised by the Parties for its decision, the Tribunal, whilst retaining its independent powers of assessment and decision, must seek to determine the content of the applicable law in accordance with evidence presented to it as to the content of the law and the manner in which the law would be understood and applied by the municipal courts.<sup>87</sup>

A searching analysis of Hungarian law led the Tribunal to the conclusion that, after the expiry of their old license, the Claimants had no proprietary rights that Hungary could have expropriated and dismissed the claim.<sup>88</sup>

The incidental relevance of domestic law in cases involving treaty claims also arises in other situations. This is well illustrated by *Maffezini v Spain*.<sup>89</sup> Article X(1) of the BIT between Argentina and Spain, applicable in that case, provided quite generally for jurisdiction in relation to investments. A clause on applicable law in Article X(5) referred the tribunal to the BIT itself, to any other treaties in force between the Parties, to host state law and to general principles of law. The claimant alleged the violation of some of the BIT's substantive standards.

The *Maffezini* Tribunal did not engage in a theoretical discussion of the applicable law. But it applied not only the BIT and general international law but also Spanish law to a number of issues before it. This included the Spanish Law on Public Administration and Common Administrative Procedure to elucidate the structure and functions of a state entity.<sup>90</sup> On the issue of an environmental impact assessment the tribunal applied international law,<sup>91</sup> Spanish legislation,<sup>92</sup> a European Community directive<sup>93</sup> and the BIT.<sup>94</sup> To the question of whether a contract had been perfected between the investor and the State entity, the Tribunal applied the Spanish Civil Code and the Spanish Commercial Code together with authoritative commentaries.<sup>95</sup>

It follows from these examples that narrow jurisdictional clauses, authorizing tribunals to deal with alleged violations of the treaty only, do not rule out the need to apply domestic law. This is also the case where a tribunal operates under a wide jurisdictional clause, covering all kinds of investment disputes, but is confronted with mere treaty claims. Even in cases involving treaty

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86 *Hungary-Netherlands BIT*, *supra* note 82 at para 162.

87 *Ibid* at para 175.

88 *Ibid* at paras 178-255.

89 *Maffezini v Spain*, Award (13 November 2000), ICSID, 16 ICSID Rev – FILJ 248, 5 ICSID Rep 419, IIC 86.

90 *Ibid* at paras 47-49.

91 *Ibid* at para 67.

92 *Ibid* at paras 68-69.

93 *Ibid* at para 69.

94 *Ibid* at para 71.

95 *Ibid* at paras 89-90.

claims only, the application of host state law may be necessary.

In these situations of an incidental application of domestic law, the existence and contents of a rule on applicable law appears to be of little or no consequence. A rule on choice of law that does not include domestic law is not an obstacle to its application. In fact, as the above examples indicate, the existence and contents of a provision on applicable law is not even discussed by tribunals.

#### IV. THE SEPARATE LIVES OF JURISDICTION AND APPLICABLE LAW

In some cases the applicable law is to be found primarily or exclusively outside the treaty establishing jurisdiction. This is particularly evident in situations involving inter-temporal questions. A tribunal's jurisdiction may extend to situations which are outside the treaty's application *ratione temporis*. A treaty may provide for jurisdiction over disputes arising from events that occurred before its entry into force. In such a situation the law in force at the time of the relevant events and not the treaty establishing jurisdiction will have to be applied to the merits of the case.

The principle of contemporaneity is well established in arbitral practice. It means that the legality of a state's conduct must be assessed in light of the law that was in force at the time of its conduct. This principle was expressed by Judge Huber in the *Island of Palmas* case<sup>96</sup> in the following terms:

A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.<sup>97</sup>

The Tribunal in *Tradex v Albania*<sup>98</sup> applied the same principle:

[I]t occurs frequently that courts and tribunals have to apply certain substantive rules of law which were in force during the relevant period though they have been replaced by new rules as from a certain date.<sup>99</sup>

The same principle is reflected by the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) at its fifty-third session in 2001.<sup>100</sup> They state:

##### ARTICLE 13

##### *International obligation in force for a State*

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

96 *Island of Palmas Case (United States v Netherlands)* (1928), PCA, II RIAA 829, ICGJ 392 [*Island of Palmas*].

97 *Ibid* at 845.

98 *Tradex Hellas SA v Albania*, Decision on Jurisdiction (24 December 1996), ICSID, 14 ICSID Rev – FILJ 161, 5 ICSID Rep 47, IIC 262.

99 *Ibid* at 191.

100 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 86 [Crawford].

The ILC has pointed out that this “is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.” It also stated that a “requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place” is “a generally recognized principle.”<sup>101</sup>

In a similar vein, Article 28 of the Vienna Convention on the Law of Treaties provides that the provisions of a treaty will not apply to facts preceding its entry into force:

#### ARTICLE 28

##### *Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

As a consequence, where a tribunal’s jurisdiction extends to facts that had occurred before the entry into force of the treaty bestowing jurisdiction, the applicable law is not to be found in that treaty. Rather, the law in force at the time of the relevant facts has to be applied. In other words, jurisdiction may exist in respect of a dispute that arises from facts which are not subject to the treaty’s substantive standards.

In a number of cases tribunals have undertaken separate examinations of their jurisdiction *ratione temporis* and of the law applicable to the relevant facts. In *SGS v Philippines*<sup>102</sup> Article VIII(2) of the Switzerland/Philippines BIT offered consent to arbitration for “disputes with respect to investments”. The Tribunal distinguished the application *ratione temporis* of the BIT’s jurisdictional provisions from the application of the BIT’s substantive standards. It said:

According to Article II of the BIT, it applies to investments “made whether prior to or after the entry into force of the Agreement”. Article II does not, however, give the substantive provisions of the BIT any retrospective effect. The normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies.<sup>103</sup>

The Tribunal also said:

It may be noted that in international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations.<sup>104</sup>

In *Impregilo v Pakistan*<sup>105</sup> the BIT between Italy and Pakistan offered jurisdiction for “any dispute arising” between the state and the investor. Some of the acts had occurred before the BIT’s entry into force. The Tribunal held that:

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101 Crawford, *supra* note 100 at 131, 232.

102 *Philippines*, *supra* note 29.

103 *Ibid* at para 166.

104 *Ibid* at para 167.

105 *Impregilo*, *supra* note 28.

[C]are must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability *ratione temporis* of the substantive obligations contained in a BIT.<sup>106</sup>

Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance.<sup>107</sup>

The fact that a treaty has ceased to exist does not affect the illegality of acts that took place while it was still in force. The Commentary to Article 13 of the ILC's Articles on State Responsibility states:

[O]nce responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law.<sup>108</sup>

Therefore, rights arising from a treaty's violation, while it was in force, survive its termination. The point is well illustrated by *Jan de Nul v Egypt*.<sup>109</sup> In that case there were two successive BITs of 1977 and 2002. The dispute settlement clause in the 2002 BIT covered "[a]ny dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment". The Tribunal found that under the 2002 BIT it had jurisdiction over the entire dispute.<sup>110</sup>

Egypt contended that the Tribunal had no jurisdiction over facts that took place before the entry into force of the 2002 BIT. The Tribunal rejected Egypt's contention. It found that the legality of events that had taken place before the entry into force of the 2002 BIT had to be examined in light of the substantive provisions of the 1977 BIT. The Tribunal said:

It is undisputed, and rightly so, that the legality of an act must be assessed in the light of the law applicable at the time of its performance. This rule of intertemporal law is well established in international judicial and arbitral practice. It is a consequence of the rule on non-retroactivity, which for treaties is codified in Article 28 of the Vienna Convention [on the Law of Treaties].<sup>111</sup>

The rule that acts are governed by contemporaneous law is also reflected in Article 13 of the ILC Articles on State Responsibility ("ILC Articles"), which rules out responsibility for an act in violation of an obligation not in effect at the time of the performance of the act.<sup>112</sup>

106 *Impregilo*, *supra* note 28 at 309.

107 *Ibid* at 311. See also *Salini*, *supra* note 28 at paras 107, 176, 177.

108 See Crawford, *supra* note 100 at 133.

109 *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, Award (6 November 2008), ICSID, ORIL IIC 356 [*Jan de Nul NV*].

110 *Ibid* at para 128.

111 *Ibid* at para 132 [footnotes omitted].

112 *Ibid* at para 133.

In other words, the Tribunal must apply [...] the provisions of the 1977 BIT with regard to conduct that took place prior to the entry into force of the 2002 BIT.<sup>113</sup>

The Tribunal also clearly distinguished between its jurisdiction over various aspects of the dispute and the substantive rules applicable to them. It said:

As a result, the substantive provisions of both treaties will apply, while, as it follows from the Decision on Jurisdiction, the jurisdiction over the dispute is based on the 2002 BIT only. In other terms, as was stressed by Prof. Schreuer, one of the Claimants' legal experts, "jurisdiction is independent of the substantive law applicable to the dispute."<sup>114</sup>

Jurisdiction under the new BIT was broad enough to cover violations of the terms of both the old and the new BIT:

Article 8 of the 2002 BIT entitles the investor to submit to ICSID "any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting State". Unlike the dispute resolution clauses of the 1977 BIT and of certain other treaties, this wording does not restrict the State's consent to arbitration of disputes involving the application of the substantive rules of the 2002 BIT.<sup>115</sup>

[T]he 1977 BIT is the law contemporaneous to the facts, which is the only one that governs acts performed while it was in force and that may give rise to the responsibility of the host State.<sup>116</sup>

*Jan de Nul* demonstrates that a tribunal that derives its jurisdiction from one treaty may have to apply the substantive provisions of an earlier treaty that has since been superseded. If there is no predecessor treaty, the applicable rules may be those of customary international law in force at the relevant time.

The difference between jurisdiction and applicable law in the context of inter-temporal questions is also highlighted by *Nordzucker v Poland*.<sup>117</sup> In that case, a BIT of 1991 between Germany and Poland was later amended by a Protocol that entered into force in 2005. The original BIT contained the usual substantive standards but the jurisdiction of an investment tribunal was narrowly circumscribed as applying only to expropriation and to transfer of money. The 2005 Protocol extended jurisdiction to "[a]ny disputes pertaining to the investments". The alleged breaches occurred before the Protocol's entry into force. The issue in dispute was whether full jurisdiction under the 2005 Protocol extended to pre-2005 violations of the BIT.

The Tribunal stressed the different points in time that are relevant for jurisdictional and for substantive provisions:

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113 *Jan de Nul NV, supra* note 109 at para 134.

114 *Ibid* at para 135.

115 *Ibid* at para 137 [footnotes omitted].

116 *Ibid* at para 140.

117 *Nordzucker, supra* note 7 and accompanying text.

For a provision creating a right/obligation to arbitrate, this is the bringing of the claim. For a provision creating a substantive obligation, this is the breach of such obligation. Each obligation, the substantive obligation, on the one hand, and the procedural obligation to submit to arbitration, on the other hand, has to be assessed in relation to the respective date at which it took effect.<sup>118</sup>

This led the Tribunal to the conclusion that from the time of the entry into force of the Protocol, full jurisdiction existed also for pre-2005 breaches. The substantive law applicable to these “old” breaches was the BIT in its original version:

As from 28 October 2005, arbitral tribunals had jurisdiction for all disputes described in article 11(1) including those relating to breaches occurred before 28 October 2005.<sup>119</sup>

The Arbitral Tribunal thus reaches the preliminary conclusion that, unless a different intention of the Parties is established the immediate applicability of a jurisdictional clause of a Treaty implies that it can also be applied to “old” events, provided these constituted already a breach of the Treaty at the time they occurred.<sup>120</sup>

The Tribunal’s overall conclusion was that:

[T]he jurisdictional clause of the new article 11(2) became immediately effective on 28 October 2005, not only for new breaches but also for earlier breaches of any of the substantive obligations which, themselves had been effective since 24 February 1991.<sup>121</sup>

*Nordzucker* again demonstrates the independent existence of the applicable law and the jurisdiction of a tribunal. Substantive rules were in force without being subject to a tribunal’s jurisdiction. The supervening extension of jurisdiction extended to pre-existing violations of these substantive rules provided they were in force at the time of the alleged violation.

## V. CONCLUSIONS

Questions of jurisdiction are not governed by the law applicable to the merits of a case but must be determined by reference to the legal instruments establishing jurisdiction and by general international law. Some questions with a bearing on jurisdiction, such as the investment’s legality, the investor’s nationality and the existence of property rights, are governed by domestic law.

Provisions on the scope of jurisdiction of investment treaty tribunals vary considerably. They may cover only, one particular aspect of the treaty’s substantive standards, or disputes concerning any of the treaty’s standards, or, most widely, any dispute arising from an investment.

Some investment treaties contain provisions on the law to be applied by investment tribunals. Some of these provisions are narrowly framed, referring only to the treaty and to general international law. Other provisions are wider and cover also host state law. In ICSID arbitration,

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118 *Nordzucker*, *supra* note 7 at para 107.

119 *Ibid* at para 108.

120 *Ibid* at para 110.

121 *Ibid* at para 118.



Article 42(1) of the Convention provides that in the absence of an agreement on applicable law the tribunal is to apply host state law and applicable rules of international law.

In some treaties the provisions concerning jurisdiction and applicable law seem to correspond: narrow jurisdictional clauses, which refer only to disputes over the treaty's substantive standards, go hand in hand with narrow clauses on applicable law which refer only to the treaty and to general international law. Some treaties offering general jurisdiction for any investment disputes provide for a wide choice of law that includes host state law. But in other treaties there is no such correspondence: treaties that contain narrow jurisdiction clauses offer a wide range of applicable sources of law. Some treaties with wide jurisdictional clauses contain applicable law clauses that refer only to the treaty itself and to general international law.

The relevance of international law in investment treaty arbitration is uncontested, in principle. But the frequent reference to *applicable* rules of international law raises the question whether this embraces the entirety of international law or only those parts of it that are directly relevant in an investment context.

Domestic law is relevant in a number of contexts. An obvious example is the existence of the proprietary rights that the investor seeks to protect. Therefore, an exclusion of domestic law, especially of host state law, by way of a narrow provision on applicable law is unworkable.

In some situations a tribunal has to apply substantive rules of international law that are entirely outside the treaty that is the basis of its jurisdiction. This is the case, in particular, where it has jurisdiction over disputes concerning events that occurred before the treaty's entry into force.

A tribunal may have to apply substantive rules of law beyond those contained in the treaty that provides the basis for its jurisdiction. These substantive rules may derive from an earlier treaty that has since been terminated, from other treaties that relate to the subject matter of the dispute, from customary international law and from domestic law. Specific rules on applicable law contained in the relevant treaties are of limited assistance in this context.