Iura Novit Curia

On what legal basis may investor-state tribunals decide disputes? This question again appears relatively straightforward. It is similarly a question that must be answered in any arbitral proceeding. And yet, like the question of the foundation of investor-state arbitration, it proves remarkably puzzling.

On the one hand, tribunals invoke the principle of *iura novit curia*—the tribunal knows the law—to justify their decisions. This would mean that parties ultimately would not need to plead the law to the tribunal. The tribunal can come to the appropriate legal resolution of the dispute once it understands

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2 Caratube International Oil Co. v Kazakhstan, ICSID Case No. ARB/08/12, annulment (Feb. 21, 2014), ¶ 95 (Armesto, Abraham, Danelius) (“[T]ribunals are entitled, within certain limits, to proceed without asking for the parties’ views”); Metal-Tech Ltd. v Uzbekistan, ICSID Case No. ARB/10/3, award (Oct. 4, 2013), ¶ 287 (Kaufmann-Kohler, Townsend, von Wobeser) (“[T]he Tribunal considers that, when it comes to applying the law, including municipal law, as opposed to establishing facts, the principle *iura novit curia*—or better *iura novit arbitrer*—allows it to form its own opinion on the meaning of the law”); Garanti Koza LLP v Turkmenistan, ICSID Case No. ARB/11/20, jurisdiction (July 3, 2013), footnote 152 (Townsend, Lambrou, Boisson de Chazournes) (“The fact that both parties have not advanced this approach to interpretation [contextual interpretation of a treaty according to Article 31 of the VCLT] is no reason not to apply it, since it is a normal approach to treaty interpretation that the Tribunal can and should apply. Moreover, the legal maxim *jura novit curia* applies”); Bosh International, Inc. v Ukraine, ICSID Case ARB/08/11, award (Oct. 25, 2012), ¶ 30 (Griffith, Sands, McRae) (“[T]he Tribunal does not consider that [late submission of legal authorities] affects its ability in this Award to take judicial notice of, refer to, or rely on, any relevant legal principles or judicial or arbitral decisions in accordance with the principle of *jura novit curia*”); RSM Production Corp. v Grenada, ICSID Case No. ARB/05/14, preliminary ruling (Dec. 7, 2009) ¶ 23 (Griffith, Abraham, McLachlan) (“Although not cited by the Applicant or the Respondent, there are a number of other arbitral decisions which deal with the power of international courts and tribunals to reopen a case for newly discovered evidence. On the basis of the principle of *jura novit curia*, the Committee is able to consider the relevance of those decisions”); Bogdanov v Moldova, award (Sept. 22, 2005), ¶ 40 (Cordero Moss) (“Under Swedish arbitration practice, which is applicable to this proceeding, it is established that the principle of *iura novit curia* applies; therefore, the Arbitral Tribunal, in applying the law, is not bound by the pleadings made by the parties, and may by its own motion apply legal sources or legal qualifications that have not been pleaded by the parties.”).
the relevant facts.\(^3\) Apparently, this principle would not obligate the tribunal to apply a law other than what is pled by the parties but authorizes it do so should the tribunal choose.\(^4\)

On the other hand, some tribunals have declined to hear new legal claims or defenses that were raised in an untimely manner.\(^5\) Others have refused to research law independently of party submission.\(^6\) Further, annulment committees have opined that tribunals are not in fact entitled to apply *iura novit curia*, at all, particularly in the context of the application of municipal law.\(^7\) Arguably, this holding could be expanded beyond municipal law to the application of international law.\(^8\)

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3 See Bogdanov v Moldova, award (Sept. 22, 2005), ¶ 40.
4 Mitchell v Congo, ICSID Case No. ARB/99/7, annulment (Oct. 27, 2006), ¶ 57 (Dimolitsa, Dossou, Giardina):

   "A comparable approach would have been along the lines of the adage *jura novit curia*—on which the DRC leaned heavily during the Annulment Proceeding—but this could not truly be required of the Arbitral Tribunal, as it is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option—and the parties should have been given the opportunity to be heard in this respect—for which reason it is not possible to draw any conclusions from the fact that the Arbitral Tribunal did not exercise it."

5 Continental Casualty Co. v Argentina, ICSID Case No. ARB/03/9, annulment (Sept. 16, 2011), ¶ 272 (Griffith, Söderlund, Ajibola) ("The Committee agrees with Continental's view that Argentina cannot be said to have invoked properly the *non ultra petita* argument prior to the Hearing. The Committee was in the circumstances ultimately prepared to consider the argument. However, in the circumstances, the Committee is not prepared to go further, and to consider of its own motion, under the principle of *jura novit curia*, whether there may have been a serious departure from a fundamental rule of procedure").

6 See CME Czech Republic BV v Czech Republic, award (Mar. 14, 2003), ¶ (Kühn, Schwebel, Brownlie) ("This does not mean that a tribunal is bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties or the Tribunal to be essential to the Tribunal's decision").

7 Fraport AG Airport Services Worldwide v Philippines, ICSID Case No. ARB/03/25, annulment (Dec. 23, 2010), ¶ 117 ("The Tribunal's Members were not experts in Philippine law. Therefore the interpretation and construction of the Philippine law, to the extent it was relevant, should have been based on the evidence and research as to the actual application of that law by the competent Philippines' organs.").

8 Maritime International Nominees Establishment v Guinea, ICSID Case No. ARB/84/4, annulment (Dec. 14, 1989), ¶ 5.03 (Sucharitkul, Broches, Mbaye) ("[T]ribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties"). There being no “terms of reference” in ICSID arbitrations, the terms of reference must refer to the pleadings of the parties.