The question of “applicable law” tends to arise once a dispute has arisen and the court or tribunal hearing the case has to determine which law or laws will govern the outcome of the dispute. Yet the law that will eventually be applicable to a dispute has an important role to play prior to any falling out between the parties, since it governs their conduct in any given circumstance. Persons, be they natural or juridical, need to know the rules to which they are subject. States, similarly, need to know the obligations that they have undertaken and to which they may be held to account. Each should also know the rights they enjoy—the obligations that other entities have towards them, and the mechanisms by which they can vindicate themselves should their rights be violated or should certain obligations towards them be unmet. These considerations—the *ex ante* obligations of the parties and their expectations about their rights and duties—go to fundamental fairness. They often have an effect on the decisions made about applicable law once a dispute has arisen, as tribunals make decisions about applicable law based on whether or not the parties should have known that they need to abide by those obligations.

In an ordinary dispute in a municipal court the question of applicable law will often not arise in a formal manner. The parties and the tribunal itself will assume that the law of the forum applies, and will argue and brief and decide the case respectively, based on that assumption. Sometimes this assumption derives from a contractual decision about applicable law, while in other cases it will be based on an assumption that the forum law is the most appropriate given the circumstances of the case. This is even the case when a dispute has inter-provincial or international characteristics. This assumption will tend to be displaced when another potentially applicable law might have an effect on the outcome of the case; in those cases choice of law will be extensively briefed and argued.

The same assumption can hold true in an international investment dispute; the parties and the tribunal can go from start to finish agreeing about applicable law. Notwithstanding this possibility, however, international investment disputes often involve disputes about the applicable law. This is not surprising,
as they almost inevitably involve multiple applicable laws governing the conduct of the relevant parties due to the cross-border nature of the relationship; the frequent involvement of a state or state entity; and the frequent relevance of an international investment treaty, and often of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States\(^1\) (ICSID Convention). It is also not surprising because frequently applicable law matters—it affects the outcome of the case.

In an investment dispute applicable law can matter for many reasons. The first is that investment tribunals, whether they are formed pursuant to a treaty, to a contract, or to investment legislation, have only the authority conferred on them by the parties to the case. The application of the inappropriate law is considered grounds for set-aside or annulment of the award, or as grounds for refusal to enforce the award.\(^2\) The second is that the law can be outcome-determinative. To take the simplest case, a state’s measure may be consistent with domestic law but may violate international law. If domestic law applies there is no liability; if international law applies there might be. More subtly, the interpretation that a tribunal gives to the interplay between laws might dictate whether a state’s measure is consistent with the fair and equitable treatment obligation; revoking an operating permit because a factory’s emissions exceed levels set by the state in order to comply with an international treaty might not violate the standard. Another reason is that applicable law might affect the type of interest awarded—simple or compound—and the rate at which

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\(^2\) Although the ICSID Convention does not include failure to apply the proper law as one of the grounds for annulment, parties have argued that failing to apply the proper law constitutes a manifest excess of powers and a violation of the parties’ agreement to arbitrate. Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY 554–557 (Cambridge University Press, 2d ed. 2009). Taida Begic, APPLICABLE LAW IN INTERNATIONAL INVESTMENT DISPUTES 168–215 (Eleven International Publishing, 2005). Similar allegations can be made under the UNCITRAL Model Law, which permits vacatur of an award if it “deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.” UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Art. 34(2)(a)(iii), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited Jan. 23, 2014).