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## The Fallacy of Treating Domestic Laws as “Facts” in Investment Arbitration

### ABSTRACT

The legal principle providing that “from the standpoint of international law, municipal laws are merely facts” is well-known in inter-State adjudication. In investment arbitration, however, the situation is different. In most cases, there is no single applicable law, rather a plurality of laws that are applied in parallel. Consequently, the qualification of domestic laws as mere “facts” is problematic. The article discusses the different shifts in investment jurisprudence concerning the treatment of domestic law, and also covers some more recent implications: the unorthodox applicable law provision of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and investment tribunals’ growing inclination to discuss the application of domestic law and EU law in the wake of the *Achmea* decision of the Court of Justice of the European Union. Finally, the article lists three practical consequences arising out of the treatment of domestic law as “facts” in investment arbitration.

**KEYWORDS:** domestic law, investment law, applicable law, investment arbitration, fallacy, CETA, *Achmea*

### I. INTRODUCTION

“From the standpoint of international law, municipal laws are merely facts.”

This century-old adage is well-known to international law practitioners, and has stood the test of time, even though it has limitations, even in the inter-State context. This article looks at what happens when the same logic is applied by tribunals in the arena of investment arbitration – a field of international law that is well-known for its cacophony of applicable laws.

The article’s main argument is that domestic laws, in particular the laws of the host State, have an elevated importance in investment arbitration, therefore their qualification as facts is reductive, and is, in fact, a fallacy. In the post-*Achmea* era, many investment tribunals have been engaging in the practice of qualifying domestic laws

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– and EU law – as facts in order to retain their jurisdiction. Accordingly, the issue of the qualification of domestic laws is a relevant and timely one, as it can have far-reaching consequences also beyond its direct implications.

The article begins with the discussion of the origins of the doctrine in question in inter-State adjudication, and continues by describing the multi-faceted role of domestic laws in investment disputes. The article then canvasses the shifts in investment tribunals' attitudes towards domestic laws over the decades – swinging from total endorsement to total rejection. Finally, following a short detour concerning the applicable law provisions of the recent CETA Agreement, the last chapter deals with the practical consequences of the (mis)characterisation of domestic laws in investment disputes.

## II. TREATMENT OF DOMESTIC LAWS IN INTER-STATE CASES

The origins of the “municipal laws are merely facts” fallacy in investment arbitration date back to 1926, and the decision of the Permanent Court of International Justice (“PCIJ”) in the *Certain German Interest* case. Here the PCIJ held that:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.<sup>1</sup>

The PCIJ was, of course, correct in its assertion to the extent that domestic laws are not a formal source of international law.<sup>2</sup> But there is more to the issue than this, even in the inter-State context: as early as 1938, there were voices suggesting that it would be a “mistake to attach undue importance” to the PCIJ’s qualification of national laws as facts, and that the general proposition that international tribunals take account of national laws only as facts “is, at most [...] debatable”.<sup>3</sup>

An ex-President of the ICJ has also recently opined that “there appear to be a range of situations, in which international tribunals, including the Court, arguably examine domestic law in a legal sense in deciding cases [...]”<sup>4</sup>

A related sub-issue of international law is the *hierarchy* between international and domestic law. Here, it was also the PCIJ that first delivered a ruling, holding that

<sup>1</sup> *Certain German Interests in Polish Upper Silesia*, 1926 Merits, PCIJ, Series A, No. 7., 4., 19.

<sup>2</sup> C. Brown, Article 38, in A. Zimmerman et al. (eds), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (OUP, 2019) 866.

<sup>3</sup> C. W. Jenks, *The Prospects of International Adjudication*, (Stevens, London, 1964) 552., 548.

<sup>4</sup> P. Tomka, J. Howley and V. Proulx, *International and Municipal Law before the World Court: One or Two Legal Orders?*, (2015) 35, *Polish Yearbook of International Law*, 11., 25.

a State cannot rely on its own laws to escape an international obligation.<sup>5</sup> This notion has since crystallised into a well-settled rule of law, codified in Article 3 of the Articles on Responsibility of States for Internationally Wrongful Acts.

Consequently, the conundrum surrounding the application of domestic law in international adjudication entails (at least) the following three sub-issues: (i) whether a court or tribunal should apply domestic laws in the first place (in place of *or* parallel to international law) (ii) if yes, what then is the hierarchy between international law and domestic law, and (iii) if a court or tribunal applies domestic law, do they apply it as law proper, or do they instead treat it as facts? These sub-issues are interlinked, and each of them informs the understanding of the other.<sup>6</sup>

While the second sub-issue, the issue of hierarchy, is more or less settled, the other two sub-issues are subject to some debate, particularly so in investment arbitration. The subject of this article is the third sub-issue, and how it has been tackled by investment arbitral tribunals.

### III. TREATMENT OF DOMESTIC LAWS IN THE PRACTICE OF INVESTMENT TRIBUNALS

As seen above, the PCIJ’s holding that domestic laws are merely facts for an international tribunal is somewhat reductive, even in the inter-State context. Still, there exist sufficient textual and policy arguments to support it and, for the purposes of the present article, it can still be characterised as the “mainstream” approach.

The situation, however is vastly different in case of investment arbitration, for the following reasons: (i) investment disputes involve public *and* private parties; (ii) the investor-State dispute settlement (“ISDS”) landscape is fragmented, and consists of thousands of investment agreements, each with different applicable law provisions (some explicitly setting out the application of domestic law); (iii) there is no equivalent of Article 38 ICJ Statute which would limit tribunals to the application of international law proper.

With these caveats in mind, we now turn first to the multi-faceted role domestic laws play in investment disputes, and then to investment tribunals’ shifting attitudes towards the application of domestic laws.

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<sup>5</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932, PCIJ, Series A/B, No. 44, 4.

<sup>6</sup> See Brown, Article 38, 866–873., discussing the three issues together under the heading ‘International Law versus Municipal Law’; see also Tomka, Howley and Proulx, *International and Municipal Law before the World Court: One or Two Legal Orders?*

## 1. THE MULTI-FACETED ROLE OF DOMESTIC LAW IN INVESTMENT DISPUTES

Investment agreements can be divided into four categories based on their applicable law provisions:<sup>7</sup> agreements stipulating the application of (i) domestic law; (ii) international law; (iii) both domestic and international law; and (iv) agreements with no applicable law provisions. The application of domestic law *as law* is pertinent to all four categories.

### *a) Domestic laws of the host state as an explicit choice of law*

This category is fairly straightforward, and is particularly common in investment contracts.<sup>8</sup> Notably, even in cases with domestic law as the law explicitly chosen by the parties, investment tribunals have found ways to attribute a corrective role to international law and apply it even without a direct reference in the choice of law provisions.<sup>9</sup>

### *b) International law as an explicit choice of law*

If an investment agreement contains a specific reference to international law, tribunals should adjudicate the dispute based on international law. Nonetheless, even in such situations, domestic law has a role to play: Kjos identifies cases of “indirect” and “corrective” application of domestic law.<sup>10</sup>

There is support for this position in arbitral decisions as well: the *ad hoc* annulment committee in the *Venezuela Holdings* case held that it is “obvious that in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law, simply because that is what the international rule requires”.<sup>11</sup>

### *c) No choice of law provisions*

Article 42(1) ICSID Convention provides that

“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.*” (emphasis added)

<sup>7</sup> In addition to the following choice of law provision, most investment agreements stipulate that the dispute be decided “in accordance with the provisions of the Agreement” itself.

<sup>8</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed. (OUP, 2012) 393. “Some contracts governing investments simply refer to the host State’s domestic law.”

<sup>9</sup> See C. H. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed. (CUP, 2009) 583–587. <https://doi.org/10.1017/CBO9780511596896>

<sup>10</sup> H. E. Kjos, *Applicable Law in Investor–State Arbitration*, (OUP, 2013) 240.

<sup>11</sup> *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, para 181.

Investment tribunals have attributed many different interpretations to the above provision – and the infamous “and” conjunction. Zachary Douglas’s scholarship provides valuable insight on how best to interpret it: he argues that (i) tribunals have an inherent authority to characterise the issues in dispute and determine the laws applicable thereto; and (ii) Douglas provides his own suggestions – his own choice of law “rules” – on what law should be customarily applicable law to a given issue.<sup>12</sup>

Therefore, in Douglas’s view, it is a mistake to characterise the applicable law provisions in BITs or in Article 42(1) ICSID Convention, as “choice of law provisions”; in fact, these provisions – and the set of laws provided therein – are mere confirmations of the various sources of law that an investment tribunal can draw upon to resolve the issues in dispute.<sup>13</sup> Douglas argues that “choice of law rules must be articulated by the tribunals themselves and their formal source is both general principles of private international law and principles derived from the particular architecture of investment treaties”.<sup>14</sup>

This applicable law provision is unique to the ICSID system. For non-ICSID cases, the situation is much less clear, as other arbitration rules, such as the 2013 UNCITRAL Arbitration Rules (“UNCITRAL Rules”) include no comparable provisions. Article 35(1) UNCITRAL Rules provides as follows:

The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

The text is largely identical to the applicable law provisions in the original 1976 UNCITRAL Rules with some slight modifications.<sup>15</sup> At the time of drafting the original Rules, it was not envisaged that investment arbitration would gain such an immense prevalence. The preamble of the Arbitration Rules also refers to “disputes arising in the context of international commercial relations”. It is fair to assume that the applicable law provisions of the Rules were also drafted with commercial disputes in mind.

What is perhaps less evident and more unfortunate is that scholarship still mainly looks at the UNCITRAL Rules through the lenses of international commercial

<sup>12</sup> Z. Douglas, *The International Law of Investment Claims*, (CUP, 2010) 39–133. <https://doi.org/10.1017/CBO9780511581137>

<sup>13</sup> Ibid. 44.

<sup>14</sup> Ibid. This can be considered an iteration of the *iura novit curia* principle, and – at least in this respect – to be in harmony with the holding of the tribunal in *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para 141.

<sup>15</sup> C. E. Croft, C. Kee and J. Waincymer, *A Guide to the UNCITRAL Arbitration Rules*, (CUP, 2013) 395. <https://doi.org/10.1017/CBO9781139018135>

arbitration.<sup>16</sup> Some helpful guidance from the available commentaries on the UNCITRAL Rules is that the term “rules of law” can mean “any body of rules, not necessarily emanating from a State” and that the tribunal can also designate different systems of law to different parts of the contract or transaction.<sup>17</sup>

**d) Both domestic and international law as an explicit choice of law**

An investment agreement referring to both international law and domestic law creates a situation identical to the default rule of the ICSID Convention discussed above. Thus, the same considerations should apply to the role of domestic laws.

**e) Domestic laws as a factual matter**

Finally, the analysis would be incomplete without conceding that there are occasions – irrespective of the choice of law provisions – when domestic laws should, in fact, be treated as facts, as described below:

It is true that in many cases, national provisions should be classified as a factual matter. For instance, in a case where the investor alleges that they have been discriminatorily treated in contravention of the investment treaty, the arbitral tribunal may need to examine a national law arguably giving rise to such discrimination. In that case, the national law is solely considered – as facts – from the viewpoint of international law; and whereas the tribunal may need to interpret the national law, it does not apply it as such.<sup>18</sup>

**f) Interim conclusions**

Taking all of the above considerations into account, the majority of scholars are in agreement that (i) investment tribunals should apply international law and domestic law in parallel, and that (ii) there is a group of distinct legal issues which are not customarily governed by international law and tribunals must apply *renvoi* to national law.<sup>19</sup> The most

<sup>16</sup> See *ibid.* 394–403., for the commentary to the applicable law provision of the UNCITRAL Rules that does not discuss the implications of the applicable law provisions for investment arbitration.

<sup>17</sup> *Ibid.* 397–398.

<sup>18</sup> Kjos, *Applicable Law in Investor–State Arbitration*, 254–255.

<sup>19</sup> Dolzer and Schreuer, *Principles of International Investment Law*, 293. (“[i]n most cases the applicable substantive law in investment arbitration combines international law and host state law. *This is so whether or not the parties have made a choice of law that combines international law with host state law.* In the majority of cases tribunals have, in fact, applied both systems of law. Where there was a contradiction between the two, international law had to prevail. It is left to the tribunals to identify the various issues before them to which international law or host state law is to apply.”); Y. Banifatemi, *The Law Applicable in Investment Arbitration*, in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, (OUP, 2010) 203. (“Indeed, by the very nature of investment treaty arbitration, certain issues can be resolved only through the application of international law; on the other hand, certain questions can be determined only pursuant to domestic

recent 2019 Commentary on the ICSID Convention comes to a similar conclusion: “[t]hus, any investment treaty arbitration is likely to involve the interplay of a triptych of laws: the treaty itself; some rules of international law; and certain rules of municipal law”.<sup>20</sup>

Accordingly, Hepburn is correct to conclude that “[in investment arbitration] it makes little sense to persist with the traditional position that domestic law is only a fact in these proceedings”.<sup>21</sup>

## 2. Shifts in investment tribunals’ attitudes towards the application of domestic laws

The same issue becomes less straightforward if we look at the practice of investment tribunals. Instead of grouping cases based on their choice of law provisions, we aim to identify overarching themes and trends in case-law over the past decades. Three such trends are (i) the slow but steady emancipation of international law as applicable law, (ii) the emergence of a theory proclaiming that signing the investment agreement itself constitutes an implicit choice of international law, and (iii) the challenges brought forward by the application of EU law as domestic law *and* as international law.

### a) The slow emancipation of international law as applicable law

In a 2003 article,<sup>22</sup> Gaillard and Banifatemi paint a fascinating picture of tribunals’ competing theories on Article 42 of the ICSID Convention and the role of international

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law. The two systems of law may thus apply depending on each distinct issue to be determined on the merits. In terms of methodology, *this is allowed* by each of the second sentence of *Article 42(1)*, *Article 33 of the UNCITRAL Arbitration Rules* or *Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce*, which enable arbitral tribunals, in the exercise of their discretion and pursuant to a choice of law inquiry, to decide what rule of law (international or domestic) is the most appropriate to the determination of each specific question.”); M. Sasson, *Substantive Law in Investment Arbitration: The Unsettled Relationship Between International and Municipal Law*, (Kluwer Law International, 2010) 206–207. (“The relationship between international law and municipal law is often tangled, but a systemic approach can nonetheless be designed so that their proper roles in investment treaty arbitration are clear. This approach must avoid the adoption of allegedly objective criteria, resting solely on international law, for deciding the content of rights relevant in the investment treaty domain. *Investment treaties concern rights, the determination of which involves application of international law and municipal law. If international law does not provide a substantive definition of a right, then international law must make a renvoi to municipal law and its provisions concerning the existence and validity of such a right.*”) (emphases added).

<sup>20</sup> J. Foubert, R. Gerbay and G. M. Alvarez, *The ICSID Convention Regulations and Rules – A Practical Commentary*, (Elgar Commentaries, 2019) 365. <https://doi.org/10.4337/9781786435248>

<sup>21</sup> J. Hepburn, *Domestic Law in International Investment Arbitration*, (OUP, 2017) 107. <https://doi.org/10.1093/acprof:oso/9780198785736.001.0001>

<sup>22</sup> E. Gaillard and Y. Banifatemi, The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process, (2003) 18 (2) *ICSID Review*, 375–411. <https://doi.org/10.1093/icsidreview/18.2.375>

law as applicable law: early investment decisions<sup>23</sup> have interpreted Article 42 in a way to limit the role of international law to gap-filling or to cases where the law of the host State is inconsistent with international law. This interpretation is problematic for a number of reasons, which now might seem self-explanatory but it had nonetheless been considered the mainstream approach for almost twenty years.<sup>24</sup>

That was until 2002, when the decision of the *ad hoc* annulment committee in the *Wena Hotel v. Egypt* case<sup>25</sup> turned the tide of jurisprudence. The *ad hoc* committee set forth what Gaillard and Banifatemi characterise as the correct interpretation of Article 42(1) of the ICSID Convention:

What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.<sup>26</sup>

This approach, unfortunately, also failed to reach uniform application<sup>27</sup> by investment arbitral tribunals, but it is the one that is most in line with scholarly opinion<sup>28</sup> and, as such, can be endorsed.

**b) The fallacy of an “implicit” choice of international law in treaty-based arbitrations with no choice of law provisions**

As apparent from the previous section, tribunals were originally quite keen to decide cases based on the domestic laws of the host State. This has largely been the case also in disputes where there was no express choice of law.<sup>29</sup>

A parallel strain of cases, however, has also surfaced, with ICSID tribunals arguing that in treaty-based disputes, the signing of the investment agreement itself constituted an implicit choice of international law; therefore, these cases fell under the

<sup>23</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, para 69.; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, para 20.

<sup>24</sup> Gaillard and Banifatemi, The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process, 403.

<sup>25</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002.

<sup>26</sup> *Ibid.* para 40.

<sup>27</sup> See the most recent commentary to Article 42 of the ICSID Convention, at Fourret, Gerbay and Alvarez, *The ICSID Convention Regulations and Rules – A Practical Commentary*, 360–365, which still discusses the *Wena Hotels* approach and the original theory as competing theories.

<sup>28</sup> See *supra* note 19 for various authorities.

<sup>29</sup> See Schreuer, *The ICSID Convention: A Commentary*, 596–598. and the cases referenced therein.



first sentence of Article 42(1).<sup>30</sup> As a result, there was no need to fall back on the second sentence of Article 42(1) – which stipulated a parallel application of domestic and international law – and cases were to be decided exclusively based on international law.

This minority opinion has gained some legitimacy with the decision of the *ad hoc* annulment committee in the *Azurix* case, a decision worth reviewing in some detail.<sup>31</sup>

The *ad hoc* committee starts its analysis by stating the obvious: “The Committee considers that the second sentence of Article 42(1) cannot possibly be understood as having the effect that, in the absence of an express choice of law clause, the municipal law of the Contracting State will be the applicable law in claims for alleged breaches of an investment treaty.”<sup>32</sup>

This is correct in the sense that Article 42(1) should not be interpreted to provide for an exclusive interpretation of domestic law. But the *ad hoc* committee follows up by stating that “the Tribunal correctly identified the law applicable under Article 42 of the ICSID Convention to Azurix’s claims of breaches of the BIT to be ‘the ICSID Convention, ... the BIT and ... applicable international law’”.<sup>33</sup> So, apparently, the *ad hoc* committee is fine with going to the other extreme, disregarding much of the prevailing case-law and scholarly opinions, and vouching for the exclusive applicability of international law. The committee goes on to argue that “[b]y definition, a Treaty is governed by international law”,<sup>34</sup> completely oblivious of any of the above-discussed nuances and complexities of the *lex specialis* regime of investment arbitration.

This interpretation completely robs the second sentence of the Article 42(1) ICSID Convention of its utility in treaty-based cases with no choice of law provisions. It seems that tribunals which follow this interpretation now fall prey to the other extreme: placing too high an emphasis on international law to the detriment of domestic law.

### **c) Challenges arising from the qualification of EU law in post-*Achmea* investment cases**

A recent rise in investment decisions qualifying domestic laws as facts has been triggered by the infamous *Achmea* decision of the Court of Justice of the European Union (“CJEU”).<sup>35</sup> On 6 March 2018, the CJEU found in a preliminary ruling procedure that the jurisdictional clauses in intra-EU BITs such as the one between the Netherlands and the Slovak Republic are contrary to EU law.

<sup>30</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, para 87.; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, para 290.

<sup>31</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009.

<sup>32</sup> *Ibid.* para 147.

<sup>33</sup> *Ibid.* para 148.

<sup>34</sup> *Ibid.* para 146.

<sup>35</sup> *Slovak Republic v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (March 6, 2018).

Dozens of ongoing intra-EU arbitration cases were put in peril as Member States brought forward jurisdictional objections based on the CJEU's Judgment. However, investment tribunals seemed immune to the CJEU's reasoning, and each and every one of them rejected these jurisdictional objections. It mattered not (i) whether the claim was BIT-based or based on the Energy Charter Treaty ("ECT"), (ii) whether the investment agreement had a choice of law provision or not, (iii) or whether the claim was initiated pre- or post-*Achmea*.

Tribunals had to make sure in their reasoning that the autonomy of EU law was preserved. This was problematic, because investment jurisprudence generally recognises EU law to be multi-faceted: on the one hand, an international legal regime, while on the other hand, a part of the national order of Member States.<sup>36</sup> Subsequent post-*Achmea* decisions have largely adopted this standard.<sup>37</sup>

This means that it was difficult for tribunals to evade the applicability of EU law, because EU law had at least the potential to be applied as international law too, as well as part of the domestic law to the case. In this latter aspect, many tribunals "returned to the well" of qualifying the domestic laws of the host State as facts, *this time applying the same principle to EU law as well*. From the many available decisions, the article analyses two in detail: *Addiko v. Croatia*,<sup>38</sup> a BIT-based case and *Eskosol v. Italy*,<sup>39</sup> an arbitration based on the ECT.

In *Addiko v. Croatia*, the BIT included no applicable law provisions, in which case tribunals should fall back to the default rule in the second sentence of Article 42(1) ICSID Convention. The *Addiko* tribunal chose to take a different route. The award first cites the above discussed decision of the annulment committee in the *Azurix* case at length,<sup>40</sup> and uncritically adopts its holdings on the implicit choice of international law. The tribunal takes note of the considerable amount of conflicting cases – in other words, arguably, the mainstream jurisprudence – and does away with them in one paragraph.<sup>41</sup>

The tribunal finishes off by admitting that "certain issues of EU law may need to be 'taken into account as a matter of fact' for purposes of applying the BIT's governing

<sup>36</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.118.

<sup>37</sup> See the influential decisions in *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 and *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50.

<sup>38</sup> *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020.

<sup>39</sup> *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019.

<sup>40</sup> *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, paras 262–263.

<sup>41</sup> *Ibid.* para 266.

international law standards”.<sup>42</sup> To support this, the tribunal refers to the recent Opinion of the CJEU,<sup>43</sup> where the EU Court has approved the EU law conformity of the Comprehensive Economic and Trade Agreement (“CETA”) between the EU and Canada.

Here, the tribunal states another fallacy: the CETA’s applicable law provisions have absolutely nothing to do with the *Addiko* case. As the following segment of the article will show, the CETA introduces a special legal regime, specifically designed by its stakeholders to be in conformity with EU law. This should not in any manner inform the tribunal’s analysis of a BIT’s provisions’ conformity with EU law.

In *Eskosol v. Italy*, the arbitral tribunal adopted a slightly different approach: as the ECT’s applicable law provisions provide for the application of the “rules and principles of international law”, the tribunal had to grapple with the potential applicability of EU law *as* international law. The tribunal’s solution was to argue that the term “rules and principles of international law” cannot encompass EU law, which is a regional system.<sup>44</sup>

The *Eskosol* tribunal goes on to discuss the potential consideration of EU law as facts:

For the avoidance of doubt, the Tribunal’s conclusion that EU law is not part of the ECT’s applicable law, and particularly not for determining the scope of the Tribunal’s jurisdiction under Article 26 of the ECT does not mean that an ECT tribunal could not consider EU law as a matter of fact if potentially relevant to the merits of a dispute, just as an ECT tribunal may consider a State’s domestic law as part of the factual matrix of a case.<sup>45</sup>

Accordingly, the *Eskosol* tribunals fares just as poorly as the *Addiko* tribunal did in the appreciation of the potential application of EU law as domestic law. This is all the more astounding, as the decision otherwise stands out as the most meticulously drafted, and well-reasoned of all of the post-*Achmea* ECT cases to date known to the author.

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<sup>42</sup> Ibid. para 267.

<sup>43</sup> Ibid. para 269.

<sup>44</sup> *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, para 121.

<sup>45</sup> Ibid. para 123.

#### IV. THE CETA'S UNORTHODOX PROVISION ON APPLICABLE LAW

The issue surrounding the qualification of domestic law has recently been revisited, and placed in the ISDS context thanks to the adoption of the CETA. Article 8.31 of the CETA contains the following provisions on applicable law in investment disputes:

1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
2. The Tribunal *shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party*. For greater certainty, in determining the consistency of a measure with this Agreement, *the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact*. In doing so, *the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party*. [...] (emphasis added)

The CETA entered into force provisionally in 2017. In the same year, Belgium requested that the CJEU rule on the EU law conformity of the Agreement. The Court delivered its Opinion in April 2019,<sup>46</sup> approximately a year after the *Achmea* decision. So, if the Court were to give the green light to the CETA, it had to argue just exactly *how* a CETA investment tribunal is different – more EU law-compliant – from a “regular” *ad hoc* investment tribunal.

The CJEU did just that, and its holding was based on two key arguments: first, the Court stated that the principle of mutual trust, which played a central role in the *Achmea* decision, is not applicable in extra-EU relations. And second, more importantly, that a CETA tribunal will not be authorised to interpret the domestic law of EU Member States; it will only take domestic law into account as a “fact”. In this way, the autonomy of the EU legal order is preserved. The Court’s relevant reasoning is reproduced below:

Those provisions serve no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information

<sup>46</sup> Opinion 1/17 of the Court (Full Court) 30 April 2019.

and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but *consists, on the contrary, of that domestic law being taken into account as a matter of fact*, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.<sup>47</sup> (emphasis added)

Thus, similarly to investment tribunals, the CJEU attributed great importance to the qualification of domestic laws in its decision. What is different in the CJEU’s case is that it had an actual textual basis to rely upon when making this ruling. Therefore, at least from this standpoint, the CJEU’s reasoning can be endorsed.

That being said, the text of the CETA actually goes further than merely qualifying domestic law as facts; it stipulates that “the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party”. In so doing, the CETA does two things: first, it attaches a hard legal *consequence* to the treatment of domestic law as facts – that is, tribunals are now unable to undertake their own interpretation, their own analysis of domestic law; they have to rely on Member States’ courts and authorities. And through this, as a second step, the CETA introduces a *lex specialis* regime of international law, one that is likely to be in conflict with general principles embodied in Article 3 of the Articles on the Responsibility of States and Article 27 of the Vienna Convention on the Law of Treaties.

While this approach can be criticised on its own merits,<sup>48</sup> it is much more coherent than the approach of investment tribunals. In the CETA’s regime, qualifying domestic law as facts, at least, has the potential to make an actual difference to the outcome of the case while, in the case of investment tribunals, the same qualification is chiefly done for the meta-legal aim of successfully rejecting *Achmea*-based jurisdictional objections.

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<sup>47</sup> Ibid. para 131.

<sup>48</sup> See J. Hepburn, CETA’s New Domestic Law Clause, *EJIL: Talk!*, 17.03.2016, <https://www.ejiltalk.org/cetas-new-domestic-law-clause/> (Last accessed: 30 December 2021), where Hepburn points out that the provision might be problematic in cases where the basis of the investors’ claim is that the judgments of the host State are not to be trusted (i.e. judicial expropriation or denial of justice claims).

## V. PRACTICAL CONSEQUENCES OF QUALIFYING DOMESTIC LAWS AS FACTS

An investment tribunal in *Invesmart v. Czech Republic* stated that the difference between treating domestic laws as law *versus* as fact is “immaterial” and “to some extent academic”.<sup>49</sup> In a similar vein, a commentator noted in connection with the CETA’s clause on domestic law that it “may have more political than legal import”.<sup>50</sup> We disagree with these contentions, and list a number of reasons in the paragraphs below with the aim of proving that qualification *does* matter.

### 1. Legal interpretation utilises a unique framework which is inapposite for the interpretation of facts

Following Roman legal traditions, the basic methods of legal interpretation are grammatical, logical, historical and systematic.<sup>51</sup> These methods of legal interpretation are simply inapposite as tools for the appreciation of facts, or serve only very limited utility. Facts do not lend themselves to the same systematic categorisation or tools of logic that legal norms do. Terms well-known to every jurist, such as “*lex specialis*” or “peremptory norm” lose their meaning when they are used outside the context of law application.

In the words of the *SPE v. Egypt* tribunal:

As to Article 8 itself, the Claimant’s contention that this provision of municipal law should be treated as a “fact” is not helpful. The Parties are in fundamental disagreement as to what Article 8 means and the Tribunal therefore must interpret Article 8 and determine its legal effect in relation to the Washington Convention.<sup>52</sup>

Describing a given rule in terms of fact indicates that it “does not pertain to the system and [...] is neither incorporated nor given any legal effect”.<sup>53</sup> Treating domestic laws as facts *limits*, by definition, tribunals’ access to these rules and, consequently, their understanding of them.

<sup>49</sup> *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para 198.

<sup>50</sup> Hepburn, CETA’s New Domestic Law Clause.

<sup>51</sup> F. K. von Savigny, *System of the Modern Roman Law*, (Hyperion Press, 1867) Volume 1, 172.

<sup>52</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para 58.

<sup>53</sup> G. Gaja, Dualism: A Review, in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law*, (OUP, 2007) 58. <https://doi.org/10.1093/acprof:oso/9780199231942.003.0003>

## 2. Qualification of domestic laws as facts is a potential ground for setting aside

Under Article 52(1)(e) of the ICSID Convention, manifest excess of power by an arbitral tribunal is a ground for annulment.<sup>54</sup> A tribunal can also exceed its powers by failing to apply the proper law.<sup>55</sup> As stated above, there is a group of distinct legal issues, the proper law for which is the domestic law of the host State – even in cases with no express choice of law provision. Adopting a more formulistic approach, one can argue that treating domestic law as facts in these cases is *ab ovo* a failure to apply the proper law. As discussed above, this approach has been rejected by the annulment committee in the *Azurix* case,<sup>56</sup> so it is unlikely to gain much traction.

In any event, in the rare cases where the treatment of domestic laws as facts leads to a *different outcome*, the award should be annulled for this reason.

## 3. The meta-consequences of qualifying domestic laws as facts

As discussed above, the recent rise in the number of references to domestic laws – or EU law for that matter – as facts is due to the high number of post-*Achmea* cases. In these cases, tribunals aim to avoid the application of domestic law or EU law in order to retain their jurisdiction.

This is not necessarily and not always problematic in each and every individual case; even if post-*Achmea* tribunals are wrong to qualify domestic law – or EU law – as facts, they tend to be right in the sense that it is rare that domestic laws or EU law – no matter their qualification – directly influence the outcome of the case. As a general practice, however, it does have *meta*-consequences that are harmful to investment jurisprudence.

Tribunals’ inclination to take a principle that was developed in the inter-State context, and then apply it, without any nuance or criticism in the field of investment arbitration, is detrimental to legal doctrine. Investment arbitration is famous for its fragmented jurisprudence, and how there are literally dozens of strains in jurisprudence for many of its core issues. The fact that the PCIJ’s holding to treat domestic laws as facts is *not* directly applicable in investment arbitration was one of the few points where there actually was relative consensus in jurisprudence and an almost absolute one in scholarship. The recent practice of tribunals in post-*Achmea* arbitrations threatens this achievement.

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<sup>54</sup> For non-ICSID cases, see Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration for a similar provision.

<sup>55</sup> Fourret, Gerbay and Alvarez, *The ICSID Convention Regulations and Rules – A Practical Commentary*, 596.

<sup>56</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, paras 146–148.

## VI. CONCLUSIONS

The article aimed to show that a direct application in the ISDS context of the PCIJ's principle on the treatment of domestic laws is problematic due to the *lex specialis* nature of investment arbitration. For this reason, there are virtually no scholarly authorities which suggest that if domestic laws are considered by a tribunal in an investment arbitration, they should be considered as facts.

Case-law, however, is much more divided. The “domestic laws are facts” argument has recently been gaining traction, due to the large number of post-*Achmea* arbitrations, where complex issues of applicable law have direct relevance for the jurisdiction of the tribunal. This means that the qualification of domestic laws – and EU law – also has a heightened importance. Investment tribunals, however, treat this qualification as a given and they refuse to engage in any kind of substantive analysis of the issue.

The important role of domestic laws in investment arbitration was also recently highlighted by the applicable law provisions of the CETA Agreement between the EU and Canada. The CETA creates a regime where tribunals are expected to treat EU Member States' domestic laws “as a matter of fact”. What is more, tribunals cannot attribute their own interpretation to these provisions; they have to follow Member States' courts and authorities. The CJEU found that the CETA is in harmony with EU law, in no small part thanks to these unorthodox applicable law provisions.

A particularly problematic consequence of the CETA Opinion is that non-CETA tribunals, such as the *Eskosol* tribunal, can now – erroneously – rely on the CJEU's arguments on applicable law to legitimise the qualification of domestic laws as facts.

Another important – and scarcely discussed – aspect of this issue is that the qualification of domestic laws as facts *vis-à-vis* as laws has very real and very practical consequences. Tribunals' legal interpretation toolset has been created for *law application*, that is, the application of the proper law to the (actual) facts of the case. Applying the “facts” to the (actual) facts sounds problematic in theory, and is likely to lead to sub-optimal results. In short, it is a fallacy.

The qualification of domestic laws in investment arbitration is a complex issue. In a number of cases, domestic laws should, in fact, be treated as facts. Other times, they are the proper law applicable to the given issue. Domestic laws should be qualified as laws and as facts, often within the same case. Tribunals should address this issue head on, and put a stop to sweeping statements that leave no room for nuance.