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# The Jurisdiction of Investment Tribunals to Adjudicate Claims and Incidental Questions Grounded in Domestic Law

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## Abstract

Over the past thirty years, arbitral tribunals tasked with determining their jurisdiction to adjudicate domestic law in investment disputes have frequently relied on one or a combination of two conventional approaches. The first approach interprets jurisdiction and applicable law provisions as serving separate functions and operating independently. The second approach contends that domestic law applies as a fact.

However, these two approaches fall short in encompassing the distinct ways in which domestic law can apply in an investment dispute. This application of domestic law is contingent on the stipulations found within a jurisdiction provision – often referred to as the “arbitration agreement” – and the jurisdictional provisions that delineate a tribunal’s personal, material, and temporal scope of jurisdiction.

To comprehensively elucidate how domestic law operates in investment arbitration, this article outlines the sources of a tribunal’s jurisdiction to adjudicate a claim and an incidental question grounded in domestic law. Firstly, the narrow or broad scope of a jurisdiction provision within an international investment agreement, domestic investment law, or investment contract determines whether a tribunal has the jurisdiction to hear a claim grounded in domestic law, pursuant to the severability doctrine. Secondly, the direct reference or *lacuna* in a jurisdictional provision determines whether a tribunal possesses jurisdiction to hear an incidental question grounded in domestic law, as a necessary and ancillary legal issue that a tribunal must preliminarily address to resolve the relevant claim, pursuant to the *lex specialis* principle.

Given these considerations, tribunals and treaty drafters should not rely on the two conventional approaches, but should consider any stipulation within a jurisdiction provision and jurisdictional provisions concerning the application of domestic law as the legal foundation of a claim and an incidental question.

### Keywords

domestic law in investment arbitration – claim and incidental question – applicable law provision – domestic-law-as-fact – inherent jurisdiction

## 1 Introduction: Jurisdiction to Adjudicate Domestic Law via Applicable Law Provisions and as a Factual Matter?

For more than a century, international courts and tribunals have faced the daunting task of determining their jurisdiction to apply domestic law in international disputes.<sup>1</sup> This challenge has presented itself with even greater frequency to investment tribunals over the past three decades. In response, they have relied mainly on one or a combination of two conventional approaches.

The first approach involves interpreting a jurisdiction provision and an applicable law provision as operating in separate silos (applicable-law-provision approach).<sup>2</sup> The jurisdiction provision, also known as an “arbitration agreement” or a “compromissory clause”, delineates the scope of the tribunal’s jurisdiction over the claim. Meanwhile, the applicable law provision determines the law applicable to the claim.

The second approach considers that domestic law applies as fact (domestic-law-as-fact approach).<sup>3</sup> It originates from the 1926 judgment of the Permanent Court of International Justice (PCIJ) in the *Certain German Interests* case. In that judgment, the Court held that it had jurisdiction to examine domestic law,

1 See *Serbian Loans, P.C.I.J. Series A, No. 20, Judgment, 12 July 1929*; Clarence Wilfred Jenks, “The Interpretation and Application of Municipal Law by the Permanent Court of International Justice”, 19 *British Yearbook of International Law* (1938) 67.

2 *Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Annulment, 1 February 2016, paras. 196–197. See also Yas Banifatemi, “The Law Applicable in Investment Treaty Arbitration”, in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements* (2nd edition, OUP, 2018), 486–493; Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd edition, CUP, 2009), 558–564.

3 *Murphy v. Ecuador II*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, para. 361; *Air Canada v. Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021, para. 147; *Canada v. Clayton*, T-1000-15, 2018 F.C. 436, para. 134.

albeit only because this law was “merely facts” from the standpoint of international law.<sup>4</sup> This approach has also been assimilated into the newer styles of applicable law provisions found in international treaties, including those negotiated by the European Union (EU).<sup>5</sup>

However, the two conventional approaches fail to accurately reflect when and how domestic law applies in an investment dispute. Their use has led to inconsistent and sometimes incorrect interpretations of domestic law issues by tribunals.<sup>6</sup> As an illustration, some tribunals have applied domestic law without having jurisdiction to do so, and others have refrained from applying domestic law despite having that jurisdiction.<sup>7</sup>

The confusion regarding the application of domestic law is understandable to some extent.<sup>8</sup> In a specific investment dispute, the relevant jurisdiction provision, jurisdictional provisions, and applicable law provision sometimes appear to make conflicting stipulations regarding the source of a tribunal’s jurisdiction to apply domestic law.<sup>9</sup> Moreover, across investment disputes, a remarkably wide variety exists in the stylistic approach to provisions within arbitration rules and the constitutive instruments that confer jurisdiction on tribunals, such as investment treaties, domestic investment legislations, and investment contracts (together, constitutive instruments).

However, the misapplication of domestic law fuels legal uncertainty in investment arbitration. It leads to the annulment, non-recognition, or set aside of an arbitral award.<sup>10</sup> It also raises doubts about the competence and legitimacy of an investment tribunal when adjudicating the responsibility of States, or foreign investors in the context of counterclaims, in disputes that involve domestic law issues.<sup>11</sup>

4 *Certain German Interests in Polish Upper Silesia, P.C.I.J. Series A, No. 7, Judgment (Merits)*, 25 May 1926, p. 19 (*Certain German Interests (Merits)*).

5 See Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016), Art. 8.31(2) (CETA); EU-Vietnam Investment Protection Agreement (signed 30 June 2019), Art. 3.42(2) (EU-Vietnam Treaty); EU-Singapore Investment Protection Agreement (signed 19 October 2018), Art. 3.13, footnote 1; Transpacific Trade and Investment Partnership Agreement (draft text of November 2015), Art. 9.25(1), footnote 34 (TTIP).

6 See text at notes 94 to 104, *infra*.

7 Zachary Douglas, “The Hybrid Foundations of Investment Treaty Arbitration”, 74 *British Yearbook of International Law* (2004) 151, 194–213; Schreuer et al., *supra* note 2, 585.

8 See *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para. 198.

9 Andrea Bjorklund, “Applicable Law in International Investment Disputes”, in Chiara Giorgetti (ed.), *Litigating International Investment Disputes* (Brill, 2014), 279.

10 See ICSID Convention (entered into force 14 October 1966), Art. 52(1)(b); New York Convention (entered into force 7 June 1959), Art. v(1)(c).

11 Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP, 2017), 7.

To comprehensively elucidate how domestic law operates in investment arbitration, this article presents the sources of tribunals' jurisdiction to adjudicate a claim and an incidental question grounded in domestic law. It proposes an interpretative framework and legal terminology for tribunals and treaty drafters when referencing domestic law in future awards and agreements. In doing so, the article contributes to the broader discussion of applicable laws, including human rights laws, in investment arbitration.<sup>12</sup> It also adds to the broader discussion of incidental questions grounded in domestic and international law within public international law.<sup>13</sup>

The article's contributions to the practice and literature are twofold. The first contribution is to identify the two situations in which a tribunal has jurisdiction to adjudicate a *claim* grounded in domestic law. Firstly, domestic law can serve as the legal foundation of a claim when a jurisdiction provision explicitly authorises it, irrespective of any law contemplated by the relevant applicable law provision. This interpretation is correct because the stipulation in the jurisdiction provision first applies independently from the applicable law provision, in accordance with the doctrine of severability. Secondly, domestic law may serve as the legal foundation of a claim when a broad jurisdiction provision does not include domestic law, but the relevant applicable law provision does, because the applicable law provision then governs as the second provision in precedence, once again pursuant to the severability doctrine.<sup>14</sup>

The article's second contribution is to discern the situations in which a tribunal has jurisdiction to adjudicate an *incidental question* grounded in domestic law. This jurisdiction does not exist because domestic law is fact rather than law. Rather, it exists because the claim grounded in international law of which the tribunal is seized (*i.e.*, the main question) requires the determination of an underlying legal issue grounded in domestic law (*i.e.*, the incidental question). It is the claim under the jurisdictional provisions outlining a tribunal's personal, material, and temporal scope of jurisdiction (jurisdictional provisions) that incidentally references domestic law. Therefore, the specific stipulation about the incidental application of domestic law in the claim takes precedence

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12 See Bjorklund, *supra* note 9; Banifatemi, *supra* note 2.

13 See text at notes 60 to 63, *infra*. See also Sharif Bhuiyan, *National Law in wro Law* (CUP, 2007).

14 Current analysis lacks grounding in the doctrine of severability. See Lorand Bartels, "Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case before It", in Tomer Broude and Yuval Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart, 2011), 117.

over the general stipulation in the applicable law provision about the law applicable to the dispute, in accordance with the principle of *lex specialis*.<sup>15</sup>

To sustain these arguments, the article proceeds in three subsequent parts. Part 2 explains that the narrow or broad scope of a jurisdiction provision in a constitutive instrument dictates whether a tribunal has the jurisdiction to adjudicate a claim grounded in domestic law. Part 3 shows that a direct reference or *lacuna* in a jurisdictional provision can empower a tribunal with the jurisdiction to adjudicate a necessary and ancillary issue grounded in domestic law.

Building on this analysis, the article concludes with practical advice in Part 4. It critiques the new style of applicable law provisions aimed at addressing domestic law issues in investment treaties. It also proposes more effective approaches for drafting and interpreting the different provisions in constitutive instruments shaping domestic law issues.

## 2 Claim: Jurisdiction to Adjudicate a Legal Demand Grounded in Domestic Law

Part 2 identifies the situations in which a tribunal has jurisdiction to adjudicate a claim grounded in domestic law. To achieve this objective, this Part initially differentiates between a claim and an incidental question in investment arbitration, as the distinction pertains to the application of domestic law (2.1). Subsequently, it considers the scope of the jurisdiction provision in connection to the legal foundation of a claim under domestic law (2.2).

### 2.1 *Distinction between a Claim and an Incidental Question*

#### 2.1.1 Definitions

A tribunal may have jurisdiction to decide a claim and an incidental question grounded in domestic law in an investment dispute.<sup>16</sup>

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15 How a *jurisdictional* provision can prompt an incidental question premised on domestic law has yet to be thoroughly explored. See Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (Kluwer, 2010), Preface; Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (OUP, 2013), Ch. 5; Hepburn, *Domestic Law*, *supra* note 11, Chs. 5–6; Reza Eftekhari, *The Role of the Domestic Law of the Host State in Determining the Jurisdiction Ratione Materiae of Investment Treaty Tribunals: The Partial Revival of the Localisation Theory?* (Brill Nijhoff, 2021).

16 See the early research of Dionisio Anzilotti, *Cours de droit international* (Gilbert Gidel tr., Sirey, 1929), 59–65. Professor Bartels uses the terminology of “principal norms” and

A “claim” refers to a demand based on a right provided by law, which the tribunal must adjudicate pursuant to the relevant jurisdiction provision (claim). When combined with the relevant facts supporting it, a claim represents the cause of action or *lex causae* in a dispute. The tribunal’s decision on the claim forms the operative part of the arbitral award and has a *res judicata* effect, as a domestic court decision would under domestic law.<sup>17</sup> To take a few examples, a common jurisdiction claim is that the claimant is a protected investor covered by the International Centre for Settlement of Investment Disputes (ICSID) Convention, and a common liability claim is that the State has violated the protections against expropriation included in the investment treaty.<sup>18</sup>

Conversely, an “incidental question” denotes a necessary and ancillary legal issue that a tribunal is required to address in order to resolve the relevant claim (incidental question). When a claim is predicated on an issue that is logically antecedent, it becomes incumbent upon the tribunal to preliminarily examine this issue. Consequently, an incidental question is context-dependent to any claim. For the same reason, a tribunal’s finding on an incidental question has value solely within the underlying proceedings, binding the tribunal alone.

Continuing with the aforementioned examples, a common incidental question to the claim of a claimant being a covered investor is the determination of the claimant’s nationality under domestic law. Similarly, when dealing with the claim of the breach of a treaty protection against expropriation, a common incidental question is the determination of the status of the allegedly expropriated property under domestic law.<sup>19</sup> As illustrated by these examples, a tribunal may be tasked to adjudicate a claim and an incidental question grounded in domestic law within the context of the law applicable to both jurisdiction and liability.

To further illustrate the distinction between a claim and an incidental question, consider the classic Hart-Fuller debate centered around a fictional law forbidding vehicles in a public park.<sup>20</sup> Would a mere statue of a vehicle be in

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“incidental norms”, respectively: *supra* note 14, 117. Similarly, Professor Bjorklund refers to “rules of decision” and “aids to interpretation”, respectively: *supra* note 9, 275–277.

17 See *Oil Platforms, Separate Opinion of Judge Kooijmans, I.C.J. Reports* 2003, p. 161, para. 3. See also *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 212–213. This is because the so-called “triple-identity” test is met. See George Bermann, “*Res Judicata* in International Arbitration”, in Stefan Kröll, Andrea Bjorklund and Franco Ferrari (eds.), *Cambridge Compendium of International Commercial and Investment Arbitration* (CUP, 2023), 1676–1696.

18 See *infra* Part 2.2.

19 See *infra* Part 3.

20 Compare HLA Hart, “Positivism and the Separation of Law and Morals”, 71 *Harvard Law Review* (1958) 593, 607, with Lon Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart”, 71 *Harvard Law Review* (1958) 630, 662–664.

breach of this law? In this scenario, the claim pertains to the alleged breach of the law. Conversely, the incidental question is determining the definition of a “vehicle” within the context of this law.

### 2.1.2 Severability Doctrine

The process of identifying the legal foundation of a claim and an incidental question over which a tribunal has jurisdiction stems from the effective interpretation of the relevant constitutive instrument, starting with the jurisdiction provision contained within. This process relies heavily on general principles of treaty and contractual interpretation applicable in international dispute resolution.

By its very nature, a jurisdiction provision, also commonly referred to as an “arbitration agreement” within international commercial arbitration<sup>21</sup> and a “compromissory clause” within public international law,<sup>22</sup> confers two distinct powers on a tribunal. The implementation of these powers occurs sequentially.

The first power, often referred to as *compétence-compétence*, is the authority to resolve a claim concerning the validity and scope of the tribunal’s jurisdiction. As stipulated by the PCIJ in the *Interpretation of the Greco-Turkish Agreement* case, “as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction.”<sup>23</sup> This power is now explicitly recognised in various arbitration rules<sup>24</sup> and international treaties.<sup>25</sup> For instance, in arbitrations under the ICSID Convention, the law typically applicable to jurisdiction includes the Convention itself, the relevant investment treaty, and international law.<sup>26</sup>

The second power granted to the tribunal is the authority to resolve a claim falling within its jurisdiction, whether the claim is predicated on a substantive protection found within a constitutive instrument or derived from other instruments. Essentially, this represents the tribunal’s power to apply the law concerning the merits of the claim.

In exercising its first power, a tribunal must initially assess independently the stipulations concerning the scope of its jurisdiction as delineated within the jurisdiction provision itself. Under the doctrine of severability, the jurisdiction

21 See e.g. ICC Arbitration Rules (entered into force 1 January 2021), Art. 6.

22 See e.g. ICJ Statute (entered into force 31 August 1965), Art. 36(1).

23 *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, P.C.I.J. Series B, No. 16, *Advisory Opinion*, 28 August 1928, p. 20.

24 See ICSID Convention, Art. 41(1); UNCITRAL Arbitration Rules (entered into force 19 September 2021), Art. 23.

25 See ICJ Statute, Art. 36(6).

26 Christoph Schreuer, “Jurisdiction and Applicable Law in Investment Treaty Arbitration”, 1 *McGill Journal of Dispute Resolution* (2014) 1, 3, 6.



provision (*i.e.*, the first agreement) is separate and autonomous from the treaty or contract that contains it (*i.e.*, the second agreement).<sup>27</sup>

In its judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council*, the International Court of Justice (ICJ) affirmed that the underlying *rationale* of the severability doctrine is to safeguard the effectiveness of consent given towards dispute resolution:

a merely unilateral suspension *per se* [cannot] render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative – *i.e.*, whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting.<sup>28</sup>

In essence, the severability doctrine implies that a jurisdiction provision survives the invalidity or termination of the treaty or contract containing it.<sup>29</sup> Moreover, this doctrine requires an initial independent assessment of the jurisdiction provision to ascertain whether it contains stipulations concerning the tribunal's scope of jurisdiction.

## 2.2 *Scope of the Jurisdiction Provision in Relation to the Legal Foundation of a Claim*

There are two distinct situations where an investment tribunal has jurisdiction to adjudicate a claim grounded in domestic law. These situations hinge upon whether the jurisdiction provision carries a narrow or broad scope.<sup>30</sup>

### 2.2.1 Narrow Provisions

The first situation emerges when a narrow jurisdiction provision explicitly authorises the application of domestic law. A narrow jurisdiction provision is

<sup>27</sup> See ICSID Convention, Art. 25(1); UNCITRAL Arbitration Rules, Art. 23(1).

<sup>28</sup> *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment*, I.C.J. Reports 1972, p. 46, 53–54, para. 16.

<sup>29</sup> See *Niko v. Bapex and Petrobangla and Niko v. Bapex*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019, paras. 588–597.

<sup>30</sup> See *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saab, 4 August 2011, para. 10.

one that expressly and specifically stipulates the legal foundation for claims that may be submitted for arbitration (narrow jurisdiction provision).

Many jurisdiction provisions in investment treaties, domestic investment laws, and investment contracts expressly empower investors to initiate claims under domestic law.<sup>31</sup> The jurisdiction provisions of over 70 publicly accessible investment treaties enumerate specific legal grounds for permissible claims that originate outside these treaties, including contractual disputes governed by domestic law.<sup>32</sup> For instance, in *Tradex Hellas v. Albania*, the claims available to the investor were confined to the substantive protections found in the relevant domestic investment law.<sup>33</sup>

Moreover, some investment contracts expressly confer on a tribunal the jurisdiction to adjudicate claims grounded in domestic law.<sup>34</sup> Host States often insist on including their domestic law in investment contracts. Historically, these contracts have served as the foundation for most early investment arbitrations. More recently, the tribunal in *Perenco v. Ecuador* had jurisdiction to adjudicate Ecuador's counterclaim under Ecuadorian environmental laws, because the applicable production-sharing contracts were governed by domestic law.<sup>35</sup> To take another example, the tribunal in *Caratube and Hourani v. Kazakhstan* found that the investment contract incorporated the substantive protections in Kazakhstan's domestic investment law, which were governed by domestic law.<sup>36</sup>

While some investment contracts refer solely to domestic law,<sup>37</sup> foreign investors generally strive to safeguard themselves against shifts in domestic law. Therefore, they will typically insist on the availability of recourse to international law under the contract as well.<sup>38</sup>

A narrow jurisdiction provision that expressly allows a claim to be submitted under domestic law will prevail over an applicable law provision that either

31 Kjos, *supra* note 15, 158–163.

32 UNCTAD, “Mapping of IIA Content”, <<https://investmentpolicy.unctad.org/international-investment-agreements/iiia-mapping>>.

33 *Tradex Hellas v. Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, para. 69.

34 Jeswald Salacuse, *The Law of Investment Treaties* (2nd edition, OUP, 2015), 299; Kjos, *supra* note 15, 171–176.

35 *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, 12 September 2014, Decision on Remaining Issues of Jurisdiction and on Liability, paras. 318–323.

36 *Caratube and Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, paras. 295, 627, 655.

37 See *Zeevi Holdings v. Bulgaria*, UNCITRAL, Final Award, 25 October 2006, para. 105.

38 Schreuer et al., *supra* note 2, 558. For instance, foreign investors might attempt to secure a stabilisation provision to mitigate domestic law shifts: see e.g. *AGIP v. Congo*, ICSID Case No. ARB/77/1, Award, 30 November 1979, paras. 86–88.

remains silent on the application of domestic law,<sup>39</sup> or stipulates the (exclusive) application of international law. According to the doctrine of severability, a jurisdiction provision (*i.e.*, the first agreement), which expressly allows claims predicated on substantive protections under domestic law beyond those contained in the treaty or contract, should be appraised independently. Concurrently, the applicable law provision in the treaty, contract, or relevant arbitration rules (*i.e.*, the second agreement) cannot circumscribe the tribunal's jurisdiction over the application of domestic law as a claim, because the narrow jurisdiction provision has *already* granted such jurisdiction. Otherwise, the termination of the treaty or contract would entail the termination of the jurisdiction provision, thereby rendering consent to dispute settlement ineffective.<sup>40</sup> In essence, the applicable law provision cannot defeat the express stipulation in the jurisdiction provision allowing a claim grounded in domestic law.

The Court of Justice of the European Union's (CJEU) ruling in the *Komstroy* case shows how a narrow jurisdiction provision in an investment treaty may enable the application of "domestic" law – here, EU law – as a claim. The narrow jurisdiction provision in Article 26(1) of the 1994 Energy Charter Treaty (ECT) covers exclusively the substantive protections within the treaty. Similarly, the applicable law provision in Article 26(6) covers the ECT (and rules and principles of international law).<sup>41</sup>

Because the ECT is EU law from the perspective of the EU,<sup>42</sup> the Court held that a tribunal established under the ECT could be required to "interpret, and even apply, EU law" as a claim in a dispute.<sup>43</sup> The Court rightly observed that a tribunal can only apply the ECT as the legal foundation of a claim. However, it incorrectly attributed this limit to the applicable law provision. Instead, this stems from the narrow jurisdiction provision in Article 26(1), which already delineates the legal foundation for permissible claims under the ECT. The content of the applicable law provision in Article 26(6) is simply redundant.

While outside the EU the ECT is not regarded as domestic law but rather as international law, this example lends support to the argument that stipulations about the legal foundation of permissible claims in a narrow jurisdiction provision (such as the one in the ECT) prevail over any stipulations in an applicable law provision.

39 See UNCTAD, *supra* note 32. See e.g. Albania-United States of America BIT (entered into force 4 January 1998).

40 See *supra* note 28.

41 Energy Charter Treaty (entered into force 16 April 1998), Art. 26(1), (6) (ECT).

42 *Moldova v. Komstroy*, Case C-741/19, Judgment [2021] ECLI:EU:C:2021:655, para. 23.

43 *Ibid.*, para. 50.

### 2.2.2 Broad Provisions

The second situation that confers a tribunal with jurisdiction to adjudicate a claim grounded in domestic law arises when the jurisdiction provision in the constitutive document is of a broad scope, *and* the relevant applicable law provision includes domestic law. A broad jurisdiction provision is one that bestows a tribunal with jurisdiction over “any” or “all” investment disputes (broad jurisdiction provision).<sup>44</sup> While a broad jurisdiction provision will first apply independently, it does not identify the legal foundation for initiating claims. This identification is left to the applicable law provision in the treaty or contract.<sup>45</sup>

A few applicable law provisions in investment treaties mandate the exclusive application of domestic law.<sup>46</sup> More frequently, the applicable law provisions in treaties refer to both domestic law and international law.<sup>47</sup> Other treaties “introduce the reference to domestic law with less mandatory language than for the primary reference to the investment treaty,”<sup>48</sup> or by positing that domestic law only becomes relevant in the absence of an agreement between the disputing parties.<sup>49</sup>

In instances where the jurisdiction provision is broad and the applicable law provision includes domestic law, tribunals have upheld that they possess jurisdiction to adjudicate claims by foreign investors,<sup>50</sup> and counterclaims by respondent States,<sup>51</sup> for violations of domestic law found beyond the treaty or contract containing the jurisdiction provision.

For instance, in the *Achmea* case, the CJEU rightly concluded that a broad jurisdiction provision enabled the application of domestic law as the legal

44 See ICSID’s Jurisdiction Model Clause 1 (Schreuer et al., *supra* note 2, 194). See e.g. China-Peru FTA (entered into force 1 March 2010), Art. 139.

45 The applicable law provision in a constitutive instrument is recognised by virtually all arbitration rules as an explicit choice of law by the parties. See ICSID Convention, Art. 42(1); UNCITRAL Arbitration Rules, Art. 35(1); ICC Arbitration Rules, Art. 21(1).

46 In a study of 1,017 treaties, Dr. Atanasova found seven such provisions: Dafina Atanasova, “Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?”, 10 *Journal of International Dispute Settlement* (2019) 1, 16.

47 *Ibid.*, 14 (finding that 55% of the investment treaties studied up to 2012 mentioned domestic law in their applicable law provisions).

48 *Ibid.*, 17.

49 See e.g. China-Netherlands BIT (entered into force 1 August 2004), Art. 10(4).

50 Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009), 234–235; Schreuer et al., *supra* note 2; Kjos, *supra* note 15, 176–180; UNCTAD, *Investor-State Dispute Settlement: A Sequel* (United Nations, 2014), 38–39.

51 Kjos, *supra* note 15, 180 (stating that “in light of the fact that investors generally do not have any obligations under international law, non-contractual [counter-]claims presented by a host state against an investor would be *based in and governed by* national law.”) (emphasis added).

foundation of the claims.<sup>52</sup> The jurisdiction provision in the 1991 Netherlands-Slovakia Bilateral Investment Treaty (BIT) allowed for “all” investment disputes to be resolved through international arbitration, and the applicable law provision in the treaty envisaged the application of domestic law.<sup>53</sup> Although the broad jurisdiction provision did not specify the legal foundation of permissible claims, the applicable law provision did. This provision enabled foreign investors to initiate a claim under domestic law, which includes, in this instance, EU law. Consequently, the Court determined that a tribunal operating under the BIT could be tasked to “interpret” or “apply” EU law as the legal foundation of a claim.

In contrast to applicable law provisions that refer to domestic law, certain applicable law provisions in constitutive documents sometimes explicitly limit the legal foundation of claims that can be heard under the treaty to those brought under international law. For instance, the jurisdiction provision in the 2010 China-Peru Free Trade Agreement (FTA) allows for arbitration of “any” investment dispute. However, the applicable law provision in the same treaty also states that a tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”<sup>54</sup> In this case, the combination of a broad jurisdiction provision and an applicable law provision that refers exclusively to international law dictates that a party cannot bring forward a claim for breach of domestic law.

Many investment treaties, domestic investment laws, and investment contracts contain no applicable law provision. This omission is observed in two thirds of all investment treaties<sup>55</sup> and many domestic investment laws.<sup>56</sup> In this scenario, the applicable law provision in the relevant arbitration rules governs by default.

For instance, take the second sentence of Article 42(1) from the ICSID Convention. This provision expressly foresees the application of domestic law when a choice of law provision is absent from the constitutive instrument. It

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52 The CJEU also held, for reasons specific to the EU context, that this foundation of permissible claims ran counter to the autonomy of EU law: *Slovak Republic v. Achmea*, Case C-284/16, Judgment [2018] ECLI:EU:C:2018:158 (*Achmea*).

53 Netherlands-Slovakia BIT (entered into force 1 October 1992, terminated 21 March 2021), Art. 8(1), (5).

54 China-Peru FTA, *supra* note 44, Art. 139(1), (3).

55 Atanasova, *supra* note 46, 12 (reporting that “[65%] of treaties signed between 2013 and 2016 contain an applicable law provision, against only 35% of earlier ones”).

56 In the UNCTAD database, no domestic investment law that includes a dispute settlement provision specifies the applicable law. See “Investment Laws Navigator”, <<https://investmentpolicy.unctad.org/investment-laws>>.

instructs that “the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

As an illustration of an ICSID case, in *SOABI v. Senegal*, the investment contract featured a broad jurisdiction provision and no applicable law provision. As a result, the second sentence of Article 42(1) from the ICSID Convention applied. The tribunal held that only the domestic law of Senegal governed the liability part of the claims between the two Senegalese parties concerning work performed in Senegal.<sup>57</sup>

As shown in this Part, a tribunal may have jurisdiction to adjudicate a claim grounded in domestic law in an investment dispute. In such circumstances, domestic law serves as “the legal rule against which the ... conduct will be measured, and compliance or lack of compliance with which will dictate the outcome of the case.”<sup>58</sup> In short, domestic law applies as “law”, as in a standard case adjudicated before a domestic court or an arbitration governed by domestic law adjudicated before an international commercial tribunal.

In this situation, the tribunal must interpret the domestic law “as such” and determine whether there has been a violation of this law. The procedural treatment of domestic law, particularly in relation to proof, is steered by the specific principles of evidence and procedure applicable to the tribunal. Most of these principles are found in the relevant arbitration rules.

### 3 Incidental Question: Jurisdiction to Adjudicate a Necessary and Ancillary Issue Grounded in Domestic Law

Part 3 identifies the situations in which a tribunal holds jurisdiction to adjudicate an incidental question grounded in domestic law. To achieve this, this Part considers the inherent jurisdiction of a tribunal over an incidental question grounded in domestic law, extending to aspects of jurisdiction, liability, and damages (3.1). It then sets out both conditions for applying an incidental question, as a necessary and ancillary issue (3.2). Finally, this Part examines the procedural treatment of an incidental question, specifically focusing on issues of proof and interpretation (3.3).

<sup>57</sup> *SOABI v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, paras. 5.01–5.02.

<sup>58</sup> Bjorklund, *supra* note 9, 275.

### 3.1 *Inherent Jurisdiction over Incidental Questions*

#### 3.1.1 *Renvoi and Fact?*

An incidental question refers to a necessary and ancillary legal issue that a tribunal must adjudicate to resolve the relevant claim. The concept of an “incidental question” provides a more accurate elucidation of the need for incidental application of domestic law. This is in comparison to the two alternative approaches that tribunals sometimes used to characterise the same exercise.

Under the first approach, tribunals refer to the application of domestic law as a *renvoi*, drawing an analogy to the concept of *renvoi* within private international law.<sup>59</sup> However, such a *renvoi* determines the law which governs a *single issue*. For instance, it determines whether the law of the forum, or the law of the foreign jurisdiction, should govern a succession dispute involving foreign elements.

In contrast, the need to apply domestic law incidentally is more akin to the concept of an incidental question in private international law. This concept, referred to as a “*question préalable*” in French or a “*Vorfrage*” in German, determines the laws governing *two related but distinct issues*. Taking the example of a succession dispute, the law of the forum applicable to the division of the estate amongst the heirs (*i.e.*, the main question) could refer the validity of the widow’s marriage to the foreign law that governs it (*i.e.*, the incidental question).

Similarly, in investment arbitration, an incidental question arises when an alleged breach of a substantive protection grounded in international law over which the tribunal has jurisdiction (*i.e.*, the main question) requires adjudicating an underlying legal issue grounded in domestic law (*i.e.*, the incidental question).

Under the second approach, tribunals treat the incidental application of domestic law as a matter of fact, relying on the PCIJ’s pronouncement in *Certain German Interests*. In that case, the Court was tasked with determining whether Poland expropriated a nitrate factory in violation of the Geneva Treaty on Upper Silesia. In its 1925 judgment, it held that a “question[] preliminary or incidental” was whether the factory was *lawfully* owned under other international treaties.<sup>60</sup> Subsequently, in its 1926 judgment, the Court ruled

59 See *Tenaris v. Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, paras. 493–495; *Fraport v. Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 394.

60 *Certain German Interests in Polish Upper Silesia*, P.C.I.J. Series A, No. 6, Judgment (Preliminary Objections), 25 August 1925, p. 18 (*Certain German Interests (Preliminary Objections)*).

that the effect of a Polish law on ownership of the factory under domestic law was also a relevant question, albeit of “*merely facts*.”<sup>61</sup>

Since these judgments, both tribunals and scholars have made distinct references to two concepts: the concept of an incidental question, which arises when international law makes incidental references to other aspects of international law, and the domestic-law-as-fact approach, which arises when international law applies domestic law as a factual element.<sup>62</sup>

This domestic-law-as-fact approach draws upon the century-old approach to the procedural treatment of foreign law by domestic courts under private international law.<sup>63</sup> However, this private international law approach presupposes that a domestic court has jurisdiction to apply domestic law by reason of an incidental question, and itself does not address the jurisdiction of the domestic court to apply foreign law. Therefore, this approach is unsuitable for transposition to international dispute settlement, at least not for explaining the source of a tribunal’s jurisdiction to apply domestic law incidentally.

In investment arbitration, a tribunal has the authority to resolve an incidental question grounded in domestic law by virtue of its inherent jurisdiction to resolve the claim before it. The ICJ, in the 1976 *Nuclear Tests* case, clarified that it “possesses an inherent jurisdiction enabling it to take such action as may be required ... to ensure that the *exercise of its jurisdiction over the merits*, if and when established, shall not be frustrated.”<sup>64</sup> As with the Court, an investment tribunal is vested with the power to make determinations necessary to fulfil its functions, including deciding an incidental question grounded in domestic law when required for the tribunal to exercise its jurisdiction.<sup>65</sup>

Investment tribunals have consistently affirmed their jurisdiction to apply domestic law incidentally. In *Waste Management v. Mexico*, the tribunal emphasised that a NAFTA tribunal’s jurisdiction to “take note of or interpret” a law other than the applicable law is “incidental in character.”<sup>66</sup> The tribunal determined that it was “relevant” to demonstrate that the host State’s specific conduct contradicted agreements or understandings established at the time

61 *Certain German Interests (Merits)*, *supra* note 4, 19.

62 Compare “Symposium on Incidental Jurisdiction”, 116 *AJIL Unbound* (2022) 160, *with, supra* note 3.

63 See *infra* Part 3.3.

64 *Nuclear Tests, Judgment*, I.C.J. Reports 1974, p. 253, para. 23.

65 See Yuliya Chernykh, *Contract Interpretation in Investment Treaty Arbitration* (Brill Nijhoff, 2022). See also Andrea Bjorklund and Jonathan Brosseau, “Sources of Inherent Powers”, 6 *European International Arbitration Review* (2018) 1, 9–14.

66 *Waste Management v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 73.



of the investment's entry, even though it remained necessary to establish that said conduct constituted a violation of the substantive standards enshrined in NAFTA's Article 1105.<sup>67</sup> This ruling was rendered notwithstanding the provisions in NAFTA that dictate that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."<sup>68</sup>

Similarly, the ICSID tribunal in *Telefonica v. Argentina* held that its jurisdiction to consider a BIT claim "would not prevent [it], when dealing with the merits, from examining *incidenter tantum* whether there have been breaches of the Transfer Agreement [under domestic law], should this be relevant in order to ascertain whether Argentina has committed the BIT breaches that [the claimant] alleges."<sup>69</sup>

### 3.1.2 Jurisdiction, Liability, and Damages Aspects

A tribunal has jurisdiction to adjudicate an incidental question grounded in domestic law concerning all three aspects of an investment dispute – namely, jurisdiction, liability, and damages.

Regarding jurisdiction, domestic law can apply to key provisions that establish the scope of a tribunal's authority to adjudicate an international claim. Material jurisdiction may be influenced by the investor's adherence with domestic law when establishing its investments.<sup>70</sup> Personal jurisdiction may be shaped by the claimant's nationality as determined under domestic law.<sup>71</sup> Temporal jurisdiction may be affected by the State measures challenged, which are governed by the domestic law in force at the time of their implementation.<sup>72</sup>

67 *Ibid.*

68 North American Free Trade Agreement (entered into force 1 January 1994), Art. 1131(1) (NAFTA). The NAFTA has been replaced by the United States-Mexico-Canada Agreement (USMCA), which entered into force on 1 July 2020. See its applicable law provision: *ibid.*, Art. 14.D.9.

69 *Telefónica v. Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, footnote 36 (emphasis in original). See also *Fraport v. Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 298.

70 See Sasson, *supra* note 15, xxix; Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 92–95; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2007), 69–70, 182–184.

71 See *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 66; *Uzan v. Turkey*, SCC Case No. V2014/023, Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016, para. 156.

72 *Levy and Gremicitel v. Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 149.

Regarding liability, a substantive standard of protection grounded in international law may be contingent upon a matter governed by domestic law.<sup>73</sup> In this case, domestic law can contribute to defining the scope of the international obligation, as exemplified by obligations found in umbrella provisions,<sup>74</sup> expropriation provisions,<sup>75</sup> and fair and equitable treatment provisions.<sup>76</sup>

For example, an umbrella provision within a treaty might necessitate that a tribunal preliminarily ascertain whether the host State has fulfilled its commitment to honour obligations made to an investor or concerning an investment, as dictated by domestic law.<sup>77</sup> To take another example, a substantive treaty protection may require determining incidentally whether the respondent State, in its capacity as an EU Member State, has complied with the EU's state aid law.<sup>78</sup> However, in all these cases, any determination concerning domestic law is subsequently scrutinised under international law to ascertain whether the State has violated any of its international obligations.<sup>79</sup>

Regarding damages, tribunals have referred to domestic law in various ways to determine the appropriate compensation for a breach of international law. In principle, remedies in international claims are grounded in international law. However, tribunals have turned to domestic law in instances where intricate questions arose concerning the nature and validity of specific investments,<sup>80</sup> or when temporal matters pertaining to the investor's rights fell under domestic law. This includes determining the date of the breach, which holds significance for calculating damages.<sup>81</sup> Domestic law has also been applied to resolve

73 Sasson, *supra* note 15, xxix; Newcombe and Paradell, *supra* note 70, 92–95; McLachlan, Shore and Weiniger, *supra* note 70, 69–70, 182–184.

74 Anthony Sinclair, “Umbrella Clause”, in Marc Bungenberg et al. (eds.), *International Investment Law: A Handbook* (Hart/Nomos, 2015), 912.

75 On the police power doctrine, see *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 271–275; on the due process component, see *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, paras. 379, 396.

76 For example, the tribunal in *Tenaris v. Venezuela* opined that the respondent State carried out the expropriation in contravention of its own nationalization legislation. This sufficed to find a breach of the “explicit *renvoi* to Venezuelan domestic law” in the two applicable BITs: *Tenaris v. Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, paras. 493–495.

77 Newcombe and Paradell, *supra* note 70, 437–438.

78 See *AES Summit v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras. 10.3.15–10.3.19; *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

79 Sinclair, *supra* note 74, 912.

80 See *Alpha v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 439.

81 See *Middle East Cement v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002.

issues as part of determining full reparations, interest, and non-monetary remedies.<sup>82</sup>

### 3.2 *Two Conditions of Application*

A tribunal has jurisdiction to apply domestic law incidentally when the conditions of necessity and ancillarity are fulfilled.

#### 3.2.1 Necessary Issue

The first condition requires that a claim grounded in international law makes the application of domestic law “necessary” due to an incidental question. Almost a century ago, the PCIJ refrained from addressing matters of domestic law that were “*not essential*” to the decision of the case.<sup>83</sup> Conversely, the Court would have examined domestic law issues if they were relevant to its determination of international liability. More recently, a Chamber of the ICJ stated in the *ELSI* case that, “[w]here the determination of a question of domestic law is *essential* to the Court’s decision in a case, the Court will have to weigh the jurisprudence of the domestic courts ...”<sup>84</sup>

Like international courts, investment tribunals have emphasised that resolving an incidental question in domestic law must be necessary. While deciding an expropriation claim in *Emmis v. Hungary*, the tribunal held that, “where the tribunal is presented with a question of domestic law *essential* to the issues raised by the parties for its decision, the tribunal, whilst retaining its independent powers of application and decision, must seek to determine the content of the applicable law.”<sup>85</sup>

A claim grounded in international law requires the incidental application of domestic law in two situations: either through direct reference or due to a gap in international law. A direct reference occurs when a claim explicitly states or implies the need to apply domestic law (direct reference).<sup>86</sup>

In the first-ever ICSID treaty case, the tribunal in *AAPL v. Sri Lanka* held that the bilateral investment treaty provided the “substantive material rules

82 Hepburn, *Domestic Law*, *supra* note 11, Ch. 4.

83 Jenks, *supra* note 1, 75 (emphasis added). On references to international law, see *Certain German Interests (Preliminary Objections)*, *supra* note 60, 18, where the PCIJ held it was “hardly possible” to exercise its jurisdiction under the Geneva Treaty in respect of which it was seized without first interpreting and applying other international treaties.

84 *Elctronica Sicula (ELSI)*, *Judgment*, *I.C.J. Reports* 1989, p. 15, para. 62.

85 *Emmis International v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 175 (emphasis added).

86 Denis Bettems, *Les contrats entre états et entreprises étrangères* (Méta-Éditions, 1989), 80.

of direct applicability.”<sup>87</sup> However, the tribunal concluded that the treaty itself required the application of other legal sources. The tribunal stated:

[I]t should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated *through implied incorporation methods, or by direct reference to certain supplementary rules*, whether of international law character or of domestic law nature. Such extension of the applicable legal system resorts clearly from Article 3 (1), Article 3 (2), and Article 4 of the Sri Lanka/U.K. Bilateral Investment Treaty.<sup>88</sup>

Moreover, the tribunal in *BG Group v. Argentina* held that “the *renvoi* of Article 1 (a) of the treaty requires this Tribunal to apply the laws of Argentina to the interpretation of this part of the definition of ‘Investment’ in the Argentina-U.S. BIT.”<sup>89</sup> This direct reference was necessary to determine the foreign investor’s rights and was mandated by customary international law.<sup>90</sup> Similarly, in *British Caribbean Bank v. Belize*, the tribunal dealt with questions concerning certain loans and security agreements. It reasoned that a claim under the treaty required assessing these agreements “by reference to the [domestic] law pursuant to which they were concluded.”<sup>91</sup>

The nature and extent of a direct reference depend upon the precise language concerning the incidental question within the relevant jurisdictional provision that establishes the tribunal’s personal, material, and temporal scope of jurisdiction. In *Prosecutor v. Erdemović*, Judge Cassese aptly explained that “[r]eliance on legal notions or concepts as laid down in a national legal system can only be justified if international rules make express *reference* to national law or if such reference is necessarily implied by the very content and nature of the concept.”<sup>92</sup> Conversely, as highlighted in another case, “where a provision of the BIT has a separable grammatical structure, those elements that do not

87 *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 21.

88 *Ibid.* (emphasis added).

89 *BG Group v. Argentina*, UNCITRAL, Award, 24 December 2007, para. 117.

90 *Ibid.*

91 *British Caribbean Bank v. Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, para. 123.

92 See e.g. *Prosecutor v. Erdemović (Sentencing Appeal)*, ICTY (Appeals Chamber) [1997] 111 I.L.R. 298, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 3 (emphasis added).

require a *renvoi* to domestic law must retain their autonomous meaning under international law.”<sup>93</sup>

Since direct references rely on the language specified in a jurisdictional provision, identifying such references can be challenging when the language used is ambiguous or vague. This is highlighted by two examples.

The first example concerns legality requirement provisions and admission provisions found in investment treaties. Legality requirement provisions require that investments be made in “accordance” or “conformity” with the host State’s domestic laws (legality requirement provisions).<sup>94</sup> These provisions make an express and clear reference to domestic law.<sup>95</sup> Non-compliance with domestic law by an investor entails that no investment was initially made or that the substantive treaty protections do not extend to the investor, whether for jurisdictional or liability purposes.<sup>96</sup>

Admission provisions are obligations within investment treaties that pertain to the acceptance of certain investments, dictating that a State will admit investments according to its legal rules (admission provisions). Since these provisions do not refer to specific domestic law obligations, tribunals have interpreted admission provisions differently.

For example, some tribunals have ruled that these provisions empower respondent States to invoke the defense of investor illegality.<sup>97</sup> However, other tribunals have held that these provisions do not entitle States to this defense<sup>98</sup>

93 *WA Investments-Europa Nova v. Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, para. 224. See also *Orascom v. Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 278.

94 See Thomas Obersteiner, “In Accordance with Domestic Law’ Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors”, 31 *Journal of International Arbitration* (2014) 265; Jarrod Hepburn, “In Accordance with Which Host State Laws? Restoring the ‘Defence’ of Investor Illegality in Investment Arbitration”, 5 *Journal of International Dispute Settlement* (2014) 531.

95 See *Fraport v. Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 394. See also *ECE Projektmanagement v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, para. 3.165 (referring to an “express requirement”); *Kim and others v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 370 (mentioning an “explicit legality requirement”).

96 See UNCTAD, *supra* note 32. See also *Gambrinus v. Venezuela*, ICSID Case No. ARB/11/31, Decision on Annulment, 30 October 2017, para. 201.

97 See *Inceysa v. El Salvador*, *supra* note 17, para. 224.

98 In *Alvarez y Marin v. Panama*, the tribunal found that this provision merely provided obligations for States, and not for investors (ICSID Case No. ARB/15/14, Award, 12 October 2018, paras. 119–131).

and that a clear treaty provision is necessary for the defense to be available.<sup>99</sup> Others have maintained that an implicit legality requirement stems from either admission provisions<sup>100</sup> or the ICSID Convention more broadly.<sup>101</sup>

A second example highlighting the challenges of determining when an ambiguous or vague jurisdictional provision directly refers to domestic law involves fair and equitable treatment (FET) provisions. Rarely, if ever, do these provisions expressly mention domestic law. Some elements of the minimum standard of treatment under customary international law, for FET provisions associated with it, also remain unsettled and contested within investment law.

Consequently, tribunals have varied on whether the applicable FET provision requires the incidental application of domestic law. Several tribunals have concluded that domestic law indeed influences FET claims,<sup>102</sup> generally determining that a host State's compliance with its domestic law is "implicit in the notion of unfairness."<sup>103</sup> In contrast, other tribunals have declined to interpret FET provisions as referring to an incidental question to domestic law without explicit language supporting this.<sup>104</sup>

Moreover, the second situation where a claim may require the incidental application of domestic law is based on *lacunae*. These are gaps in international law due to the absence of express rules governing a situation (*lacunae*). Certain commentators have critiqued *lacunae* by arguing, among other things, that "[o]nly adherence to an extreme form of legal positivism permits the discovery of *lacunae* within a functional legal system."<sup>105</sup>

99 The tribunal in *Stati v. Kazakhstan* concluded that the ECT's "extremely detailed definition of investment and other details regulated" set out no legality requirement, and it could not see where this requirement would come from. See SCC Case No. V116/2010, Award, 19 December 2013, para. 812. Cf. *Khan v. Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, paras. 383–384.

100 Some tribunals have held that this requirement is implicit in all investment treaties, regardless of any formulation on legality used. See *Alvarez and Marin v. Panama*, *supra* note 98, para. 135; *Ampal-American Israel Corporation v. Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016; *Fraport v. Philippines II*, *supra* note 69, para. 332.

101 See *Getma v. Guinea*, ICSID Case No. ARB/11/29, Award, 16 August 2016, para. 174; *Cortec Mining v. Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018, para. 333.

102 See Hepburn, *Domestic Law*, *supra* note 11, Ch. 2.

103 José Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law, 2011), 185; Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart, 2009), 154, 310.

104 *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 318; *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 281.

105 Douglas, *Investment Claims*, *supra* note 50, 130.

Leaving aside this academic debate, it is widely accepted that international law is incomplete in practice. Gaps exist in international law itself as a legal system,<sup>106</sup> and in investment treaties, investment contracts, and domestic investment laws. For example, the tribunal in *Mera v. Serbia* held that “[s]ince there is no definition of ‘seat’ in the ICSID Convention, nor in the BIT, and no uniform definition under international law ... the term in question must be interpreted by way of *renvoi* to municipal law.”<sup>107</sup>

To function effectively, international law fills these gaps by incorporating the rules from one or more legal systems.<sup>108</sup> Where treaties do not comprehensively or adequately address certain issues, these gaps must typically be supplemented by customary international law and general principles of international law.<sup>109</sup> In other instances, gaps in treaties and customary international law implicitly refer to, and must be supplemented by, domestic law rules. As such, “tribunals may have recourse to the law of the host State in a complementary, or ‘gap-filling’, manner.”<sup>110</sup>

In the *Barcelona Traction* case, the ICJ held that

international law has had to recognise the corporate entity as an institution created by States in a domain *essentially* within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to *refer* to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.<sup>111</sup>

106 Mariano Aznar-Gómez, “The 1996 Nuclear Weapons Advisory Opinion and *Non Liquet* in International Law”, 48 *International and Comparative Law Quarterly* (1999) 3, 18.

107 *Mera v. Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, para. 89.

108 See Robert Kolb, “Règle résiduelle de liberté en droit international public (Tout ce qui n’est pas interdit est permis)”, 34 *Belgian Review of International Law* (2001) 100, 108. See also Hepburn, *Domestic Law*, *supra* note 11, 106; Schreuer et al., *supra* note 2, 594; Sasson, *supra* note 15, xxvii.

109 See e.g. *EDF v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 899 (noting the parties’ agreement to this effect).

110 Kjos, *supra* note 15, 258–259. See also Bjorklund, *supra* note 9, 274; Jarrod Hepburn, “Applicable Law in TPP Investment Disputes”, 17 *Melbourne Journal of International Law* (2016) 349, 364–365; Kolb, *supra* note 108, 108.

111 *Barcelona Traction, Judgment*, *I.C.J. Reports 1970*, p. 4, para. 38 (emphasis added).

The Court diverged on the issue of which domestic law(s) was invoked by international law. The majority concluded that international law referred to rules on corporate entities “generally accepted by municipal legal systems.”<sup>112</sup> In his dissenting opinion, Judge Morelli postulated that international law referred instead to the rules on corporate entities of a “given State.”<sup>113</sup>

Examining this issue from the vantage point of an incidental question shows that both perspectives hold partial validity. Initially, the domestic law of the State, which governs the corporate entity, applies to recognise an institution created and maintained under that law. Subsequently, the rule of customary international law, referring to domestic law through a *lacuna*, itself determines the conformity of this domestic law with international law. In this later stage, an assessment of the generally accepted domestic laws may become relevant, such as comparing and contrasting them with the domestic law of the given State.

For example, in an expropriation claim based on NAFTA or the ECT,<sup>114</sup> the substantive treaty protection against expropriation serves as the legal foundation of the claim under international law. However, the tribunal must first incidentally apply the domestic law that governs the alleged property rights to ascertain whether these rights existed and thus could be expropriated.<sup>115</sup> This outcome remains unchanged, notwithstanding that the applicable law provisions in NAFTA and the ECT only contemplate the application of the treaty and international law.<sup>116</sup>

### 3.2.2 Ancillary Issue

The second condition for a tribunal to exercise jurisdiction over domestic law incidentally is that this law is ancillary to the claim grounded in international law. Deriving from the term “incidental”, this condition manifests itself in slightly different ways, contingent on whether the incidental question is grounded in international law or domestic law.

When an international law rule requires the application of an incidental question under *international law*, such question must retain a *supplementary*

<sup>112</sup> *Ibid.*, para. 50.

<sup>113</sup> *Barcelona Traction, Separate Opinion of Judge Morelli*, 5 February 1970, paras. 4–5.

<sup>114</sup> NAFTA, *supra* note 68, Art. 1110; ECT, *supra* note 41, Art. 13.

<sup>115</sup> See *Gavrilovic v. Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 432; *Vestey v. Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 257; *Emmis International v. Hungary*, *supra* note 85, para. 162.

<sup>116</sup> See e.g. *Bayview v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, paras. 109–118; *Mobil v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 354. See also UNCTAD, *supra* note 50, 133.



role to the claim alleging a breach of the international law rule. Failure to maintain this role would result in the incidental question falling outside the tribunal's jurisdiction.

In the case in question, when the international law rule requires the application of an incidental question under *domestic law*, this question must retain a *subsidiary* role to the claim alleging a breach of the international law rule. Otherwise, the incidental question would not give effect to the international law rule, which is hierarchically superior to it in this context. As Article 3 of the Articles on State Responsibility recognises, “[t]he characterisation of an act of a State as *internationally* wrongful is governed by international law”. Article 3 also states that “[s]uch characterisation is not affected by the characterisation of the same act as lawful by [domestic] law.”<sup>117</sup> Similarly, the Commentary to Article 3 observes that international law “determines the *scope* and *limits* of any reference to [domestic] law.”<sup>118</sup> In investment arbitration, this means that “the implications of some issues of [domestic] law for a claim under the [treaty are reserved] for international law to determine.”<sup>119</sup>

Respondent States have occasionally contended that tribunals lack jurisdiction to assess their treatment of foreign investors against their domestic laws within claims governed by international law.<sup>120</sup> At times, other States have argued that tribunals should simply accept their contentions that they have complied with their domestic law.<sup>121</sup>

However, when a claim requires that a tribunal decide incidentally on domestic law, this stipulation supersedes others in the relevant applicable law provision.<sup>122</sup> As the examples provided throughout Part 3 illustrate, a claim

<sup>117</sup> *Articles on Responsibility of States for Internationally Wrongful Acts* (November 2001), Supplement No. 10 (A/56/10), Ch. IV.E.1, Art. 3 (*Articles on State Responsibility*). The “irrelevance of internal law” pertains only to any justification by a State for the failure to comply with its international obligations: *ibid.* However, a claim based on international law can bring about an incidental question based on domestic law: James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, 2002), 94.

<sup>118</sup> Crawford, *supra* note 117, 38 (emphasis added). The Commentary also notes that “the provisions of internal law ... [can be] incorporated in some form, *conditionally* or *unconditionally*, into that [international] standard” (*ibid.*) (emphasis added).

<sup>119</sup> *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 72 (emphasis omitted).

<sup>120</sup> See e.g. *Bilcon v. Canada*, UNCITRAL, PCA Case No. 2009-04, Application for Set Aside, 16 June 2015, paras. 144–146, 198–200.

<sup>121</sup> See e.g. *TECO v. Guatemala*, ICSID Case No. ARB/10/23, Guatemala's Memorial on Annulment, 17 October 2014, paras. 89–179.

<sup>122</sup> See Hepburn, *Domestic Law*, *supra* note 11, 107; Douglas, “Hybrid Foundations”, *supra* note 7, 196.

based on a jurisdictional provision, not the applicable law provision, establishes an incidental question, including the corresponding domestic law.<sup>123</sup> Therefore, the *specific* stipulation in the claim concerning the incidental application of domestic law prevails over the *general* stipulation in the applicable law provision about the law applicable to the dispute, in accordance with the *lex specialis* principle.<sup>124</sup> In essence, an applicable law provision typically has no bearing on determining the legal foundation of an incidental question.

Furthermore, the grounds available for challenging an arbitral award confirm that a tribunal can only apply domestic law incidentally when a claim grounded in international law makes this application both necessary and ancillary.<sup>125</sup> For instance, a tribunal would commit an “excess of power” if it failed to exercise jurisdiction over a claim by refusing to apply domestic law incidentally where necessary, irrespective of whether the applicable law provision anticipates this incidental application.<sup>126</sup> Conversely, a tribunal would also commit an “excess of power” by applying domestic law as a claim when it only had jurisdiction to apply it as an incidental question, regardless of the applicable law provision’s content.<sup>127</sup>

The case of *Bilcon v. Canada* shows that both conditions of a necessary and ancillary issue must be met. To determine whether Canada breached NAFTA’s FET provision, the tribunal first assessed Canada’s compliance with its domestic environmental framework (*i.e.*, the necessary condition), even if NAFTA’s applicable law provision did not anticipate the application of domestic law.<sup>128</sup> The majority held that non-compliance with domestic law would not in itself amount to a breach of the minimum standard of treatment, which was the claim grounded in international law in this case (*i.e.*, the ancillary condition).

123 See *Oostergetel v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 140.

124 Bartels, *supra* note 14, 117. According to the principle of *lex specialis* in domestic law and international law, when two rules govern the same scenario, the rule on a specific subject matter supersedes the rule on the more general matter: *Beagle Channel Arbitration (Argentina v. Chile)*, I.L.R. Vol. 52 (1979), p. 141, paras. 36, 38 and 39; *Articles on State Responsibility*, *supra* note 117, Art. 55.

125 ICSID Convention, Art. 52(1)(b); New York Convention, Art. V(1)(c). See *Tulip Real Estate and Development v. Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 58.

126 A tribunal manifestly exceeds its powers, among others, if it fails to exercise jurisdiction where it exists or to apply the proper law. See *Vivendi v. Argentina I*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 86.

127 In this case, a tribunal cannot sit as a “supreme court” on domestic law issues or seek to establish breaches of domestic law *per se*: see *Azinian v. Mexico*, ICSID Case No. ARB[AF]/97/2, Award, 1 November 1999, para. 99.

128 *Bilcon v. Canada*, PCA Case No. 2009-04, 17 March 2015, Award on Jurisdiction and Liability, paras. 588–604.

On the facts, however, the “fundamental departure from the methodology required by Canadian ... law” did breach the international standard.<sup>129</sup>

When Canada sought to set aside the award based on the tribunal’s domestic law ruling, the Canadian Federal Court rejected the application. The Court opined that “the Tribunal’s discussion of domestic law was *incidental* to the main issues that were before it, and did not constitute an excess of jurisdiction.”<sup>130</sup>

### 3.3 *Procedural Treatment of Domestic Law*

The application of domestic law as an incidental question leads to a question regarding its procedural treatment, particularly the manner of establishing and interpreting domestic law.

#### 3.3.1 Proof

As stated earlier, the PCIJ held in *Certain German Interests* that domestic law is “merely facts” from the standpoint of international law.<sup>131</sup> Consequently, the Court could “apply” domestic law to assess its compliance with international law without necessarily “interpreting [it] as such.”<sup>132</sup>

The approach of treating domestic law as fact instead of law, which has since been replicated in investment arbitration,<sup>133</sup> echoes one of the century-old approaches within private international law towards the procedural treatment of foreign law. In many jurisdictions, foreign law is treated as fact. It thus falls outside of court notice, and rulings made on it at the trial court level are binding upon appellate courts. In contrast, in a handful of jurisdictions, foreign law is considered as law. Therefore, it can be examined *ex officio* by the domestic courts according to the principle of *iura novit curia*, and rulings on it are subject to judicial review by appellate courts.

However, the approach to treating foreign law in litigation within domestic courts is ill-suited for transposition to the incidental application of domestic law within international courts and tribunals. Instead, such application is guided by the principles of evidence and procedure relevant to these courts and tribunals.

129 *Ibid.*, paras. 594, 600. Cf. *Bilcon v. Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, 17 March 2015, paras. 42–43 (arguing that the majority’s approach has introduced the potential for getting damages for what is *in effect* a breach of domestic law, and this is not what the NAFTA intended to do).

130 *Canada v. Clayton*, *supra* note 3, para. 106.

131 *Certain German Interests (Merits)*, *supra* note 4, 19.

132 *Ibid.*

133 See *supra* note 3.

Significantly, the burden of invoking and proving domestic law is not contingent on distinguishing fact from law. Rather, it depends on whether the proof pertains to the tribunal's jurisdiction, or its decision on the substance of such jurisdiction.

First, when it comes to a tribunal's *jurisdiction* over an incidental question, domestic law may be more aptly (although not perfectly) regarded as law. This is because it can be considered *ex officio* by the tribunal and is subject to review by domestic courts and *ad hoc* annulment tribunals. The positive effect of the *compétence-compétence* principle entails that an international tribunal must rule on its jurisdiction, including on any incidental application of domestic law, even without a jurisdictional challenge.<sup>134</sup>

As the ICJ pointed out in the *Fisheries Jurisdiction* case,

establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it ... this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts'. That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Instead, it is for the Court to determine from all the facts and take into account all the arguments advanced by the Parties.<sup>135</sup>

Nevertheless, a tribunal will typically heavily depend on the parties' assistance to determine whether it has jurisdiction to apply domestic law as an incidental question, much like a tribunal would do for facts. This is due to the limited scope of the *iura novit arbiter* principle in international arbitration, particularly when this principle relates to a source of law other than international law.

Second, when it comes to a tribunal's decision *in substance* on an incidental question, domestic law may be more aptly (although not perfectly) viewed as fact. This is because the parties plead domestic law, and any misapplication of it is typically not subject to the review of domestic courts or *ad hoc* annulment tribunals.

Moreover, each party bears the burden of proving its facts and arguments in international arbitration.<sup>136</sup> The party carries "the burden of proof for the conditions required in the applicable substantive rules of law to establish the

<sup>134</sup> ICSID Convention, Art. 41(1); UNCITRAL Arbitration Rules, Art. 23.

<sup>135</sup> *Fisheries Jurisdiction, Judgment, 4 December 1998, I.C.J. Reports 1998*, p. 432, paras. 37–38 (internal citations omitted).

<sup>136</sup> See ICSID Convention, Art. 36(2); UNCITRAL Arbitration Rules, Art. 27(1).

claim [or defence]”,<sup>137</sup> including any domestic law that the substantive rules might incidentally refer to. In practice, the parties often hire domestic lawyers or jurists to provide expert evidence on domestic law.<sup>138</sup>

However, while a tribunal is only required to decide the claim within the bounds of the parties’ request,<sup>139</sup> it holds the power to decide all issues brought forth by this claim.<sup>140</sup> This includes the ability to apply the law applicable to an incidental question to the facts, as the tribunal deems appropriate, much like a tribunal would do for law.

### 3.3.2 Interpretation

The proposition indicating that the procedural treatment of domestic law is subject to the procedural principles applicable to the tribunal underlines how tribunals ought to decide or interpret domestic law.

Certain investment tribunals have ruled that domestic law, acting as a fact and not part of the “governing law”, does not require interpretation “as such.”<sup>141</sup> In these cases, tribunals have correctly determined that domestic law does not serve as the legal foundation of a claim. Tribunals have seemingly referred to domestic law as fact to avoid a direct conflict with the relevant applicable law provisions, which contemplate the application of international law alone.

Nevertheless, the domestic-law-as-fact approach understates domestic law’s role as “applicable law” that calls for legal interpretation. In contrast, the concept of an incidental question grounded in domestic law fully acknowledges this reality. As the tribunal in *SPP v. Egypt* pointed out, “the contention that municipal law should be treated as a fact is not helpful. When parties are in fundamental disagreement as to what a provision of domestic law means, the tribunal must interpret that provision.”<sup>142</sup> Several tribunals have likewise acknowledged the “broader role” of domestic law: it extends beyond merely

137 *Middle East Cement v. Egypt*, *supra* note 81, para. 89. See also *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 121.

138 See *Enron v. Argentina*, *supra* note 104, para. 206; Hepburn, *Domestic Law*, *supra* note 11, Ch. 4.

139 See the principle of *non ultra petita* (“not beyond the request”): *Arrest Warrant of 11 April 2000*, *Judgment*, I.C.J. Reports 2002, p. 3, para. 43.

140 See the principle of *iudex decidere debe* (“the judge should decide”): *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, *Advisory Opinion*, I.C.J. Reports 1973, p. 166, para. 41.

141 See *Alps Finance v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, para. 197.

142 *SPP v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 541.

determining factual matters, because the relevant domestic principles and rules define its content and scope.<sup>143</sup>

Moreover, the concept of an incidental question informs a tribunal on how to interpret domestic law, including whether to follow or diverge from domestic court interpretations. Initially, a tribunal must endeavour to apply domestic law as it is applied by the State's highest courts, aligning with its interpretative authorities.<sup>144</sup> As the PCIJ stated in the *Brazilian Loans* case, it “would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force”.<sup>145</sup>

Nonetheless, a tribunal maintains its independent interpretative power over domestic law within its jurisdiction to adjudicate the claim grounded in international law. This means a tribunal retains the capacity to interpret domestic law even when this law is “uncertain or divided”,<sup>146</sup> and is not “bound” *per se* by particular domestic court rulings. For instance, a tribunal may overlook these rulings under special circumstances where adherence would conflict with a well-established rule of international law, as in the case of a denial of justice.<sup>147</sup>

Finally, the concept of an incidental question clarifies the value of domestic law interpretation within and beyond the specific arbitral procedure.<sup>148</sup> Notably, a tribunal's determination on the content of an incidental question grounded in domestic law generally remains immune from the challenges of the arbitral award resulting from a failure to apply the proper law.<sup>149</sup>

In the same vein, this determination is legally binding only for the disputing parties, and not for the State's domestic courts. As expressed in the *Chorzów Factory* case, the PCIJ's affirmation of a right of ownership under domestic law impacted only the States involved in that specific international proceeding. The Court's decision on the existence of a property right did not constitute *res judicata* for proceedings within the domestic courts of the State.<sup>150</sup> Indeed,

143 *Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 39; *Enron v. Argentina*, *supra* note 104, para. 206.

144 *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, para. 96; *Victor Pey v. Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para. 68.

145 *Brazilian Loans*, P.C.I.J. Series A, No. 21, Judgment, 12 July 1929, p. 124.

146 *Ibid.*

147 See e.g. *América Móvil v. Colombia*, ICSID Case No. ARB(AF)/16/5, Award, 7 May 2021, paras. 345–347.

148 See Chernykh, *supra* note 65, 361–375.

149 *Soufraki v. United Arab Emirates*, *supra* note 144, para. 97.

150 See Jenks, *supra* note 1, 71.

an international tribunal's incidental determination of domestic law does not achieve *res judicata* status for proceedings before a domestic court based on a different cause of action.<sup>151</sup> This is because one of the three prerequisites for the doctrine to apply, especially the prerequisite that the proceedings share the same subject-matter, is not met.

#### 4 Conclusion: Jurisdiction to Adjudicate Domestic Law through Revised Provisions and Interpretations

This article has outlined the source of tribunals' jurisdiction to adjudicate a claim and an incidental question grounded in domestic law, shaped by the stipulations concerning domestic law in jurisdiction provisions and jurisdictional provisions determining a tribunal's personal, material, or temporal scope of jurisdiction. This analysis suggests that an applicable law provision often plays a smaller role in defining the laws pertinent to an investment dispute than the conventional applicable-law-provision and domestic-law-as-fact approaches suggest.

Recent scholarly debate has questioned whether variations in the formulation of applicable law provisions significantly influence tribunals' jurisdiction to apply domestic law.<sup>152</sup> Some commentators argue that "not much authority" should be given to such provisions because they outline only rarely the legal foundation of permissible claims and incidental questions.<sup>153</sup>

Given the considerations elaborated in Parts 2 and 3, the drafters of constitutive instruments might consider incorporating the following stipulations regarding the application of domestic law in jurisdiction provisions, jurisdictional provisions, and applicable law provisions, to ensure maximum effectiveness.

Firstly, those drafters aiming to limit the legal foundation of permissible claims – for instance, by excluding claims under domestic law – should express this limitation in a narrowly defined jurisdiction provision. Such a provision should avoid granting a tribunal jurisdiction over "any" or "all" disputes related to the constitutive instrument. Instead, it should specify that a tribunal's jurisdiction is exclusively over claims for breaches of the instrument's substantive protections grounded in international law. Using the term "claim" in a

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<sup>151</sup> See generally Bermann, *supra* note 17.

<sup>152</sup> Jan Dalhuisen and Andrew Guzman, "The Applicable Law in Foreign Investment Disputes", 8 *World Arbitration & Mediation Review* (2014) 229, 232–233.

<sup>153</sup> *Ibid.*, 248.

jurisdiction provision will clarify that the respondent State's conduct will be evaluated against the substantive protections. For example, some US treaties include narrow jurisdiction provisions listing exclusively different legal foundations of claims that can be submitted for arbitration, accompanied by narrow applicable law provisions specifying the law applicable to each foundation of the claim.<sup>154</sup>

Secondly, drafters wishing to limit the application of domestic law as an incidental question –for instance, by excluding the incidental application of domestic law in FET claims – should do so in a jurisdictional provision rather than an applicable law provision. As demonstrated, while the applicable law provision in NAFTA does not encompass domestic law, NAFTA tribunals have frequently applied domestic law incidentally on issues such as property rights.<sup>155</sup> Some critics argue that the style of the applicable law provisions in NAFTA, the ECT, and similar treaties is “impractical” and “not advisable.”<sup>156</sup> They suggest that it puts a tribunal in an uncomfortable position of having to choose between the explicit language of the applicable law provision (which excludes the application of domestic law) and the implicit meaning of jurisdictional provisions (which requires the incidental application of domestic law).<sup>157</sup>

Instead, a jurisdictional provision should provide detailed stipulations about the incidental application of domestic law, because it is the provision that directly refers to or leaves a *lacuna* to domestic law. The jurisdictional provision should indicate, through explicit reference or exclusion, the connecting factors relevant to the incidental application or exclusion of domestic law.<sup>158</sup>

For example, the definition of a “foreign investor” should clarify how the home State's domestic law on nationality applies. The definition of an “investment” should outline how property rights are to be established and maintained under the host State's domestic law.<sup>159</sup> Substantive protections grounded in international law, such as the FET and expropriation standards, should prescribe rules of domestic law that may be relevant incidentally.

Despite this, the jurisdictional provisions of recently negotiated treaties rarely identify incidental issues under domestic law. For instance, the

154 See e.g. Morocco-United States FTA (entered into force 1 January 2006), Arts. 10.15 and 10.21.

155 See e.g. *Bayview v. Mexico*, *supra* note 116, paras. 109–118; *Mobil v. Canada*, *supra* note 116, para. 354.

156 Schreuer et al., *supra* note 2, 562.

157 *Ibid.*

158 Atanasova, *supra* note 46, 26.

159 *Ibid.*



Comprehensive Economic and Trade Agreement's (CETA) complex FET provision does not explicitly mention the incidental application of domestic law, even though it appears to imply it. However, CETA defines "an enterprise of a Party" through an explicit reference to domestic law, as "an enterprise that is constituted under the laws of that Party".<sup>160</sup>

Thirdly, drafters of constitutive instruments who intend to stipulate how the parties must prove domestic law and how a tribunal must interpret it should incorporate these points in an applicable law provision. Certain constitutive instruments include stipulations about the legal foundation of permissible claims in their applicable law provisions.<sup>161</sup> However, these stipulations can sometimes be ineffective, such as where jurisdiction provisions prevail over them pursuant to the severability doctrine. They can also sometimes be redundant, such as where jurisdiction provisions mirror them. In either case, applicable law provisions typically remain silent on the crucial issues of how to prove and interpret the laws applicable in investment disputes, including domestic law.

Even the newly negotiated applicable law provisions by a few States, such as those in the Colombia-Canada FTA<sup>162</sup> and the CETA,<sup>163</sup> establish only with moderate accuracy how domestic law should be proven and interpreted incidentally. For instance, the CETA provides that "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*."<sup>164</sup> According to the European Commission, this provision is intended to "further guarantee[ing] that the autonomy of the EU legal order is fully preserved."<sup>165</sup> It safeguards the CJEU's exclusive jurisdiction over the application of EU law by preventing the application of domestic law (including EU law) as the legal foundation of a claim.<sup>166</sup> The term "fact" in this provision was also likely included as a political tool to appease States concerned that international tribunals might be authorised to apply their domestic laws.<sup>167</sup>

However, as shown earlier, the stipulations about the legal foundation of permissible claims are found primarily in the jurisdiction provision of an

160 See CETA, *supra* note 5, Art. 8.1. Similarly, EU-Vietnam Treaty, *supra* note 5, Art. 1.2(b).

161 Atanasova, *supra* note 46, 21.

162 Canada-Colombia FTA (entered into force 15 August 2011), Art. 832, footnote 10.

163 CETA, *supra* note 5, Art. 8.31(2)

164 *Ibid.* (emphasis added).

165 Commission's Reading Guide on the draft TTIP Agreement, Memo, 16 September 2015, Brussels, B.ii.

166 Jarrod Hepburn, "CETA's New Domestic Law Clause" (17 March 2016, *EJIL: Talk!*).

167 Hepburn, *Domestic Law*, *supra* note 11, 367.

investment treaty. The domestic-law-as-fact approach also fails to accurately describe how domestic law must be proven and applied incidentally. Relying on the applicable law provision in CETA mentioned above, the CJEU held in Opinion 1/17 that this type of provision does not authorise a tribunal to “interpret” domestic law (including EU law) but rather merely to “take [domestic law] into account as a matter of fact.”<sup>168</sup> This stipulation led the Court to deny the normative value of domestic law in a dispute and reject that a tribunal must “apply” and “interpret” domestic law.

Instead, the new style of applicable law provisions should specify that domestic law applies as an incidental question – and perhaps also as a “legal fact”. This implies that the parties should typically plead and prove the incidental application of domestic law, while the tribunal should interpret it as a law.<sup>169</sup> Furthermore, the new style of applicable law provisions should state that domestic law may be applied incidentally where a treaty’s jurisdictional provision makes this “ancillary” and “necessary” (and not simply “as appropriate”, as in CETA) to a claim grounded in international law.<sup>170</sup>

The proposed drafting of jurisdiction provisions, jurisdictional provisions, and applicable law provisions outlined above can address certain issues concerning the application of domestic law encountered by an investment tribunal. Nevertheless, these drafting recommendations can only foresee some of the situations where a tribunal possesses the jurisdiction to adjudicate a claim and an incidental question grounded in domestic law.

As underscored in this article, tribunals already hold such jurisdiction under existing constitutive instruments. It remains their responsibility to judiciously exercise this jurisdiction in various scenarios requiring it. In this context, tribunals should refrain from leaning on the conventional applicable-law-provision and the domestic-law-as-fact approaches, considering they are not entirely accurate.

Above all, tribunals must implement their jurisdiction to apply domestic law through a stringent and transparent approach. Failing to do so, they risk destabilising the bedrock of the investment arbitration “system”, which is, and has always been, rooted in consent.

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168 *UE-Canada CET Agreement*, Opinion 1/17 [2019] ECLI:EU:C:2019:341, para. 131 (Opinion 1/17).

169 See Hepburn, *Domestic Law*, *supra* note 11, Ch. 4.

170 CETA, *supra* note 5, Art. 8.31(2).

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