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Jean Ho,

Eric de Brabandere,

Yuliya Chernykh,

Dominic Dagbanja,

Aikaterini Florou,

Gabriel Lentner,

Daniel Peat,

and Facundo Perez Aznar

Academic Forum Working Group Paper

27 March 2024

Citation: *Academic Forum*, 27 March 2024. Eric de Brabandere, Yuliya Chernykh, Dominic Dagbanja, Aikaterini Florou, Gabriel Lentner, Daniel Peat, Facundo Perez Aznar. 'The Role of Domestic Law in Investment Dispute Settlement', Academic Forum on ISDS Concept Paper 2024/1, 27 March 2024

Academic Forum on ISDS Website:

<https://www.jus.uio.no/ior/english/research/projects/copiid/academic-forum/>

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THE ROLE OF DOMESTIC LAW IN INVESTMENT DISPUTE SETTLEMENT

*Jean Ho (Convenor), Eric de Brabandere, Yuliya Chernykh, Dominic Dagbanja,
Aikaterini Florou, Gabriel Lentner, Daniel Peat, Facundo Perez Aznar*

I. INTRODUCTION

1. This paper identifies and discusses the pervasive role and relevance of domestic law during the three key phases of investment dispute settlement under investment treaties. These three key phases are the admissibility/jurisdiction phase, the merits phase, and the enforcement and annulment phase. A survey of existing trends and findings reveals that while the application of domestic law is pervasive in investment dispute settlement, the extent to which an outcome turns on domestic law depends on the specific context in which that domestic law was applied. To showcase these variations, the discussion in the rest of this paper is structured as follows:

II. References to domestic law in investment treaties

III. The admissibility/jurisdictional phase in investment treaty arbitration

- i. Pre-arbitration requirements
 - a. Fork-in-the-road provisions
 - b. Exhaustion of local remedies
- ii. The nationality of a protected investor
- iii. The legality of a protected investment
- iv. The existence of a protected investment
- v. The validity of European Union Members' submission to arbitration in intra-EU investment treaties

IV. The merits phase in investment treaty arbitration

- i. Attribution
- ii. Expropriation claims
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 - a. National Treatment (“NT”) claims

- b. Most-Favoured-Nation (“**MFN**”) claims
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 - a. Limited liability clauses
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- V. The enforcement and annulment phase in investment treaty arbitration
 - i. Enforcement
 - a. Enforcement procedures and domestic law
 - b. Enforcement of investment treaty awards under EU law
 - ii. Annulment (Art. 52 ICSID Convention)

II. REFERENCES TO DOMESTIC LAW IN INVESTMENT TREATIES

2. Domestic law is commonly referenced in investment treaties either explicitly and/or (at least) implicitly. Explicit references typically relate to the nationality of the investor, the definition of an investment, the requirement that the investment be made ‘in accordance with host state laws’, the applicable law of the treaty itself and other miscellaneous references.
3. With regards to the definition of *investment* in investment treaties, they often refer to every kind of asset invested in accordance with the laws and regulations of a contracting state, including rights and interests protected under domestic law.¹ For example, the Argentina-Japan bilateral investment treaty (“**BIT**”) defines investment to include “licences, authorisations, permits and similar rights conferred pursuant to the laws and regulations” of the host state – as many BITs do.² Whether any of these constitute an investment depends on the nature and the extent of the rights that the investor holding such right or interest has under the laws and regulations of the host state. Even without such explicit references, international (investment) law accords protection of property rights that are themselves a creature of domestic law. Here, the weight and deference given to domestic law in determining whether a protected investment exists or not varies in practice.³ In terms of scope,

¹ Steven Ratner, ‘International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows’ (2020) 21(1) *Journal of World Investment and Trade* 7, 23. See also *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 204; *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) paras 138-140. See Section III(iii), *infra*, for a more detailed discussion on the legality of protected investments in accordance with domestic law.

² Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018, not yet in force) (‘**Argentina-Japan BIT**’) art 1(a)(vii).

³ *Perenco Ecuador Ltd v Ecuador*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014) para 522. See also *Biloune and Marine Drive Complex LTD v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989) paras 207-208. *Saipem SpA v People’s Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Provisional Measures (21 March

the treaties apply to investments made in the host country in accordance with its laws and regulations.

4. As regards the qualification as an *investor*, investment treaties generally require that a corporate entity be organised or constituted in accordance with domestic law⁴ or have its seat in the territory of a contracting state.⁵
5. There are also other miscellaneous explicit domestic law references found in a number of investment treaties. For example, provisions requiring public availability and publication of domestic laws, regulations, administrative procedures, administrative rulings, judicial decisions⁶ and for states to ensure that measures and efforts are undertaken in accordance with their laws and regulations to prevent and combat corruption relating to covered investments.⁷ The explicit references also include provisions granting the right to the transfer of funds.⁸
6. Some investment treaties also explicitly refer to domestic law as part of the applicable substantive law, along with the treaty and international law.⁹
7. The domestic law references in investment treaties vary widely in their function and nature. In one way or the other, these references empower arbitral tribunals to interpret and/or apply domestic law in a specific context, at times for establishing jurisdiction, to determine the nationality of investors or the existence of (or extent of the rights to) protected investments, besides other issues. However, investment treaties do not provide for tribunals assuming the role of domestic courts or other administrative tribunals. Evidence for the importance of this sensitive issue for states is the recent

2007) para 124. See also *Nagel v Czech Republic*, SCC Case No 049/2002, Final Award (9 September 2003) paras 296 and 298.

⁴ Argentina-Japan BIT (n 2) art 1(e).

⁵ See e.g. Treaty between the Federal Republic of Germany and the Republic of Madagascar on the Mutual Encouragement and Protection of Investments (signed 1 August 2006, entry into force 17 October 2015) (**'Germany-Madagascar BIT'**) art 1(3)(a); Agreement between the Federal Republic of Germany and the Government of the Republic of Guinea on the Promotion and Reciprocal Protection of Investments (signed 8 November 2006, entry into force 14 October 2014) (**'Germany-Guinea BIT'**) art 1(3)(b).

⁶ Argentina-Japan BIT (n 2) art 8; Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (signed 14 February 2018, entry into force 15 May 2019) (**'Armenia-Japan BIT'**) art 8; Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (signed 14 January 2019, entry into force 28 September 2019) (**'Belarus-Hungary BIT'**) art 11; and Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments (signed 12 June 2018, entry into force 23 August 2019) (**'Canada-Moldova BIT'**) art 12.

⁷ Argentina-Japan BIT (n 2) art 9; and Armenia-Japan BIT (n 6) art 11.

⁸ Argentina-Japan BIT (n 2) art 14; Armenia-Japan BIT (n 6) art 15; Belarus-Hungary BIT (n 6) art 7; and Canada-Moldova BIT (n 6) art 11; Indonesia-Australia Comprehensive Economic Partnership Agreement (signed 4 March 2019, entry into force 5 July 2020) art 14.9; United States-Mexico-Canada Agreement (signed 30 November 2019, entry into force 1 July 2020) art 14.9.

⁹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (signed 11 December 1990, entry into force 19 February 1993) (**'Argentina-United Kingdom BIT'**).

inclusion of provisions seeking to safeguard the right to regulate in investment treaties based on references to domestic law.¹⁰

8. The explicit and implicit reference to domestic law in investment treaties reinforces the idea that states envisage the continuous intersection of domestic law and investment treaties in the regulation of foreign investment.

III. THE ADMISSIBILITY/JURISDICTIONAL PHASE

i. Pre-arbitration requirements

a. *Fork-in-the-road provisions*

9. Fork-in-the-road provisions provide that investors must choose between the litigation of their claims in the host state's domestic courts or through international arbitration and that the choice, once made, is final. The rationale of the provisions is to avoid parallel claims. This type of provision appears in an important number of international investment agreements.¹¹ An example of a fork-in-the-road provision can be found in Art. 8(2) of the France-Argentina BIT, which establishes that an investor's claim:

shall, at the request of the investor, be submitted: -Either to the domestic courts of the Contracting Party involved in the dispute; - Or to international arbitration [...] Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final.¹²

10. When applying fork-in-the-road provisions, tribunals generally followed two approaches. Under the first approach, tribunals have held that the loss of access to international arbitration under a fork-in-the-road clause applies only if the same dispute involving the same cause of action between the same parties has been submitted to the domestic courts of the host state (the so-called triple identity test).¹³ Under the second approach, tribunals have adopted a broader perspective, merely

¹⁰ Canada's 2021 Foreign Investment Promotion and Protection Agreement ('**Canada Model BIT**') arts 3, 16.

¹¹ According to the UNCTAD Investment Hub <investmentpolicy.unctad.org> (accessed 29 February 2024), fork-in-the-road clauses appear in 582 out of 2584 mapped international investment agreements.

¹² Agreement between the Government of the Argentine Republic and the Government of the French Republic on the Promotion and Reciprocal Protection of Investments (signed 3 July 1991, entry into force 3 March 1993) ('**France-Argentina BIT**') art 8(2).

¹³ See e.g. *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Jurisdiction (17 July 2003) para 80; *Pey Casado and Pr sident Allende Foundation v Republic Chile*, ICSID Case No ARB/98/2, Decision on

examining whether the ‘fundamental basis’ of the claims brought before the local court was the same as the fundamental basis of the arbitration claims.¹⁴

11. Tribunals have analysed domestic law to determine what type of test should be applied and what kind of disputes could activate the fork-in-the-road clauses. The analysis of national legislation was relevant, for instance, to determine whether an investor had made a free choice between national and arbitral tribunals.¹⁵ The analysis of the internal legal system was also relevant to determine whether a triple identity test could be applied in a particular case, because national legal systems do not commonly provide for the state to be sued in respect of a breach of treaty as such. Consequently, it was considered that a strict application of the triple identity test would deprive the fork-in-the-road provision of its practical effects.¹⁶

b. Exhaustion of local remedies

12. The exhaustion of local remedies (i.e. the seeking of redress for a harm allegedly caused by a state within its domestic legal system before pursuing international proceedings) or the resort to them for a period of time prior to arbitration is a precondition to arbitration that can be included in international investment agreements. Nonetheless, very few cases involve investment agreements that require the exhaustion of local remedies before submitting a claim to Investor-State Dispute Settlement (“ISDS”).¹⁷ Where investment agreements include a ‘exhaustion of local remedies’ requirement, it is often limited only to a specific time period (quite often 18 months). For example, the Argentina-United Kingdom BIT (1990) provides that disputes between an investor and the host state “shall be submitted to international arbitration... where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made.”¹⁸

the Application for Annulment (18 December 2012) para 486; *FREIF Eurowind Holdings Ltd v Kingdom of Spain*, SCC Case No 2017/060, Award (8 March 2021) paras 419-20.

¹⁴ See e.g. in *Pantechniki SA Contractors and Engineers v Albania*, ICSID Case No ARB/07/21, Award (28 July 2009) paras 61-7; *H&H Enterprises Investments, Inc. v Arab Republic of Egypt*, ICSID Case No ARB 09/15, Award (6 May 2014) para 368; and *Supervisión y Control S.A. v Republic of Costa Rica*, ICSID Case No ARB/12/4, Award (18 January 2017) para 330.

¹⁵ *Occidental Exploration and Production Company v Ecuador*, LCIA Case No UN3467, Award (1 July 2004) para 60.

¹⁶ See e.g. *Libananco Holdings Co Limited v Turkey*, ICSID Case No ARB/06/8, Award (31 August 2011) para 548; *Chevron Corporation and Texaco Petroleum Company v Ecuador*, PCA Case No 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) paras 4.77-4.89; *Nissan Motor Co., Ltd. v Republic of India*, PCA Case No 2017-37, Decision on Jurisdiction (29 April 2019) para 216.

¹⁷ According to the UNCTAD Investment Hub <investmentpolicy.unctad.org> (accessed 29 February 2024), the requirement to resort first to local tribunals appeared in 89 out of 2584 mapped international investment agreements.

¹⁸ Argentina-United Kingdom BIT (n 9) art 8(2)(a)(i). For more recent examples, see Treaty between the Republic of Belarus and the Republic of India on Investments (signed 24 September 2018, not yet in force) (‘**India-Belarus BIT**’) art 15.2; and India-Taiwan Province of China BIT (signed 18 December 2018, not yet in force) art 15.4(b), where the parties have agreed to five-year and four-year ‘exhaustion of local remedies’ requirement, respectively.

13. Arbitral tribunals often interpret local legislation when analysing local litigation provisions.¹⁹ In some cases, tribunals have analysed in detail local legislation and the particularities of local proceedings and claims brought by investors or their subsidiaries before local courts to determine whether the 18 months provision had been complied with.²⁰ In other cases, tribunals have analysed whether the requirement to resort to local tribunals for a period of time could be disregarded because it was futile to do so.²¹ In the latter type of cases, some tribunals have considered it necessary to analyse “whether the municipal system of the respondent State is reasonably capable of providing effective relief” and considered that this “must be determined in the context of the local law and the prevailing circumstances.”²²

ii. The nationality of a protected investor

14. An important, if not fundamental requirement for an international investment agreement to apply, and for an arbitral tribunal established under such treaty to have jurisdiction, is that the investment must have been made by an investor within the meaning of the investment agreement, and that the investor must be a “national” of the contracting state other than the Respondent State party to the dispute. Nationality is typically defined differently for natural persons and legal persons in international investment treaties.

15. Natural persons usually are defined as nationals of a state by reference to the fact that they have the nationality of a state party to the treaty, sometimes with the explicit reference to the fact that the nationality needs to be “in accordance with the law” of one of the Contracting States.²³ The nationality of natural persons is thus determined by the law of the state whose nationality is at issue. Investment agreements, in doing so, operate a *renvoi* to the domestic legislation of the State

¹⁹ Facundo Pérez Aznar, ‘Local Litigation Requirements in International Investment Agreements’ (2016) 17 Journal of World Investment & Trade 536.

²⁰ See e.g. *TSA Spectrum de Argentina SA v Argentina*, ICSID Case No ARB/05/5, Award (19 December 2008) para 112; *Philip Morris Brands SARL and others v Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) para 113; *Teinver SA and others v Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) paras 132-136; and *Ömer Dede and Serdar Elhüseyni v Romania*, ICSID Case No ARB/10/22, Award (5 September 2013) paras 241 and 249.

²¹ See e.g. *BG Group v Argentine Republic*, UNCITRAL, Final Award (24 December 2007) para 157; *Abaclat and ors v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction (4 August 2011) para 589.

²² *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) para 609. See also *Alemanni and others v Argentine Republic*, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) para 316; and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) paras 135, 152 and 202.

²³ Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic (signed 20 October 1992, entry into force 01 October 1994) (‘**Argentina-Netherlands BIT**’); US Model Bilateral Investment Treaty (2012) art 1.

concerned. The “general principle [that] it is for each State to decide in accordance with its law who is its national”, has been considered to be “a well established principle of international law.”²⁴

16. Art. 25 ICSID Convention contains the requirement that the dispute brought under ICSID is a dispute between a “national of one contracting State” and “another contracting State”. National of one contracting State’ is defined for natural persons, as “any natural person who had the nationality of a Contracting State other than the State party to the dispute”. Here too, the determination of nationality is made by reference to the domestic law of the state of the investor whose nationality is at issue.
17. Arbitral tribunals are thus required to apply domestic law for the assessment of the existence of the nationality of a certain natural person. This may require arbitral tribunals to analyse whether the nationality requirements under domestic law are met. However, arbitral tribunals may also, aside from the application of domestic law in assessing the existence of nationality, be required to assess the effectiveness of a given nationality, in light of the applicable norms of international law. This has been discussed in the case of the possible application of the ‘effective nationality’ test²⁵ or in the case of dual nationality of investors who are natural persons.²⁶
18. As far as legal persons are concerned, investment treaties may use different criteria, such as the place of incorporation, the seat or head office of the corporation, or the persons controlling the company. In some instances, nationality of legal persons is defined also through the controlling shareholders.²⁷ Art. 25 ICSID Convention requires legal persons to have the “nationality of a Contracting State other than the State party to the dispute” without setting any criteria to identify nationality. Art. 25 ICSID Convention does allow the parties to treat a company incorporated in the host state as a national of another state “because of foreign control”. In the latter case, a company incorporated in the host state may thus be considered a national of the home state, if the parties have agreed to this, for example, in the applicable investment treaty.
19. As with natural persons, irrespective of the finding that under the domestic law of a given State a corporate investor has the nationality of that State, general international law, the applicable investment agreements, or the ICSID Convention can pose limits. This is the case, for example,

²⁴ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 86. See also United Nations, ‘Draft Articles on Diplomatic Protection’ (2006) 2(2) Yearbook of the International Law Commission art 4. See also section on commentary to art 4 at paras 1-2.

²⁵ See e.g. *Micula v Romania* (n 23) para 100.

²⁶ See e.g. *Dawood Rawat v The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction (6 April 2018) para 172.

²⁷ E.g. *Argentina-Netherlands BIT* (n 22).

when the nationals controlling the legal person are of the same nationality as the Respondent in an investment dispute.²⁸

iii. The legality of a protected investment

20. Many international investment treaties contain so-called ‘legality requirements’ or ‘in accordance with the law’ provisions (i.e. provisions which require investments to have been made in accordance with domestic law).²⁹ Certain tribunals have over the past years read such a requirement into investment treaties even in the absence of such a clause.³⁰ Such a requirement, whenever express or implied, unequivocally requires the application of domestic law to assess the conformity of the investment with that legislation.
21. When such a clause is added to an investment agreement, the non-fulfilment of obligations under domestic law may – depending on the precise formulation of the relevant text of the treaty – impact the admissibility of claims based on the treaty, or the existence of a covered investment for the purposes of the treaty and the jurisdiction of the tribunal. The general idea behind such clauses is to bar the application of the treaty to investments made in breach of the host state’s legislation,³¹ and as a consequence, bar an arbitral tribunal from establishing jurisdiction to hear a claim based on an ‘illegal’ investment. Legality requirements usually only concern the definition of investment under an investment treaty and relate to the scope of application of the treaty. As such, they do not contain any obligations on the part of the foreign investor which could form the basis of a claim from the host state against the investor.³²
22. There is still much discussion about which types of domestic legislation can trigger the application of the legality requirement. Several decisions accepted that only non-trivial violations of the host state’s legislation will trigger the application of the clause.³³ In others, tribunals have found that the

²⁸ See e.g. *KT Asia Investment Group B.V. v Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award (17 October 2013) para 139. For decisions discussing this question in relation to the ICSID Convention, see *TSA Spectrum v Argentina* (n 19) para 159ff.

²⁹ See for an overview: Eric De Brabandere, ‘Human Rights and International Investment Law’ in Markus Krajewski and Rhea T. Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) 619-645.

³⁰ See e.g. *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005).

³¹ See for a discussion Jarrod Hepburn, ‘In Accordance with Which Host State Laws? Restoring the “Defence” of Investor Illegality in Investment Arbitration’ (2014) 5 *Journal of International Dispute Settlement* 531.

³² *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) para 1185.

³³ See e.g. *Tokios Tokelès v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 86; *LESI Spa et Astaldi SpA v People’s Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Decision on Jurisdiction (12 July 2006) para 83(iii); *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008) para 104.

legality requirement is triggered only by “noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State”.³⁴

23. Whether a legality requirement operates at the level of the establishment of the investment only, or whether it extends throughout the lifecycle of the investment is an unsettled question. What can nonetheless be said is that the formulation of the legality requirement in the applicable investment treaty is fundamental and will influence the interpretation of such a provision by an arbitral tribunal. Some tribunals have thus argued that when the applicable BIT requires investments to be *made* consistent with the host state’s legislation, the requirement is limited to the establishment phase only.³⁵ The illegality of the investor’s conduct during the life of the investment may be relevant to the merits stage of a dispute, but it would not affect the jurisdiction of the tribunal.

iv. The existence of a protected investment

24. Rather than setting general requirements for what can be considered as ‘a protected investment’, domestic law determines the very *existence* of underlying assets or rights that might potentially qualify as ‘a protected investment’ under international law. In particular, domestic law defines the existence of property (movable, immovable, intellectual property, securities, shares, and other corporate rights),³⁶ contracts³⁷ and other assets or rights (claims to money, permits/licences, arbitration awards, settlement agreements),³⁸ as well as their categorisation in the first place. In governing the existence of these assets and rights, domestic law also defines a broad range of connected questions such as registration, validity, scope, transfer, termination, and similar. Not all of these assets and rights can easily qualify as ‘a protected investment’ under international investment law. Purely commercial transactions, loans, arbitral awards, and settlement agreements may find somewhat more difficulty in being recognised as ‘a protected investment’ under international law than other assets and rights.³⁹ Overall, what can be qualified as a protected

³⁴ *Vladislav Kim and Others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017) para 398.

³⁵ *Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) para 127. For other examples in which the requirement was limited to the establishment of the investment, see *Saba Fakes v Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) para 119; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013) para 185ff; *ibid* para 377.

³⁶ For instance, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v The Republic of Hungary*, ICSID Case No ARB/12/2, Award (16 April 2014) para 162. See also *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 235-71; *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v Republic of Panama*, ICSID Case No ARB/16/34, Decision on Expedited Objections (13 December 2017) paras 159-222.

³⁷ For instance, *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award (9 September 2003) para 316. See also Yuliya Chernykh, *Contract Interpretation in Investment Treaty Arbitration: A Theory of the Incidental Issue* (Brill 2022) 17-70.

³⁸ For instance, *Generation Ukraine Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) paras 18.43-18.46.

³⁹ Yas Banifatemi and Elise Edson, ‘Chapter 2. Jurisdiction of the Centre’ in Julien Foutet, Rémy Gerbay, and Gloria M. Alvarez (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar 2019) 133.

investment depends on a combination of a treaty regulation, jurisprudence (the ‘Salini test’), and the peculiarity of the factual circumstances of the case. Summarised in other words, domestic law defines the *reality* of assets or rights, or the inner layer of the concept of a protected investment; international law defines the *qualification* of these assets or rights as ‘a protected investment’, or the outer layer of the concept of a protected investment.

v. The validity of European Union Members’ submission to arbitration in intra-EU investment treaties

25. European Union (“EU”) law raises several legal issues, such as questions as to its qualification as international law and/or domestic law or as simple fact.⁴⁰ Most importantly, the validity of the arbitration clauses contained in intra-EU investment treaties as well as the Energy Charter Treaty (“ECT”) has been a highly contentious issue for years.⁴¹ The European Commission has consistently intervened as *amicus curiae* in intra-EU arbitration disputes to argue against the applicability of the arbitration clause between the EU Member States. Among the first cases where the European Commission intervened was *Electrabel v Hungary*.⁴² The Commission argued that the Tribunal should not assume jurisdiction over claims concerning a subject-matter falling within the competence of the EU and triggering the latter’s responsibility if contrary to the ECT.⁴³
26. In contrast, the Respondent did not make any jurisdictional objection to the claim that was narrowly limited to whether the Respondent’s own actions – and not the European Commission’s – violated the ECT.⁴⁴ The Tribunal rejected the Commission’s jurisdictional objections on three grounds: first, there was no inconsistency between EU law, the ECT, and the ICSID Convention;⁴⁵ second, the measure challenged was not a Community measure;⁴⁶ and third, from its perspective under international law, the Tribunal noted the establishment of the Parties’ consent to international arbitration under the ICSID Convention.⁴⁷

⁴⁰ Ursula Kriebaum, ‘Article 42’ in Stephan W Schill and others (eds), *Schreuer’s Commentary on the ICSID Convention* (Cambridge University Press 2022) 868 (with further references).

⁴¹ Among the first communications regarding potential incompatibility of EU law with intra-EU BITs see the letter and note by the European Commission in 2006 cited in *Eastern Sugar B.V. (Netherlands) v The Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007) paras 119 and 126.

⁴² *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012).

⁴³ *ibid* para 5.10.

⁴⁴ *ibid* para 5.29.

⁴⁵ *ibid* para 5.32.

⁴⁶ *ibid* para 5.33.

⁴⁷ *ibid* para 5.37.

27. Since the award in *Electrabel*, the Court of Justice of the EU (“CJEU”) has passed its own judgment on the validity of intra-EU arbitration clauses. In the *Slovak Republic v Achmea* case,⁴⁸ the CJEU found that the arbitration clause contained in the BIT between the Netherlands and Slovakia was incompatible with EU law. More specifically, the Court held that Arts. 267 and 344 TFEU⁴⁹ must be interpreted as precluding a provision in an international agreement concluded between Member States, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.⁵⁰
28. A number of arbitral tribunals have not followed the CJEU’s decision. For example, in *Vattenfall v Germany*,⁵¹ the Tribunal unanimously rejected Germany’s contention that the Tribunal lacked jurisdiction because of the CJEU ruling in *Achmea*. In reaching this conclusion, the Tribunal argued that the CJEU’s reasoning was not specifically addressed to ISDS under the ECT, which is not an agreement “between Member States” as referred to in the *Achmea* judgment, but a multilateral treaty that counts the EU itself among its members.⁵²

IV. THE MERITS PHASE IN INVESTMENT TREATY ARBITRATION

i. Attribution

29. This section will look only at the attribution of conduct to the state for the purposes of establishing state responsibility, and hence, as a question relating to the merits of the dispute.
30. In general terms, the establishment of state responsibility for breaches of investment agreements follows the general rules of the international law of state responsibility. As noted by the International Law Commission (“ILC”) in its Articles on the Responsibility of States for Internationally Wrongful Acts (“ILC Articles”), the obligations of States may relate to “any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”⁵³

⁴⁸ Case C-284/16, *Slowakische Republik (Slovak Republic) v Achmea BV* [2018] ECLI:EU:C:2018:158.

⁴⁹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ L. 326/47-326/390.

⁵⁰ *ibid* para 62.

⁵¹ *Vattenfall AB and others v Germany*, ICSID Case No ARB/12/12, Decision on the *Achmea* Issue (31 August 2018).

⁵² *ibid* paras 161-162.

⁵³ ILC Draft Articles on State Responsibility for Internationally Wrongful Acts with Commentaries (2001) art 33(2), and the accompanying commentary to art 33 at para 4.

31. The characterisation of an act as internationally wrongful is governed solely by customary international law, while national law, and the characterisation of an act as wrongful or lawful under that legal system, does not affect the international wrongfulness of the act.⁵⁴ By necessary implication, the same is true as far as the attribution of conduct is concerned.⁵⁵ However, this does not mean that domestic law is irrelevant – on the contrary, domestic law has huge relevance. Leaving aside the question of *lex specialis* in certain investment treaties and arbitral practice⁵⁶, the application of the rules on attribution of conduct to the State, as developed by the ILC, often involves a *renvoi* to domestic law, especially when Arts. 4 and 5 ILC Articles are involved.

32. Art. 4 ILC Articles is drafted as follows:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

33. The provision makes clear that domestic law has an important role to play, since under para. 1, the position in the State's organisation plays a role, and under para. 2, the "status of an entity under the international law of the State" is fundamental.

34. There is general agreement, that the acts of an entity which has a separate legal personality under the domestic law of the state in question are not in principle *de jure* organs of the state.⁵⁷ Yet, as generally accepted, organs of the state can also be identified absent any formal acknowledgement under domestic law that an entity is a state organ. However, it should be established that there is "complete dependence and strict control".⁵⁸ This, as the International Court of Justice ("ICJ")

⁵⁴ *ibid* art 3.

⁵⁴ *ibid* commentary to art 12 at para 9.

⁵⁵ See on this: *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) para 576 ff.

⁵⁶ For a discussion, see Crawford J, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review–Foreign Investment Law Journal 131. See also M Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 The European Journal of International Law 629. See also *United Parcel Service of America Inc. v Government of Canada*, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007) para 59, which revolved around arts 1502 and 1503 of the North American Free Trade Agreement. See also *Mesa Power Group v Canada*, PCA Case No 2012-17, Award (24 March 2016) para 365; and *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (27 October 2015) para 317 ff, applying the United States-Oman Free Trade Agreement.

⁵⁷ *Unión Fenosa Gas, S.A. v Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018) para 9.94.

⁵⁸ Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020) 141.

decided in the 2007 Bosnian Genocide Case, requires proof of a particularly great degree of state control over them – a relationship which the Court expressly described as “complete dependence”.⁵⁹

35. Based on these criteria, several Arbitral Tribunals have found that an entity cannot be considered as a state organ *de facto*, especially if these entities had separate legal personality under domestic law.⁶⁰
36. Other tribunals have nonetheless found that certain entities were *de facto* organs, often based on an assessment of the domestic law applicable to the status/position, conduct, and operation of that entity. In *Flemingo Duty Free v Poland*,⁶¹ the Tribunal found that the conduct of the PPL (Polish Airports State Enterprise), organised as a private entity but fully owned by the Polish State, was attributable to Poland.⁶² In doing so, the Tribunal analysed the domestic legal framework under which PPL operated in Poland.
37. Two interesting decisions in this respect are *Ampal v Egypt* and *Unión Fenosa Gas, S.A. v Egypt* which relate to similar circumstances. In both cases, the acts complained of were those of the Egyptian General Petroleum Corporation (“EGPC”) and of the Egyptian Natural Gas Holding Company (“EGAS”). EGPC was created “by law in 1976 to regulate and manage the Egyptian hydrocarbons sector”.⁶³ EGAS, which is wholly owned by EGPC, is a “local holding company for natural gas wholly owned by the Egyptian government”⁶⁴, and was “created by Decree of the Egyptian Minister of Petroleum in August 2001 to regulate, organise, and exploit the Respondent’s natural gas resources.”⁶⁵
38. The Tribunal in *Ampal* decided that EGPC is ‘an Egyptian State organ’ without explaining whether it considers EGPC to be a *de jure* or *de facto* organ.⁶⁶ However, the Tribunal in *Unión Fenosa Gas* noted that “circumstances sufficient to connote the status of an organ of the State to a separate legal person must be extraordinary, involving functions and powers considered to be as quintessentially powers of Statehood, such as those exercised by police authorities”⁶⁷. It then concluded, contrary

⁵⁹ *Bosnia and Herzegovina v Serbia and Montenegro* [2007] ICJ GL No 91 para 393.

⁶⁰ See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) para 119; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) para 190; and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) para 184.

⁶¹ *Flemingo DutyFree Shop Private Limited v the Republic of Poland*, UNCITRAL, Award (12 Aug 2016) paras 420 ff.

⁶² *ibid.*

⁶³ *Unión Fenosa Gas v Egypt* (n 56) para 5.16.

⁶⁴ *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) para 27.

⁶⁵ *Unión Fenosa Gas v Egypt* (n 56) para 5.17.

⁶⁶ *Ampal v Egypt* (n 63) para 138.

⁶⁷ *Unión Fenosa Gas v Egypt* (n 56) para 9.96.

to the Tribunal in *Ampal*, that EGPC was not a state organ.⁶⁸ In both cases, the Tribunals analysed the domestic legal framework under which both EGPC and EGAS operated.

39. Findings that the acts of an entity are attributable to the state under Art. 5 ILC Articles are more common, in line with the general idea that a finding that a state entity is a *de facto* organ of a state is ‘exceptional’.⁶⁹ Art. 5 ILC Articles is worded as follows:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

40. Art. 5 requires the combination of two elements: the act must be carried out by an entity “empowered by the law of that State to exercise governmental authority” (emphasis added), and the act in question must involve the exercise of that governmental authority⁷⁰, which leaves room for the application of domestic law as the operation of Art. 5 ILC Articles requires that the entity in question is “empowered by the law of that State to exercise elements of the governmental authority”.⁷¹ The assessment of whether entities are empowered to exercise elements of governmental authority thus requires tribunals to engage in an analysis of the domestic law of the host state. For example, the Tribunal in *Unión Fenosa Gas*, referred to above, noted that it has not been established that EGPC or EGAS are “‘empowered’ by Egyptian law to exercise governmental authority”.⁷² The Tribunal referred to the ILC Articles Commentary which mentions that “the internal law in question must specifically authorise the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community”.⁷³

41. Attribution of conduct under Art. 8 ILC Articles (Conduct directed or controlled by a State) is much more factual, and structural considerations such as ownership over an entity have been considered to be ‘irrelevant’.⁷⁴ The same goes for Art. 11 ILC (Conduct acknowledged and adopted by a State as its own), which has only very rarely been used in investment arbitration.

⁶⁸ *ibid* para 9.9.

⁶⁹ *Bosnia and Herzegovina v Serbia and Montenegro* (n 58) para 393.

⁷⁰ See also *an de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 November 2008) para 163; and *Mr. Kristian Almås and Mr. Geir Almås v The Republic of Poland*, PCA Case No 2015-13, UNCITRAL, Award (27 June 2016) para 2015.

⁷¹ Emphasis added.

⁷² *Unión Fenosa Gas v Egypt* (n 56) para 9.114.

⁷³ ILC Articles (n 52) commentary to art 5 at para 7.

⁷⁴ *White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award (30 November 2011) para 8.1.16. See also *Almås v Poland* (n 69) para 268 ff.

ii. Expropriation claims

42. Investment treaties typically contain an expropriation clause, which provides that all takings of protected investments by the host state should be done in pursuit of a public purpose, in compliance with due process, in a manner that is non-discriminatory, and upon payment of appropriate compensation. Some newer generation investment treaties also specify that only protected investments bearing proprietary characteristics can be expropriated, while others clarify that expropriations carried out pursuant to the host state's valid exercise of its police powers are non-compensable. When evaluating expropriation claims under investment treaties, tribunals are usually tasked with a 3-stage evaluation: (i) the presence of an object of expropriation; (ii) the existence of a compensable expropriation; and (iii) the legality of the expropriation.
43. Domestic law plays an important role in stages (i), (ii), and (iii) of a tribunal's evaluation of the merits of an expropriation claim. When determining if the investor is basing its expropriation claim on a right or interest that is capable of being expropriated in stage (i), a tribunal relies on the host state's domestic law to ascertain the existence and nature of the claimed right or interest. When determining if an expropriation, which is essentially a substantial deprivation of the claimed right or interest, is compensable in stage (ii), a tribunal verifies the compliance of sovereign conduct with domestic law when the host state invokes its police powers. Additionally, when determining if an expropriation meets the cumulative treaty conditions for legality in stage (iii), a tribunal locates evidence of due process in the availability of avenues for investor recourse in the host state's domestic law.
44. **Stage (i):** As all protected investments under investment treaties are situated within the territory of the host state, whether or not an investor holds a right or interest amounting to a protected investment within the territory of a host state can only be confirmed by referring to the law which created the alleged right or interest, which would be the domestic law of that host state.⁷⁵ If the alleged right or interest does not exist under domestic law, it will not qualify as a protected investment, let alone give rise to an expropriation claim. Recourse to the host state's domestic property law is critical when the applicable investment treaty or arbitral tribunal requires the object of an expropriation claim to resemble property. This is because, in order for an alleged right or interest to be recognised and protected as property under an applicable investment treaty via an

⁷⁵ *EnCana Corporation v Republic of Ecuador*, UNCITRAL, Award (3 February 2006) para 184; see also discussion at *infra* section (iv).

expropriation claim, it must first be recognised and protected as property under the domestic law of the investor's host state.⁷⁶

45. **Stage (ii):** When states invoke their police powers in response to expropriation claims brought by investors, the validity of a state's exercise of its police powers is determined not only with reference to any applicable treaty or general international law conditions, such as the non-discriminatory implementation of measures and the protection of public welfare,⁷⁷ but also with reference to the domestic law of the state that is invoking its police powers.⁷⁸ Tribunals have found that states that expropriate in accordance with or within the limits of the mandate conferred by their domestic law can claim a valid exercise of their police powers,⁷⁹ whereas states that expropriate in disregard of their domestic law are not entitled to invoke their police powers to refute expropriation claims.⁸⁰

46. **Stage (iii):** To recap, the cumulative conditions for a lawful expropriation under investment treaties are taken for a public purpose, in compliance with due process, in a manner that is non-discriminatory, and upon payment of appropriate compensation. Tribunals rarely second-guess the public purpose articulated by host states, while non-discrimination and the payment of compensation are factual and accounting inquiries respectively. This leaves the condition of due process, whose satisfaction or otherwise is determined with reference to domestic law. The requirement of due process for a lawful expropriation may envisage, among other guarantees, the availability of avenues for an investor who is affected by the host state's expropriatory measure to appeal against or seek compensation for the taking. States that fail to comply with the due process guarantees found in their domestic law,⁸¹ or fail to establish any due process guarantees under their domestic law,⁸² will be liable for an unlawful expropriation.

⁷⁶ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v Hungary*, ICSID Case No ARB/12/3, Award (17 April 2015) para 158; see also Monique Sasson, *Substantive Law in Investment Treaty Arbitration* (Wolters Kluwer 2010) 81-2.

⁷⁷ ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entry into force 24 February 2012), annex 2 s 4; UNCTAD, 'Expropriation - A Sequel' (2012), online <https://unctad.org/system/files/official-document/unctadidiaeia2011d7_en.pdf> (accessed 29 February 2024) 78-90.

⁷⁸ Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017) 42-3.

⁷⁹ *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Pt IV Ch D, para 12; *Saluka Investments v Czech Republic* (n 1) paras 271-5; *Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010) para 266.

⁸⁰ *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 106; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) para 214.

⁸¹ *Middle East Cement Shipping and Handling Co, S.A. v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002) paras 139 and 143; *Quiborax SA v Bolivia* (n 79) para 226.

⁸² *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award of the Tribunal (2 October 2006) paras 435 and 438.

iii. Fair and Equitable Treatment claims

47. The obligation to ensure that foreign investors are provided with fair and equitable treatment (“FET”) is a stalwart of international investment agreements, being found in virtually every treaty that regulates the treatment of foreign investors. Domestic law interacts with the FET obligation in three different ways.
48. First, and perhaps most clearly, the domestic laws of a state may be positive acts that breach the FET obligation, thus acting as the *fait generateur* of international responsibility for the state. A recent example is the *Cairn v India* case, which related to India’s domestic taxation legislation.⁸³ In that case, the claimant argued that an amendment to the Income Tax Act 1961, which, it argued, resulted in retroactive taxation, breached the FET obligation contained in the UK-India BIT, a claim with which the Tribunal ultimately agreed.⁸⁴
49. Secondly, domestic law has been used to *interpret* the FET obligation, substantiating what kind of investor protection the provision encompasses.⁸⁵ This is most clearly the case with the protection of an investor’s legitimate expectations – a concept subsumed under the FET obligation that some tribunals view as originating in domestic law. The link between domestic and international law is nicely illustrated by the Tribunal in the *Gold Reserve Inc. v Venezuela* case, which explained the connection as follows:

“With particular regard to the legal sources of one of the standards for respect of the fair and equitable treatment principle, i.e. the protection of “legitimate expectations”, these sources are to be found in the comparative analysis of many domestic legal systems... Based on converging considerations of good faith and legal security, the concept of legitimate expectations is found in different legal traditions according to which some expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent. In particular, in German law, protection of legitimate expectations is connected with the principle of Vertrauensschutz (protection of trust) a notion which deeply influenced the development of European Union Law, pointing to precise and specific assurances given by the administration. The same notion finds equivalents in other European countries such as France

⁸³ *Cairn Energy PLC and Cairn UK Holdings Ltd v The Republic of India*, PCA Case No 2016-07, Final Award (21 December 2020).

⁸⁴ *ibid* para 1816.

⁸⁵ For more information, see Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019), Ch 5.

in the concept of *confiance légitime*. The substantive (as opposed to procedural) protection of legitimate expectations is now also to be found in English law, although it was not recognized until the last decade. This protection is also found in Latin American countries, including in Argentina...”⁸⁶

50. Thirdly, domestic law has sometimes been used by tribunals as a *benchmark* for evaluating whether the act at issue breaches the FET guarantee. For example, in the *Plama v Bulgaria* case, the claimant argued that taxes imposed as the result of debt restructuring breached the FET obligation enshrined in Art. 10(1) of the ECT.⁸⁷ The Tribunal rejected the claim on procedural grounds, but also noted that:

“Respondent produced evidence which shows that the tax laws of many countries around the world treat debt reductions, as were negotiated in this case, as income taxable to the beneficiary... [i]t cannot therefore be said that Bulgaria’s law in this respect was unfair, inadequate, inequitable or discriminatory. It was part of the generally applicable law of the country like that of many other countries.”⁸⁸

51. Cumulatively, these three forms of interaction between the FET guarantee and domestic law – domestic law as *fait generateur* of responsibility; domestic law as means of interpreting FET; and domestic law as benchmark – demonstrate that domestic law continues to assert an important role in the operation of FET.

iv. Umbrella Clause claims and choice-of-law

52. The umbrella clause gives domestic law a central role in the settlement of investment disputes. The umbrella clause seeks to capture the obligations of states outside of the terms of investment treaties which states have undertaken with investors, for example in domestic legislation or a contract. It arises from provisions in investment treaties to the effect that each contracting party has a duty to observe any other obligation it may have entered into with regard to investments.⁸⁹ Generally, a breach of state contracts and other non-international obligations to investors does not amount to a

⁸⁶ *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014). Similarly, see *Total S.A. v The Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010) paras 128-129.

⁸⁷ *Plama v Bulgaria* (n 1). For more on this, see Daniel Peat, ‘International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method’ (2018) 9 *Journal of International Dispute Settlement* 654.

⁸⁸ *Plama v Bulgaria* (n 1) para 269.

⁸⁹ *Argentina-United Kingdom BIT* (n 9) art 2(2).

breach of international law obligations.⁹⁰ It follows that in the absence of the umbrella clause, a contractual breach does not violate an investment treaty.⁹¹ According to some tribunals, the inclusion of an umbrella clause has the effect of leading to a state incurring international responsibility when the state breaches a contractual obligations towards the investor. An umbrella clause thus leads to a breach of a contract “being thus ‘internationalized’, i.e., assimilated to a breach of the treaty.”⁹² The effect of an umbrella clause depends on its framing in investment treaties. When it is framed as a promise or an undertaking by a state to observe any other obligation with respect to covered investments, the legal effect of an umbrella clause can be “to impose an international treaty obligation on host countries that requires them to respect obligations they have entered into with respect to investments protected by the treaty.”⁹³ States have been found to violate the umbrella clause in investment treaties for not observing obligations undertaken under domestic law.⁹⁴ The umbrella clause is an important provision for the continued role of domestic law in investment dispute settlement because once an undertaking is given by the host state to foreign investors through domestic law and that undertaking is not observed, the investor can invoke an umbrella clause (if it is present in the applicable treaty) to enforce the undertaking, which will require the tribunal to interpret and apply the domestic law.⁹⁵

53. Like the umbrella clause, a choice of law made by the parties also allows domestic law as “the law invariably chosen by the parties”⁹⁶ to continue to have a role to play in investment dispute resolution.⁹⁷ Party autonomy to choose the applicable law is well established.⁹⁸ Choice of law circumscribes the scope of laws that would apply to the parties’ transaction and dispute.⁹⁹ The making of a choice of law must be interpreted as limiting the rights of the parties to those rights protected by the chosen law because “where the parties have made a choice of law within the legal limits permitting such a choice to be made, the chosen jurisdiction has the dominant interest to have its law followed.”¹⁰⁰ The extent to which national law plays the role envisaged by the parties making

⁹⁰ Case Concerning the Payment of Various Serbian Loans Issued in France (*France v Kingdom of Serbs, Croats and Slovenes*) [1929] PCIJ Rep Series A No 20 41; *Noble Ventures, Inc. v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) para 53; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) para 117; Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 181.

⁹¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) paras 95-96.

⁹² *Noble Ventures v Romania* (n 89) para 54.

⁹³ Jeswald Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 301.

⁹⁴ *Eureko BV v Republic of Poland*, Partial Award (19 August 2005) para 246; *Fedax N.V. v The Republic of Venezuela*, ICSID Case No ARB/96/3, Award (9 March 1998) para 29; *SGS v Philippines* (n 89) para 28.

⁹⁵ Ho, *State Responsibility for Breaches of Investment Contracts* (n 89) 180-221.

⁹⁶ Dominic Dagbanja, ‘The Scope and Legal Effect of Choice of Law in International Arbitration’ (2019) 4(1) Cambridge Law Review 59, 61.

⁹⁷ *ibid.*

⁹⁸ *ibid.* 66.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.* 63.

a choice of domestic law depends on the extent to which tribunals respect the exercise of the parties' autonomy to make a choice of domestic law.¹⁰¹

v. Non-discrimination claims

a. National Treatment (“NT”) claims

54. Most modern BITs include NT provisions, which require contracting states to provide foreign investments or investors from the other contracting state with treatment no less favourable than they accord in like circumstances to their own investments or investors. When analysing whether states have complied with that standard, tribunals have applied a test that, with some variations, consist of: (a) analysing whether a foreign investment or investor has suffered a ‘treatment’ that is (b) ‘less favourable’ than that given to a proper comparator (i.e. a national investment or investor) in (c) ‘like circumstances’.¹⁰² Tribunals in turn have analysed (mainly under (c)) whether there is any public policy reason that justifies a different treatment. In applying these elements of the standard, investment tribunals very often had to analyse domestic law.

55. As regards (a), ‘treatment’ in NT provisions, it has been considered that treatment “is a broad term which in the context of BITs refers to the legal regime that applies to investments once they have been admitted by the host State.”¹⁰³ Numerous investment tribunals have expressly analysed whether there was a ‘treatment’ in light of local legislation.¹⁰⁴

56. With respect to (b), the ‘less favourable’ treatment element of NT, tribunals have also recognised the relevance of domestic law in its analysis. For example, in a case under NAFTA Chapter 11, when analysing whether the foreign investors received ‘less favourable treatment’, the Tribunal’s majority noted: “Cases of alleged denial of national treatment must be decided in their own factual and regulatory context. In the present case, what is at issue is whether the Investor was treated less favourably for the purpose of an environmental assessment.”¹⁰⁵ The Tribunal’s majority proceeded to analyse the treatment given to national investors under the Canadian Environmental Assessment

¹⁰¹ *ibid* 63.

¹⁰² See e.g. *UPS v Canada* (n 55) para 83.

¹⁰³ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Nijhoff The Hague 1995) 58, quoting *Jean-Pierre Laviee, Protection et promotion des investissements: Études de Droit International Economique* (PUF 1985) 79.

¹⁰⁴ See e.g. *UPS v Canada* (n 55) paras 85-86; *Merrill and Ring Forestry L.P. v Canada*, ICSID Case No UNCT/07/1, Award (31 March 2010) para 79.

¹⁰⁵ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 Mar 2015) para 694.

Act and concluded that they had received more favourable treatment than the claimants in like circumstances.¹⁰⁶

57. Concerning (c), the ‘like circumstances’ analysis, two different tests are normally invoked when applying that element of NT: (i) the regulatory test, which takes into account the context and alternative policy of the measure at hand and it assumes that it is possible to make legitimate regulatory distinctions; and (ii) the competition test which evokes the distinction between ‘like products’ in the WTO and which assumes that in principle investors competing should be treated equally.¹⁰⁷ Both tests require an analysis of local legislation. In *Grand River v United States*, the Tribunal referred to the analysis of national ‘legal regime(s)’ of previous NAFTA tribunals under NAFTA’s NT and MFN provisions. The Tribunal noted that the reasoning of these cases “shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like” for purposes of the NT and MFN provisions.¹⁰⁸

b. Most-Favoured-Nation (“MFN”) claims

58. Most BITs include a MFN provision that requires contracting states to provide foreign investments or investors of the other contracting party with treatment no less favourable than they accord in like circumstances to investments or investors of third countries.

59. One of the characteristics of MFN provisions is that, subject to the limitations of the particular clause, the treatment they cover has a dual aspect, one internal and another external: they encompass the more favourable treatment given by internal measures (e.g. laws and regulations) as well as the more favourable treatment granted by international measures (e.g. international agreements and unilateral acts).

60. In relation to the first aspect referred to above, investors have invoked MFN provisions before arbitral tribunals to enjoy the more favourable treatment afforded by internal measures to other foreign investors from third countries. In these situations, tribunals have applied MFN clauses in the same way in which they have applied NT provisions: with some variations, they have analysed whether there was ‘treatment’ covered by the clause, whether there was a comparator that received ‘less favourable’ treatment, and whether the investor or investment and the comparator were in ‘like

¹⁰⁶ *ibid* paras 695-696.

¹⁰⁷ On this topic see Nicholas DiMascio and Joost Pauwelyn, ‘Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 *American Journal of International Law* 1, 48-89.

¹⁰⁸ *Grand River Enterprises Six Nations Ltd and others v United States*, ICSID Case No Case ARB/10/5, Award (12 January 2011) para 167.

circumstances'. As in NT, in applying the elements of the standard, investment tribunals have very often had to analyse domestic law.

61. For example, in *Parkerings v Lithuania*, the Tribunal considered that “[t]he essential condition of the violation of an MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation” and therefore “a comparison is necessary with an investor in like circumstances”.¹⁰⁹ In *Grand River v United States*, the claimants claimed that they were treated less favourably than other foreign cigarette manufacturers. The Tribunal followed other tribunals that gave significant weight to the “legal regimes applicable to particular entities in assessing whether there are in ‘like circumstances’”.¹¹⁰ For the Tribunal, the reasoning behind these cases showed “the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling fact in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103”.¹¹¹

62. In relation to the second aspect referenced above, i.e., MFN and ‘treatment’ granted by international measures, the situation appears to be more chaotic. There are two issues concerning MFN and external measures that have been analysed by investment tribunals. First, MFN clauses have been used to modify limited ISDS provisions in the base treaty (i.e. the treaty used as the basis for the jurisdiction of an arbitral tribunal and which includes the MFN clause).¹¹² Second, they have been used to ‘import’ or ‘incorporate’ substantive standards not included into the base treaty from other treaties or to ‘modify’ existing substantive standards already included into the base treaty.¹¹³ The use of MFN provision for these purposes has been the object of controversy in arbitral decisions and doctrine. In this type of analysis, the reference to local legislation is absent or very limited.

vi. Compensation

a. Limited liability clauses

63. Domestic law *may* play some role in the calculation of compensation via contractual provisions, i.e., limited liability clauses, clauses on the limitation of damages, stabilisation clauses, and other

¹⁰⁹ *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para 369.

¹¹⁰ *Grand River v United States* (n 107) para 166.

¹¹¹ *ibid* para 167.

¹¹² See e.g. *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000).

¹¹³ See e.g. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 225-35. For a detailed discussion of this topic see Facundo Pérez-Aznar, ‘The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements’ (2017) 20 *Journal of International Economic Law* 777.

provisions. The word ‘may’ is important for two reasons. First, domestic law does not determine the principles of calculation of compensation in investment treaty arbitration. Compensation in investment treaty arbitration is anchored on international law: relevant treaty provisions and customary international law.¹¹⁴ Second, the jurisprudence is not entirely settled on the issue: there is a growing line of cases recognising the relevance of contractual provisions,¹¹⁵ but also some cases where tribunals approach the role of contractual terms for the calculation of compensation critically.¹¹⁶

64. The *rationale* for giving effect to contractual provisions is premised on the understanding that compensation is awarded for losses suffered by those whose assets and rights are affected by respective breaches of international investment law. Because these rights do not come into existence as a matter of international law, domestic law has to be considered in establishing their value in light of contractual limitations or ‘caps’, if any. As a matter of principle, this rationale does not have exclusive connection to contractual rights and may be equally applied for calculating damages in relation to property rights that also come into existence under relevant domestic law. The arguments against considering contractual provisions are premised on the outer layer of the question, namely that domestic law does not govern the calculation of compensation in investment treaty arbitration as such and that contract claims and treaty claims are different.
65. When tribunals find contractual provisions relevant for setting a limit or otherwise, such as some guidelines in the calculation of damages, they inevitably deal with domestic law applicable to a contract and governing these provisions. The role of domestic law, in this respect, is accordingly indirect. It governs the validity of contractual provisions and their scope but does not determine general approaches to compensation. At the same time, the role of domestic law is not peripheral as various domestic laws may approach the validity or interpretation of limited liability provisions and other contractual provisions differently¹¹⁷ and this may have an impact on the assessment of compensation.

¹¹⁴ Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 425.

¹¹⁵ *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No ARB/07/12, Award (7 June 2012) paras 65-85; *Burlington Resources, Inc. v Republic of Ecuador*, ICSID Case No ARB/08/5, Award (7 February 2017) paras 358-359; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Award of the Tribunal (8 March 2019) paras 170-88.

¹¹⁶ *Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Award of the Tribunal (9 October 2014) paras 218 and 254; see also *Ionannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18 and ARB/07/15, Award (3 March 2010) paras 477-85; *Ron Fuchs v The Republic of Georgia*, ICSID Case No ARB/07/15, Award (3 March 2010) paras 477-85 (both *Ionannis Kardassopoulos* and *Ron Fuchs* involve stabilisation clauses of a specific character, limiting the state’s liability for reimbursement in the case of expropriation, confiscation or nationalisation).

¹¹⁷ Marcel Fontaine and Filip de Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 381-91; Gabrielle Nater-Bass and Stefanie Pfisterer, ‘Contractual Limitations on Damages’ available at

b. Quantum calculation and counterclaims

66. Domestic law may be relevant to a tribunal's determination of the amount of compensation owed to the investor if the state is found to have breached an investment treaty obligation. Tribunals are guided by domestic law when host states dispute claimed payments that allegedly contravene their domestic laws,¹¹⁸ and when host states bring counterclaims against investors for misconduct that violates their domestic laws.¹¹⁹
67. When liable host states seek a reduction in the amount of compensation by invoking domestic law, tribunals must examine the salient provisions in, for many cases, the host state's domestic law in order to decide if the sought reduction is justified. This means that domestic law, when applicable, affects how tribunals calculate the quantum of damages. Host states have invoked, and tribunals have applied, domestic law to vary compensation amounts when an investor tries to enforce contractual payment obligations that are potentially invalid under the host state's domestic law,¹²⁰ and when an investor has purportedly assigned away a significant portion of its investment which validity falls to be determined by the underlying contract's governing law.¹²¹ Tribunals have also had recourse to domestic law when making interest determinations, which are an integral part of calculating the quantum of damages. As international law more generally, and investment treaties more specifically, contain no or vague guidelines on how interest on compensation should be calculated,¹²² some tribunals have turned to the host state's or the arbitral seat's domestic law for guidance on, for example, whether simple or compound interest should be awarded,¹²³ or what the appropriate interest rate is.¹²⁴
68. States occasionally bring counterclaims against investors in investment treaty arbitration. Their ability to do so depends on the wording of the applicable treaty. Investors typically claim state breaches of treaty law, while states typically counterclaim investor breaches of domestic law. States

<<https://globalarbitrationreview.com/guide/the-guide-damages-in-international-arbitration/5th-edition/article/contractual-limitations-damages>> (accessed 29 February 2024); Chernykh, *Contract Interpretation in Investment Treaty Arbitration* (n 36) 73-110.

¹¹⁸ Hepburn, *Domestic Law in International Investment Arbitration* (n 77) 78-81.

¹¹⁹ *ibid* 91-2.

¹²⁰ *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award (8 November 2010) paras 207, 211, 218, 263, 309, 332, 442 and 471.

¹²¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) paras 614, 618, 626, 639-640; see also *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Dissenting Opinion (20 September 2012) paras 44 and 78.

¹²² Hepburn, *Domestic Law in International Investment Arbitration* (n 77) 85-6.

¹²³ *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Final Award (14 March 2003) paras 156 and 158.

¹²⁴ *SwemBalt AB, Sweden v The Republic of Latvia*, UNCITRAL, Decision by the Court of Arbitration (23 October 2000) para 46.

counterclaim with the objective of obtaining a full or partial reduction in the amount of compensation payable to the investor, on the basis that even if the state is liable for a treaty violation, the investor's misconduct bars it from receiving any or full compensation for that violation.¹²⁵ When a state counterclaims that an investor has violated domestic law, the tribunal must apply the relevant domestic law to assess the merits of the counterclaim. And if the tribunal finds for the state on its counterclaim, this usually entails a reduction in the amount of compensation payable to the investor.¹²⁶ Some states have highlighted investor misconduct and non-compliance with domestic law to tribunals without framing their allegations as counterclaims. Nonetheless, when tribunals are persuaded that these allegations of investor misconduct are true, it has also resulted in a reduction in the amount of compensation ultimately awarded to the investor by the tribunal.¹²⁷

V. THE ENFORCEMENT AND ANNULMENT PHASES IN INVESTMENT TREATY ARBITRATION

i. Enforcement

a. Enforcement procedures and domestic law

69. In addressing the role of domestic law, this section deals with recognition, enforcement, and execution under a single umbrella of 'enforcement procedures'. These procedures are understood as 'an injection' of an arbitral award into a national system that gives an award the same effect as a decision of a local state court. A common denominator of 'enforcement procedures' is chosen, even though recognition and execution may differ in their content from enforcement. Indeed, on a conceptual level, recognition can be defined as formal confirmation of an award by a local court; enforcement is defined as a more active endorsement of an award enabling state assistance for ensuring compliance; and execution is seen as a procedure entailing actual measures of enforcement by competent authorities, whatever these authorities might be. Furthermore, recognition and enforcement both belong to judiciary procedures whereas execution belongs to post-judiciary procedures. Also, it may be argued that some awards do not require active steps of enforcement and execution, but nevertheless may require recognition, particularly when liability is found but no damages are awarded. Sometimes, the described distinctions appear less obvious as it may be suggested that recognition inevitably takes place, expressly or implicitly, before any enforcement

¹²⁵ *Perenco Ecuador Ltd. v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015).

¹²⁶ Hepburn, *Domestic Law in International Investment Arbitration* (n 77) 92.

¹²⁷ *Occidental Petroleum Corporation v Ecuador*, Award (n 120) para 687; *Yukos Universal Ltd (Isle of Man) v The Russian Federation*, PCA Case No 2005-04/AA227, Final Award (18 July 2014) para 1637; *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012- 2, Award (15 March 2016) paras 6.99-6.102.

or execution procedures, or it may be argued, for instance, that enforcement effectively includes execution. While the precise notion of recognition, enforcement, and execution may differ across countries, their regulation inevitably depends on domestic law. Domestic law defines the relevant *procedural* aspects of enforcement procedures and *grounds* for refusing recognition and/or enforcement.¹²⁸ Indeed, two major international instruments – the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**the New York Convention**”) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“**the Washington Convention**”) – do not exclude the role of domestic law in relation to various questions of enforcement procedures and even occasionally directly recognise it. This is important as both treaties have global reach,¹²⁹ aiming to ensure compliance and in the case of the New York Convention, also *the international minimum standard*.¹³⁰

70. Below are some examples of issues typically governed by domestic law in the context of recognition and/or enforcement of foreign arbitral awards. The covered *procedural* questions for recognition and/or enforcement typically include an indication of a state court competent to consider an application on recognition and/or enforcement; formal and material requirements to a request on recognition and/or enforcement; evidentiary issues; interim measures in support of recognition and/or enforcement; possibility, and the peculiarities of subsequent appeal and cassation; suspension of the procedure of enforcement because of the pending challenge to an award; the scope of confidentiality, if any; jurisdictional immunity in procedures of recognition and/or enforcement; and time limits for applying for recognition and/or enforcement in the first place.¹³¹ The covered *procedural* questions for execution procedures, if distinct from enforcement, also include issues of initiation, suspension or termination of execution procedures, attachment and seizure of state assets,

¹²⁸ Discussing exequatur, Marta Requejo Isidro suggests that: ‘National law applies to all aspects not dealt with in the conventions and agreements...’: see Marta Requejo Isidro, ‘Exequatur’, Max Planck Encyclopedia of International Procedural Law [MPEiPro], <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1546.013.1546/law-mpeipro-e1546?prd=OPIL>> (accessed 29 February 2024).

¹²⁹ The New York Convention has 170 contracting parties, see <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> (accessed 29 February 2024). The ICSID Convention has 169 contracting parties, see <<https://icsid.worldbank.org/about/member-states/database-of-member-states>> (accessed 29 February 2024).

¹³⁰ The New York Convention defines in Article VII (1) the prevailing role of any other regulation, including domestic regulation, in case this regulation provides more favourable regime for recognition and/or enforcement.

¹³¹ The ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention gives a good comparative overview of various peculiarities of domestic regulations: see ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention, 23 ICC Bulletin, Special Supplement (2012). For an extensive overview of the harmonised domestic regulation on recognition and enforcement together with existent idiosyncrasy see also: Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 3691-4098 and Global Arbitration Review, ‘Challenging and Enforcing Arbitration Awards’ <<https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards>> (accessed 29 February 2024).

as well as possible permanent or temporal moratoria on execution, and more generally state immunity against execution etc.¹³²

71. In what relates to the grounds for refusing recognition/enforcement of arbitral awards, both the New York Convention and the ICSID Convention expressly recognise the role of domestic law in informing the content of certain grounds for refusal in recognition and enforcement. According to Art. V(1)(d) New York Convention, the law of the country where the arbitration took place may become relevant for assessing if the composition of the arbitral authority or the arbitral procedure was not in accordance with it. According to Art. V(1)(e) New York Convention, the law under which the award was made defines whether the award has not yet become binding or has been set aside or suspended by a competent authority. According to Arts. V(2)(a) and V(2)(b) New York Convention, the law of the place of recognition and enforcement defines if the subject matter is not capable of settlement by arbitration, or if the recognition and enforcement would be contrary to the public policy of that country. While being distinct from the New York Convention in establishing an unconditional duty for the states to comply and excluding any type of control over awards,¹³³ the Washington Convention still expressly recognises in Art. 54(3) the role of domestic regulation in governing execution, and in Art. 55, the role of domestic law in defining state immunity from execution.

b. Enforcement of investment treaty awards under European Union law

72. In May 2020, a majority of EU Member States entered into an agreement terminating the BITs concluded between them.¹³⁴ The termination agreement implements the March 2018 CJEU judgment (*Achmea* case), where the Court found that investor-State arbitration clauses in intra-EU BITs are incompatible with the EU Treaties.

73. Following the termination agreement, the CJEU issued two more judgments on the invalidity of intra-EU arbitration clauses. Invoking the termination agreement, in *Poland v PL Holdings*,¹³⁵ the Court held that Arts. 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from

¹³² Phoebe D. Winch, 'State Immunity and the Execution of Investment Arbitration Awards' in Catharine Titi (eds), *Public Actors in International Investment Law* (European Yearbook of International Economic Law 2021) 57-77.

¹³³ *Eiser Infrastructure Limited v Kingdom of Spain* [2020] FCA 157 demonstrates an interesting discussion of the interplay between the ICSID Convention and domestic Australian law in relation to questions of recognition, enforcement, and execution.

¹³⁴ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, OJ L 169 (29 May 2020) 1-41. Signatories of the termination agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain.

¹³⁵ Case C-109/20, *Republiken Polen v PL Holdings Sàrl* [2021] ECLI:EU:C:2021:875.

another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles.

74. The CJEU has also issued a decision on the non-applicability of the ECT arbitration clause intra-EU. It did so in the context of an extra-EU case, *Republic of Moldova v Komstroy*,¹³⁶ where the Court reasoned that despite the multilateral nature of the ECT, its arbitration clause in Art. 26 is intended to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the BIT at issue in the case giving rise to the judgment of 6 March 2018, *Achmea*.¹³⁷ Consequently, the same grounds precluding the application of the arbitration clause intra-EU, namely the preservation of the autonomy and of the particular nature of EU law, also hold true in the case of the ECT.¹³⁸ The Court thus concluded that Art. 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.¹³⁹
75. Notably, in June 2022, for the first time, a Stockholm-seated arbitral Tribunal established under the ECT upheld the intra-EU jurisdictional objection. Parting company with the Tribunal's stance in *Vattenfall v Germany* and arguing that the *Achmea* and *Komstroy* judgments were applicable to the dispute before it, the Tribunal in *Green Power v Spain* held that the EU Member States involved (Denmark, Sweden, and Spain) had agreed on the principles of primacy and autonomy of EU law, which was, thus, *lex superior* to other international obligations.¹⁴⁰
76. The issue of the validity of the ECT arbitration clause intra-EU has also been addressed in the negotiations for the reform of the ECT. In the decision of the Energy Charter Conference reaching an agreement in principle on the modernisation of the ECT, the Contracting Parties agreed that the arbitration clause of Art. 26 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation (“REIO”) in their mutual relations. Currently, the EU is the only such REIO Contracting Party.¹⁴¹
77. The objections to the jurisdiction of intra-EU arbitral tribunals have been combined with objections to the enforceability of the ensuing awards. The *Micula* saga is indicative of the difficulties in

¹³⁶ Case C-741/19, *Republic of Moldova v Komstroy LLC* [2021] ECLI:EU:C:2021:655.

¹³⁷ *ibid* para 64.

¹³⁸ *ibid* para 65.

¹³⁹ *ibid* para 66.

¹⁴⁰ *Green Power K/S and Obton A/S v Kingdom of Spain*, SCC Case No 2016/135, Award (16 June 2022).

¹⁴¹ Decision of the Energy Charter Conference, CCDEC 2022 10 GEN (24 June 2022).

enforcing intra-EU arbitral awards. In the case of *Ioan Micula, Viorel Micula and Others v Romania*,¹⁴² the Respondent and the Commission argued that any payment of compensation arising out of the award would constitute illegal state aid under EU law and render the Award unenforceable within the EU.¹⁴³ In particular, the Commission argued that “any award requiring Romania to reestablish investment schemes which have been found incompatible with the internal market during accession negotiations, is subject to EU State aid rules”, and “the execution of such award can thus not take place if it would contradict the rules of EU State aid policy.”¹⁴⁴

78. The Tribunal argued that it was not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award would be rendered, especially but not exclusively when it came to enforcement matters. It thus found it inappropriate to base its decisions on matters of EU law that may come to apply after the Award had been rendered and, consequently, it did not address the Parties’ and the Commission’s arguments on the enforceability of the award.¹⁴⁵ In its request for annulment of the award, the applicant argued that the Tribunal’s failure to decide the issue of unenforceability provided two bases for annulment: (i) manifest excess of powers; and (ii) failure to state reasons.¹⁴⁶ The Committee rejected both annulment grounds. It held that the Tribunal had given reasons for its conclusion that it was not useful to determine whether the award would be unenforceable and had found that it was not the Tribunal’s duty to address the potential non-enforceability of the Award after it had been rendered.¹⁴⁷

79. The question of the enforceability of this intra-EU award has been raised in several court proceedings both in EU courts and overseas. For example, a Swedish court refused to enforce the award, finding that enforcement would put Sweden in breach of its EU-law duty of sincere cooperation.¹⁴⁸ In contrast, in February 2020, the UK Supreme Court found that EU law does not bar the enforcement of an investment award under the ICSID Convention and lifted a three-year stay over a US\$330 million award against Romania.¹⁴⁹ Moreover, the United States District Court for the District of Columbia agreed to enforce the award holding, among others, that all of the facts

¹⁴² *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No ARB/05/20, Award (11 December 2013).

¹⁴³ *ibid* para 330.

¹⁴⁴ *ibid* para 335.

¹⁴⁵ *ibid* para 340.

¹⁴⁶ *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No ARB/05/20, Decision on Annulment (26 February 2016) para 225.

¹⁴⁷ *ibid* paras 230-35.

¹⁴⁸ *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No ARB/05/20, Decision of the Nacka District Court in Stockholm (23 January 2019). Translation available at <<https://jusmundi.com/en/document/pdf/decision/en-ioan-micula-viorel-micula-and-others-v-romania-i-decision-of-the-nacka-district-court-in-stockholm-wednesday-23rd-january-2019>> (accessed 29 February 2024).

¹⁴⁹ *Micula and others v Romania* [2020] UKSC 5. For an analysis of the judgment, see Aikaterini Florou, ‘The UK Supreme Court Judgment in *Micula v Romania*: A Landmark Judgment for the Relationship between EU Law and International Investment Law?’ (2021) 36(2) ICSID Review–Foreign Investment Law Journal.

in the arbitration had occurred before Romania joined the EU in 2005 and consequently the *Achmea* decision was not applicable to the dispute.¹⁵⁰

ii. Annulment (Art. 52 ICSID Convention)

80. The purpose of Art. 52 ICSID Convention was to provide a means by which the award of a tribunal could be reviewed within strict confines beyond the scope of domestic jurisdictions. As annulment replaced setting-aside procedures before domestic courts, the drafters of the ICSID Convention hoped that parties would be more confident in the finality of awards,¹⁵¹ something that *ad hoc* annulment committees have been conscious to echo.¹⁵² In other words, annulment procedures operate to exclude the operation of domestic law – although, whether this necessarily promotes the finality of awards has been questioned by some.¹⁵³

VI. CONCLUSION

81. When domestic law often arises for consideration and application in the admissibility/jurisdiction, merits, and enforcement phases of investment treaty arbitration, as the foregoing discussion has shown, it clearly plays an important role in investment dispute settlement as a whole.

82. That said, the consideration and application of domestic law appears to be more pervasive and decisive in some contexts than in others. Notably, EU law, as interpreted by the European Commission and the CJEU, appears to invalidate intra-EU investment treaty arbitrations and bar the enforcement of intra-EU investment treaty awards.

83. The role of domestic law seems more pronounced in determinations on the issues of exhaustion of local remedies, the nationality of a protected investor, the legality and existence of a protected investment, the attribution of various investment treaty claims to host states, counterclaims, and in enforcement procedures for arbitral awards.

¹⁵⁰ *Ioan Micula et al. v Government of Romania*, United States District Court for the District of Columbia Case No 17-cv-02332-APM, Memorandum Opinion (09 November 2019).

¹⁵¹ Legum Barton and Kirtley William, 'The Status of the Report of the Executive Directors on the ICSID Convention' (2012) 27(1) ICSID Review–Foreign Investment Law Journal 159, 170 citing the Report of the Executive Directors on the ICSID Convention, see especially paras 41-43.

¹⁵² See e.g. *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No ARB/13/8, Decision on Request for Annulment (29 September 2016) paras 126-31.

¹⁵³ See Markus Burgstaller and Charles Rosenberg, 'Challenging International Arbitral Awards: To ICSID or not to ICSID?' (2011) 27 Arbitration International 91.

84. In contrast, the role of domestic law seems more nuanced in the interpretation of fork-in-the-road provisions, compensation assessment, and annulment under the ICSID Convention.