5. DOMESTIC JURISPRUDENCE AS AN AID TO THE INTERPRETATION AND APPLICATION OF DOMESTIC LAW

Though often refusing to accord *res judicata* effects of specific domestic judicial decisions, investment tribunals with equal frequency acknowledged the great utility of domestic jurisprudence in the law ascertainment process generally.[1] As the present chapter intends to demonstrate, tribunals in fact recurrently resorted to such jurisprudence in determining questions of domestic law that were relevant to the resolution of claims pending before them. The question that is central then is how domestic jurisprudence should theoretically be conceived, apart from simply being considered as "evidence in the arbitration in question".[2] Are investment tribunals bound to considering such jurisprudence when interpreting domestic law? If so, how are they to become acquainted with such jurisprudence? Furthermore, under what circumstances are tribunals more likely to accept the case-law of domestic courts when interpreting or applying international law? And eventually, how do tribunals actually make use of this case-law in practice? These are the questions that the present chapter purports to address.

After explaining the reasons warranting resort to domestic jurisprudence in the law ascertainment process (5.1.), this chapter outlines the duties of investment tribunals with regard to the use of domestic jurisprudence in the ascertainment of domestic law (5.2.). It also touches on the factors controlling the reception of jurisprudence on the part of investment tribunals (5.3.), before it finally looks at the practical challenges facing tribunals when considering domestic judicial pronouncements in the law ascertainment process (5.4.).

5.1. Reasons for Resorting to Domestic Jurisprudence in the Law Ascertainment Process

Resort to domestic jurisprudence may be necessary for a variety of reasons in the law ascertainment process. In the practice of investment tribunals, domestic judicial decisions have often been consulted with a view to clarifying concrete statutory provisions whose interpretation or application gave rise to uncertainty (5.1.1). But perhaps equally often with a view to resolving questions of grater complexity, which could not be resolved by a simple application of statutory provisions (5.1.2.). Occasionally, domestic judicial decisions had even been referred to for other reasons than because of actual dicta on points of law; namely, because of certain factual information that was indirectly of assistance in the law ascertainment process (5.1.3.). Admittedly, however, a variety of reasons can concurrently explain reliance on a particular judicial decision, which means that any classification therefore occurs at the cost of some generalization.

[1] See e.g. *Occidental v Ecuador* (*Final Award*) (LCIA Case No UN3467, 1 July 2004) 137 (recognizing how pronouncements of municipal courts provided 'useful guidance in understanding" domestic legislation); *Emmis v Hungary (Award)* (ICSID Case No ARB/12/2, 16 April 2014)176 (expressing the view that domestic judgments were 'likely to be of great help' in determining the content of specific municipal laws); or *Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002) [84] (considering that domestic judgments provide 'necessary background' to a tribunal's understanding of domestic legal issues).

[2] *Petrobart v Kyrgz Republic (Award)* (SCC Case No 126/2003, 29 March 2005) 41 (observing that 'a judgment rendered by a foreign court of law may well become relevant as evidence in the arbitration in question').

5.1.1. Uncertainties Concerning the Applicable Statute

One of the most common reasons necessitating resort to domestic jurisprudence was that the domestic legal provision in question gave rise to uncertainty. One of the causes of such uncertainty was that the terms actually used in the particular provision were capable of being interpreted in more than one way, which gave rise to ambiguity. In *Occidental v. Ecuador* (2004), for example, support was thus sought in domestic jurisprudence for the purpose of determining whether a provision of the Ecuadorian Tax Code granting "manufacturers" the right to VAT refunds equally applied to companies engaged in petroleum extraction even though these were allegedly not engaged in "manufacture".[3]

Most commonly, however, the cause of uncertainty lay in the circumstance that the relevant matter was not expressly mentioned in the legal provision in question, but the provision was capable of being applied, or was alleged to apply by analogy. In *CME v. Czech Republic* (2003), a domestic judgment was quoted by the Tribunal in support of the conclusion that the date on which contractual damage claims become due in accordance with the Czech Civil Code was equally applicable to tort claims.[4] In *Pey Casado v. Chile* (2008), domestic jurisprudence was considered to establish whether the provision of the Chilean Constitution governing the loss of Chilean nationality equally applied to a voluntary renunciation of nationality that was otherwise not expressly mentioned in the Constitution.[5] In *Fraport v. Philippines II* (2014), a domestic judgment was cited in support of the conclusion that the statute in question equally prohibited the interference of minority shareholders in the management of a public corporation even though these were not expressly listed in the category of persons to whom the prohibition applied.[6] In *Dan v. Hungary* (2015), prior jurisprudence was examined and relied upon in determining the competence of a Hungarian court to order submission of additional documents not expressly required in the governing statute.[7] Whereas in *Rusoro Mining v. Venezuela* (2016), a judgment of the Venezuelan Supreme Court was scrutinized with a view to establishing whether transfers of shares in companies holding mining concessions equally fell under an authorization requirement that the Mining Law otherwise imposed on direct transfers of concessions.[8]

References to domestic jurisprudence were particularly common in construing certain fundamental legal provisions, such as domestic provisions relating to the nature and scope of proprietary rights, which are commonly drafted in open-ended language. In *BG v. Argentina* (2007), the jurisprudence of Argentinean courts was thus considered in the process of determining that property rights were not limited to assets registered as such for accounting purposes.[9] In *Glamis Gold v. USA* (2009), judicial decisions were referred to in support of the conclusion that an unpatented mining claim constitutes real property in every sense.[10] In *Khan Resources v. Mongolia* (2015), a judicial precedent was carefully scrutinized in seeking to determine

[3] *Occidental v Ecuador (Final Award)* (n 1), [136]-[43].

[4] *CME v Czech Republic (Final Award)* (UNCITRAL, 14 March 2003), [631]-[32].

[5] Victor Pey Casado and President Allende Foundation v Republic of Chile (Award) (ICSID Case No ARB/98/2, 8 May 2008) [306]-[10].

[6] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines (Fraport II) (Award) (ICSID Case No ARB/11/12, 10 December 2014), [411].

[7] *Dan v Hungary (Decision on Jurisdiction and Liability)* (ICSID Case No ARB/12/9, 24 August 2015)[110], [113], [136].

[8] *Rusoro Mining Ltd v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB(AF)/12/5, 22 August 2016) [324]-[339].

[9] *BG Group Plc. v. The Republic of Argentina (Final Award)* (UNCITRAL, 24 December 2007), [120]-[127]. The Tribunal explained that resort had to be made to the interpretive work of the courts as no statutory definition of the term 'assets' could be found undery any Argentine law of general application.

[10] *Glamis Gold Ltd v US (Award)* (UNCITRAL NAFTA, 8 June 2009), [37].

whether mining licences could constitute intangible property under Mongolian law.[11] In *Emmis v. Hungary* (2014), in turn, domestic jurisprudence was canvased more broadly with a view to clarifying the categories of rights that could be generally recognized as proprietary under Hungarian law and the essential requirements for a right to have a proprietary character,[12] but also with a view to confirming that the rights acquired by virtue of a company's participation as a bidder in the tender for the new broadcasting license did not have a proprietary character.[13] Though used with a view to resolving ambiguities, in the majority of these cases the role of jurisprudence was primarily a supplementary one. Domestic judgments were invoked solely for confirmative purposes; to support the interpretation given to a provision by the investment tribunal on the basis of a plain meaning of the text.

Finally, domestic jurisprudence was sometimes considered to establish how the statutory provision was applied in practice. In the case of *Siag v. Egypt* (2007), the practice of domestic courts was scrutinized with a view to confirming whether or not a declaration expressing intention to retain Egyptian nationality, as expressly laid down in the relevant statute, continued to remain an applicable requirement under Egypt's nationality law. Though the provision laying down such requirement did not, on the face of it, give rise to ambiguity, domestic jurisprudence had to be scrutinized since Respondent alleged the trend of not giving effect to such requirement to have emerged in domestic judicial practice.[14]

5.1.2. Uncertainties Concerning the Law in General

Apart from reasons relating to legal uncertainty, support had often-times been sought in the jurisprudence of domestic courts because of the complexity of the particular question of domestic law; that is, where the resolution of the issue could not be found in the simple statutory interpretation of one or more concrete legislative provisions.

The following awards provide some illustration. In *Nykomb v. Latvia* (2003), domestic judgments were considered in determining the legal effects of the references to Latvian laws and regulations as used in the price clauses in the contracts that Claimant's subsidiary had entered into with the national electric energy distributor.[15] In *Consorzio Groupement L.E.S.I.-DIPENTA v. Algeria* (2005), Italian jurisprudence was considered in establishing whether an unincorporated consortium of companies had the capacity under Italian law to act in its own right.[16] In *Pey Casado v. Chile* (2008), Chilean jurisprudence was relied upon in determining whether failure to comply with specific registration requirements laid down in the Chilean Civil Code entailed the absolute nullity of a share purchase transaction.[17] In *Micula v. Romania* (2013), a Romanian judgment was canvased with a view to establishing whether special financial incentives provided for by the Romanian government gave rise to vested rights or else a right to compensation.[18] In *Apotex v. USA* (2013), a US domestic judgment was cited in support of the conclusion that final approval of a tentatively approved Abbreviated New Drug Application was not automatic.[19] In *MetalTech v.*

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[11] Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia (Award) (UNCITRAL, 2 March 2015) [307].

[12] *Emmis v Hungary (Award)* (n 1), [178]-[179], [182], [186]-[191].

[13] ibid [245]-[253].

[14] Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Decision on Jurisdiction) (ICSID Case No ARB/05/15, 11 April 2007) [54], [130]-[132].

[15] Nykomb Synergetics Technology Holding AB v. The Republic of Latvia (Arbitral Award) (SCC, 16 December 2003) 26.

[16] *Consorzio Groupement LESI-DIPENTA v Algeria* (*Award*) (ICSID Case No ARB/03/08, 10 January 2005) [39(iii)].

[17] *Pey Casado v Chile* (n 5), [226]-[27].

[18] *Micula v Romania (Final Award)* (ICSID Case No ARB/05/20, 11 December 2013) [450]-[52].

[19] Apotex Inc. v. United States of America (Award on Jurisdiction and Admissibility) (UNCITRAL, 14 June 2013) [210].

Uzbekistan (2013), judicial practice concerning bribery was cited in determining whether it was unlawful under Uzbek law to pay a Government official to take steps toward the performance of an action in circumstances where the official actually lacked authority to perform such action.[20] In *Teco v. Guatemala* (2013), Guatemalan Supreme Court judgments were considered to clarify the legal nature of certain recommendations issued by a technical committee and the obligations that the national electricity regulator had towards such recommendations.[21] In *Tulip Inn v. Turkey* (2014), a Turkish judgment was referred to in ascertaining the legal status of public economic enterprises under Turkish law.[22] In *Emmis v. Hungary* (2014), Hungarian judgments were invoked to clarify the precise legal nature of the general terms of tender, which was relevant for determining whether the broadcasting regulator was bound by those terms.[23] In *Fraport v. Philippines II* (2014), Philippine judgments were relied upon for the purpose of determining the defining moment when a corporate entity had to comply with the particular statute, or whether eventual violations of that statute could eventually be cured.[24] In *Chevron v. Ecuador (Lago Agrio) (2015)*, a prior domestic judgment was considered with a view to determining the circumstances under which a claim can be treated as an individual claim as opposed to a collective or diffuse claim.[25] Finally, in *Accession Mezzanine* (2015), support was sought in Hungarian judgments for the purpose of determining the possibility of renewal of broadcasting rights under the broadcasting agreement held by Claimant's radio company,[26] the extent of the broadcasting regulator's discretion in awarding points in a particular tender process,[27] or the competence of Hungarian courts to directly award a broadcasting right or otherwise compel the regulator to enter into a new broadcasting agreement.[28]

In some cases, domestic jurisprudence had to be consulted due to the practical impossibility of ascertaining the law in other ways than through domestic jurisprudence. Sometimes, recourse to jurisprudence was a convenient way to establishing how the law was actually applied in practice. In *Siag v. Vechi* (2007), for example, domestic jurisprudence was considered to determine the evidentiary value of certificates of nationality in general.[29] Very often, however, judicial decisions have had to be considered with a view to ascertaining the existence of particular doctrines and principles, insofar as these could not be ascertained directly from statutory provisions. Particularly in relation to common law systems, where cases can often be the sole source of the law in a particular field, scrutiny of domestic case-law has almost been unavoidable. In some cases, the analysis was sustained by simple reference to the most pertinent judicial precedents. In *LETCO v. Liberia* (1986), for example, domestic judicial authorities were quoted in support of the possibility under Liberian law of awarding compensation for foregone profits,[30] whereas in *PNG Sustainable Development v. Papua New Guinea* (2015), reference was made to domestic and English jurisprudence in support of the proposition that PNG law recognized a principle of statutory interpretation analogous to that of *effet utile*.[31] In other cases, the scrutiny of domestic precedents was much more extensive. In *FW-Oil v. Trinidad and Tobago* (2006), for

[20] *MetalTech v Uzbekistan (Award)* (ICSID Case No ARB/10/3, 4 October 2013) [283].

[21] *Teco v Guatemala (Award)* (ICSID Case No ARB/10/23, 19 December 2013) [512]ff.

[22] *Tulip Inn v Turkey (Award)* (ICSID Case No ARB/11/28, 10 March 2014) [288].

[23] *Emmis v Hungary* (n 12), [245]-[246].

[24] *Fraport v Philippines II* (n 6), [397], [430].

[25] Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Decision on Track 1B) (UNCITRAL, PCA Case No 2009-23, 12 March 2015) [168]-[75].

[26] *Accession Mezzanine v Hungary* (ICSID Case No ARB/12/3, 17 April 2015) [93]-[9].

[27] ibid [126].

[28] ibid [134]-[44].

[29] *Siag v Egypt* (n 14), [51], [149], [152]-[53], [193].

[30] Liberian Eastern Timber Corporation v Republic of Liberia (Award)(ICSID Case No ARB/83/2, 31 March 1986) [41].

[31] *PNG Sustainable Development v Papua New Guinea* (ICSID Case No. ARB/13/33, 5 May 2015) [316].

example, a great deal of jurisprudence of various common law countries was carefully examined with a view to determining whether common law recognized a process contract as a specific form of contract regulating the conduct of negotiations towards the final contract.[32] In *World Duty Free v. Kenya* (2006), likewise, the jurisprudence of England and several other common law jurisdictions was considered in determining the consequences under common law of a contract obtained by bribery.[33]

Yet, the practice of extrapolating principles and doctrines from domestic jurisprudence has not been limited to the field of common law. First, such practice has equally been followed in relation to legal questions arising in the context of civil law jurisdictions. In *Acuven v. Venezuela* (2003), for instance, domestic judicial decisions were referred to in stating the general position under Venezuelan law on the scope of lost profits compensation and the standard of proof applicable to determining the amount of loss.[34] Second, the practice has also extended to extrapolating principles and rules from several systems of law, as normally required when determining the existence of general principles of law. In the same *World Duty Free* case, the domestic jurisprudence of several common and civil law jurisdictions was thus drawn upon to conclude that bribery was contrary to international public policy of most States.[35] While in *Niko v. Bangladesh* (2013), decisions of different jurisdictions were similarly invoked in support of the proposition that contracts having influence peddling or bribery as their objectives or motives were generally treated as void or unenforceable and could thus be denied effect by international arbitrators.[36]

5.1.3. Factual Relevance

In some of the cases, in turn, domestic judgments have been considered or relied upon, not so much because of the specific judicial pronouncements on points of domestic law, but because they provided the factual context for the tribunals' own interpretation of a particular statutory provision. In *Fraport v. Philippines II* (2014), for example, reference was made to a Philippine Supreme Court´s judgment in explaining the purpose of the statutory prohibition preventing the employment of aliens, which purpose was then considered by the investment tribunal to confirm that the statutory prohibition applied to all and any executive or management personnel.[37] Similarly, in *Emis v. Hungary* (2014), a Hungarian Supreme Court´s judgment was quoted in explaining the overall purpose of a tendering process, which purpose was then considered to explain that the rights obtained in relation to that process could not be deemed to constitute valuable proprietary assets.[38] On the other hand, in *Mobil v. Venezuela* (2010), and some other cases where the tribunal's jurisdiction was premised on domestic legislation, domestic laws were considered to possibly play "a useful role" in determining the State's intention in formulating the legal instrument through which consent to arbitrate was expressed.[39]

Last but not least, an inquiry into domestic jurisprudence was occasionally necessary insofar as jurisprudential developments itself formed the factual premise of the treaty claim. The

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[32] *FW-Oil v Trinidad and Tobago (Award)* (ICSID Case No ARB/01/14, 3 March 2006) [153]-[56], [168], [173]-[74], [178].

[33] *World Duty Free v Kenya (Award)* (ICSID Case No ARB/00/7, 4 October 2006) [161]-[65], [172]-[81], [185]-[87].

[34] *Acuven v Venezuela* (Award) (ICSID Case No ARB/00/5, 23 September 2003) [345], [349].

[35] *World Duty Free* (n 33), [140]-[53].

[36] *Niko v Bangladesh (Decision on Jurisdiction)* (ICSID Case No ARB/10/18, 19 August 2013) [436].

[37] *Fraport v Philippines II* (n 6), [462].

[38] *Emmis v Hungary* (n 12), [251], [253].

[39] Mobil v Venezuela (Decision on Jurisdiction) (ICSID Case No. ARB/07/27, 10 June 2010) [96]; also CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (Decision on Jurisdiction) (ICSID Case No. ARB/08/15, 30 December 2010) [89].

most straightforward example of this type of situations is the award in *Eli Lilly v. Canada* (2017), where the Tribunal extensively examined Canadian jurisprudence for the purpose of establishing whether Canadian courts dramatically changed their interpretation of the utility requirement under Canadian patent law, through a series of cases adopting the promise utility doctrine. In the circumstances of that case, the alleged "dramatic" departure from prior case-law was the factual premise for Claimant's claim that the invalidation by the Canadian judiciary of two of its drug patents through application of the promise utility doctrine amounted to a violation of the minimum standard of treatment and an act of expropriation.[40] Yet, examples of domestic jurisprudence being used for similar purposes can be found in other cases. In *Dan Cake v. Hungary* (2015), where the very object of the claim was the alleged impropriety of a Metropolitan Court of Budapest's judgment, the Tribunal examined a previous decision of High Court of Appeal, insofar as the impugned judgment referred to "consistent judicial practice".[41]

5.2. The Scope of Investment Tribunals' Law-Ascertainment Duties

Apart from the many practical reasons that may certainly warrant resort to domestic jurisprudence, the question arises as to the existence of any reasons of *legal* nature that may actually necessitate such resort. The argument that I intend to make in the present section is that domestic judicial decisions do not represent just any other evidence that the investment tribunals are free to neglect when interpreting and applying domestic law. Given the special weight that is given to domestic jurisprudence in national legal systems (5.2.1.), I argue that there is actually a duty on the part of investment tribunals to consider such jurisprudence when determining a point of domestic law that is essential to the issues raised by the disputing parties for decision (5.2.2.). In view of this duty, I therefore explore the extent to which investment tribunals can be deemed to know such jurisprudence, and the implications arising therefrom (5.2.3.).

5.2.1. The Legal Weight of Domestic Jurisprudence: From Sources of Law to Evidence of Interpretation and Application of Domestic Law

Domestic judicial pronouncements carry particular legal weight in the law ascertainment process. This is not solely the case in those countries – primarily of the common law tradition – where judicial decisions are treated as sources of law (appropriately called "case-law"), but also in countries that do not do so. Of course, in countries where judicial decisions are deemed to form part of the law – in the same sense as, for instance, legislation – judgments actually constitute *the law*. For that reason already, investment tribunal will have to give them proper consideration, just as domestic courts will normally treat them as binding and, pursuant to the doctrine of *stare decisis*, will be required to follow them when deciding subsequent cases with similar issues or facts. The more so given that in common law systems, judgments often operate so as to affect the rules of positive law, by amplifying them, qualifying them, displacing them, or at the very least, by assisting in the formation of new positive rules of law through the creation of new analogies.[42] Yet, even in legal systems where judicial decisions do not have the status of sources of law, such as those of the civil law tradition, judgments do carry a particular weight in the law ascertainment process, insofar as they are considered to represent *authoritative interpretations of positive laws*. Indeed, although considered not to constitute binding precedent, in many civil law systems, prior decisions (especially those of superior courts) will be treated as persuasive and, by virtue of the doctrine of *jurisprudence constante*,

[40] Eli Lilly and Company v. The Government of Canada (Final Award) (ICSID Case No UNCT/14/2, 16 March 2017) [307]-[389].

[41] Dan Cake S.A. v. Hungary (Decision on Jurisdiction and Liability) (ICSID Case No. ARB/12/9, 24 August 2015) [136].

[42] cf A Lincoln, 'The Relation of Judicial Decisions to the Law' (1907) 21 Harvard Law Review 120, 126.

lower courts will be bound to consider them when reaching a decision.[43] Regardless of the legal tradition, therefore, domestic judicial pronouncements provide authoritative evidence as to the content of domestic law, which investment tribunals ought not to neglect.

5.2.2. Duty to Consider Domestic Jurisprudence in the Interpretation and Application of Domestic Law

In view of the considerable legal weight accorded to judgments in many domestic legal systems, it is of little surprise that international courts, when faced with the need to interpret and apply domestic law, have deemed it necessary to do so in accordance with relevant domestic jurisprudence. The relevant considerations facing an international court in such case have been famously set out by the Permanent Court of International Justice (PCIJ) in the *Loans* cases (1929). In *Brazilian Loans*, the Court thus explained that,

> "[o]nce the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force."[44]

While in the circumstances of that case, the Court was expressly permitted to depart from decisions of domestic courts, the Court remained of the view that it

> "… must pay the utmost regard to the decisions of the municipal courts of, a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied".[45]

In the related *Serbian Loans*, the Court further added to this that

> "leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal […] would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members."[46]

The principles and considerations enounced by the Permanent Court in the *Loans* cases were not novel ones. Already in the *García and Garza* case (1926) before the Mexican Claims commission, Commissioner Nielsen professed the existence of "a well-recognized general principle that the construction of national laws rests with the nation's judiciary."[47] Indeed, the principle has never been seriously contested. Not only has the Permanent Court reaffirmed the

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[43] See eg V Fon and F Parisi, 'Judicial precedents in civil law systems: A dynamic analysis' (2006) 26(4) International Review of Law and Economics 519-35.

[44] *Brazilian Loans (Judgment)* PCIJ (ser A) No 21 (12 July 1929) 124.

[45] ibid.

[46] Payment of Various Serbian Loans Issued in France (France v Kingdom of the Serbs, Croats, and Slovenes) (Judgment) (1929) PCIJ ser A No 20 (12 July 1929) 46-47.

[47] Dissenting Opinion of Commissioner Nielsen in *Teodoro García and MA Garza (United Mexican States) v United States of America* (3 December 1926) IV UNRIAA 119, at 126.

principle in later cases,[48] but also the PCIJ's successor, the International Court of Justice,[49] as well as other international adjudicatory bodies[50] have frequently endorsed the proposition that an international adjudicatory body is bound to follow domestic jurisprudence in the interpretation and application of domestic law.

In the investment arbitration context, too, the principle has consistently been upheld that arbitrators are not at liberty to interpret domestic law in accordance with what they themselves consider to be the most appropriate interpretation, but that they are essentially bound to follow the practice of domestic legal authorities in the ascertainment of the content of domestic law. Among the first to expressly endorse such principle was the Annulment Committee in the *Soufraki* case (2007). In considering Claimant's grief in that case that the original Tribunal had not applied Italian nationality laws as an Italian court would have done, the Committee took the view that "[a]n international tribunal's duty to apply Italian law is a duty to endeavour to apply that law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the State's judicial authorities".[51] This was considered to follow from the general principle that "when applying national law, an international tribunal must strive to apply the legal provisions as interpreted by the competent judicial authorities and as informed by the State's 'interpretative authorities'"[52] – a principle that the Committee deduced from the abovementioned holdings of the PCIJ in the *Serbian* and *Brazilian Loans* cases. The principle found endorsement in subsequent jurisprudence. The Annulment Committee in the *Fraport* case (2010), relying on the same PCIJ precedents, considered that an investment tribunal "should give particular consideration" to municipal decisions as to the construction of the relevant legislation in determining "how it would be applied within the municipal legal system".[53] Specifically, the Committee confirmed that the Tribunal was under an "obligation […] to apply municipal law as it would be applied in the Philippines, taking into account the evidence of the relevant authorities as to the proper construction of that law."[54] Eventually, the duty of investment tribunals to

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[48] *Panevezys-Saldutiskis Railway* (1938) PCIJ Ser A/B, No 76, 19 ('The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision.')

[49] See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits Judgment)* [2010] ICJ Rep 639 (30 November 2010) [70] ('The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts.') See also *Elettronica Sicula SpA (ELSI), United States v Italy (Judgment)* [1989] ICJ Rep 15 (20th July 1989) [62] ('Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts…').

[50] See eg ECtHR, *Case of Kononov v Latvia (Judgment)* Application No 36376/04 (24 July 2008), [197] ('it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation so that its role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention'); and similarly *Korbely v Hungary (Judgment)* Application No 9174/02 (19 September 2008), [72]; WTO, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* WT/DS213/AB/R and Corr1 (19 December 2002) [157] (evidence as to the scope and meaning of domestic law 'will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.'); or STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/I/AC/R176bis (16 February 2011) [35] ('In consonance with the case law of international tribunals, […] generally speaking the Tribunal will apply Leba=nese law as interpreted and applied by Lebanese courts').

[51] Hussein Nuaman Soufraki v The United Arab Emirates (Decision of the Ad Hoc Committee on the Application for Annulment) (ICSID Case No ARB/02/7, 5 June 2007) [96].

[52] ibid [96] cf [97] (restating that it had 'to strive to apply the law as interpreted by the State's highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities').

[53] Fraport AG Frankfurt Airport Services Worldwide v Philippines (Decision on the Application for Annulment) (ICSID Case No ARB/03/25, 23 December 2010), [236].

[54] ibid 244.

interpret and apply domestic law in accordance with the way that such law would be understood and applied by domestic courts has been explicitly recognized in other cases.[55]

Unlike the PCIJ in the *Brazilian* and *Serbian Loans* cases, which derived the duty to defer to domestic judicial pronouncements in applying domestic law from the nature and functions of it as an international tribunal applying international law – *i.e.*, a body established with a view to resolving disputes among states on the basis of international law, composed of members of various national background, and not to be presumed to know the domestic laws of the various countries[56] – none of the investment tribunals proceeded to spell out the source of such duty. However, if one is to follow the reasoning of the *Fraport* Annulment Committee, which noted in its decision that an investment tribunal "had not been chosen for its knowledge of Philippine law",[57] the duty on the part of investment tribunals to follow domestic jurisprudence in the ascertainment of the content of domestic law could logically be inferred from the circumstance that investment tribunals are not necessarily composed of arbitrators having sufficient knowledge of the domestic law that they are supposed to apply. This is an aspect that calls for further examination.

5.2.3. Duties pertaining to the Possession, Acquisition, and Application of Knowledge of Domestic Jurisprudence

If investment tribunals are thus bound to apply domestic law in accordance with the relevant domestic jurisprudence, the question necessarily arises as to their actual knowledge of this jurisprudence. Can this knowledge be presumed, pursuant to the principle of *iura novit curia* (5.2.3.1.)? If such presumption is not applicable, are investment tribunals otherwise bound to engage in their own research with a view to identifying and establishing the most relevant jurisprudence (5.2.3.2.)? Alternatively, are they bound to seek the views of the parties as to the details of the applicable law, including their views on the pertinent domestic jurisprudence (5.2.3.3.)? Lastly, if they receive such views, to what extent are they then bound by the parties' submissions on the content of that jurisprudence (5.2.3.4.)?

5.2.3.1. Duty to Know Domestic Jurisprudence

When it comes to the ascertainment and application of the law to the circumstances of the case, there are still some notorious differences in the powers and duties that different legal systems accord to adjudicators. While common law systems have traditionally favoured a more limited role for courts in the adversarial search for the truth, in civil law systems, the law is generally presumed to lie within the "judicial knowledge" of the courts, in light with the maxim *iura novit curia* – the principle which literally stands for the proposition that "the judge knows the law".[58] By virtue of this principle, not only are the parties dispensed with the need to prove that the rule, upon which they rely, actually exists as valid law, but judges can also apply the law by right of

[55] See eg *Teco v Guatemala (Award)* (n 21), 477 (recognizing that the Tribunal's task was to apply 'the content of Guatemalan law as interpreted by the Constitutional Court') and 500 (holding that it was necessary to apply Guatemalan law 'in light of the relevant findings of the Guatemala Constitutional Court'); or *Emmis v Hungary* (n 1), [175] (acknowledging that the Tribunal 'must seek to determine the content of the applicable law in accordance with […] the manner in which the law would be understood and applied by the municipal courts').

[56] See *Brazilian Loans* (n 44), 124 and *Serbian Loans* (n 46), 46.

[57] *Fraport (Annulment)* (n 53), [236]; footnotes omitted.

[58] cf FA Mann, 'Fusion of the Legal Profession', (1977) 93 L.Q.R. 367, 375.

their authority (*ex officio*). It is in both senses that the principle has also been considered and applied in the context of international adjudication.[59]

Fundamentally, the notion of *iura novit curia* is about who ultimately bears the responsibility to know and apply the law correctly: is it for the adjudicator to identify the applicable legal principles, with claimants merely needing to assert and prove the facts and clarify the relief sought? Or is it for the parties to educate the adjudicator on the content of the relevant legal rules? In investment arbitration, one can quickly reject the idea that responsibility for the ascertainment and application of the law would lie exclusively with the arbitrators, so that – in line with the civil law adage *da mihi factum, dabo tibi jus* ("give me the facts, and I will give you the law/justice") – the parties would solely be required to plead their facts. Under most arbitration rules, it is obligatory for the parties to explicitly state the juridical bases of their claims and defences,[60] meaning that the parties cannot avoid also pleading the law. The question, rather, is a more specific one: whether beyond the statement/invocation of rules, the parties need also adduce evidence as to the content of those rules, and educate the tribunal on the specific nature and detail of the applicable law, or whether the tribunal can instead be deemed to literally "know the law" – that is, to be aware of it and to understand it – independently from any potential input from the parties.

In the context of international commercial arbitration, doubts have frequently been expressed about the idea that arbitrators could (or should) be deemed to be acquainted with the applicable law, given especially that commercial arbitral tribunals have no proper *lex fori*.[61] In the context of international adjudication, in contrast, the proposition was generally accepted that the law could be deemed to lie within the judicial knowledge of a court, with the consequence that the parties would not carry the burden of establishing or proving particular rules.[62] The issue of contention has been, rather, whether the proposition equally holds true for questions of domestic law. In the *Brazilian Loans*, the PCIJ namely rejected the suggestion that, as "a tribunal of international law", it would be "obliged also to know the municipal law of the various countries."[63] Investment tribunals, on their part, have largely not expressed themselves on this particular issue. While some of them formally endorsed the extension of the principle of *iura novit curia* to issues of domestic law,[64] none in fact subscribed to the literal implications thereof: the presumption that they would necessarily be familiar with domestic law and national jurisprudence of the host State involved in the proceedings.[65] And so, too, academic views considering the

[59] See e.g. ICJ, Fisheries Jurisdiction (UK v Iceland) (Judgment) [1974] ICJ Rep 3 (25 July 1974) [17]; or Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment) [1986] ICJ Rep 14 (27 June 1986), [29]. See generally B Cheng, General Principles of Law as Applied by International Courts and Tribunals (CUP 1953) 299-301.

[60] See eg Rule 31(3) ICSID Arbitration rules (requiring the memorial to contain 'a statement of law', and the counter-memorial to include 'observations concerning the statement of law in the last previous pleading' and 'a statement of law in answer thereto'); or art 20(3)(e) UNCITRAL (requiring the statement of claim to include '[t]he legal grounds or arguments supporting the claim.') and art 21(4) (replicating the same requirement with respect to the statement of defence).

[61] cf ILA Report on 'Ascertaining the Contents of the Applicable Law in International Commercial Arbitration', reproduced in (2010) 26(2) Arbitration International 193, at 201-06.

[62] *Fisheries Jurisdiction* (n 59), [17].

[63] *Brazilian Loans* (n 44), 124.

[64] *Oostergetel v Slovak Republic (Award)* (UNCITRAL, 23 April 2012) 140-41; and *MetalTech v Uzbekistan* (n 20), [287] ('when it comes to applying the law, including municipal law, as opposed to establishing facts, the principle *iura novit curia* – or better *iura novit arbiter* – allows it to form its own opinion on the meaning of the law.')

[65] See FG Sourgens, KAN Duggal & IA Laird, *Evidence in international investment arbitration* (OUP, 2018), 135, suggesting that the practice of investment arbitration 'on its face further disproves the assumption that tribunals know the law in a non-trivial sense'.

application of *iura novit curia* to questions of domestic law remain mostly limited to observations at the level of principle.[66]

One can possibly advance arguments both in favour and against the proposition that domestic law and domestic jurisprudence could be taken to lie within the "judicial knowledge" of investment tribunals. Speaking in favour of such presumption is certainly the fact that investment tribunals today must concurrently apply *both* international law (i.e. the applicable investment treaty and/or general international law) *and* the law of the host State that is party to the investment dispute (either as the law directly applicable to the merits, or else as the law indirectly applicable by *renvoi*).[67] In that, investment arbitration differs from international commercial arbitration more generally, where it may often be difficult to identify a particular *lex fori*, as well as from inter-State judicial or arbitral proceedings, where the adjudicatory bodies are usually mandated to apply solely international law. At the same time, it is also clear that a general presumption in favour of investment tribunals knowing domestic law may not sit particularly well with some of the underlying premises of investment arbitration itself. Conceived as an alternative to domestic litigation, the very *raison d'etre* of investment arbitration has been to provide for a neutral forum where investment disputes can be decided by arbitrators that are not involved with, or related to the host State. Indeed, some arbitration rules, of which most notably the ICSID Convention, actually place limitations with respect to the nationality of arbitrators that can be appointed to resolve a particular dispute.[68] In practice, of course, it may not infrequently happen that one of the arbitrators – usually, the one appointed by the State party to the dispute – will have some knowledge of the law of the host State. Whereas such arbitrators can certainly assist the co-arbitrators in familiarizing themselves with the content of the domestic legal rules that the tribunal might be required to apply, it is rather far-fetched to consider in such cases that the tribunal can actually be deemed to *know* the law. Besides, to the extent that such presumption would rest on the expertise of one of the party-appointed arbitrators, this could place the appointing party – in most cases, the Respondent State – in a more advantageous position, and possibly even run against the *nemo judex* principle.[69]

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[66] See eg A Newcombe and L Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer, 2009), 88-89.

[67] See O Chukwumerije, 'International Law and Article 42 of the ICSID Convention' (1997) 14 Journal of International Arbitration 79, 82, explaining that it is both domestic and international law that must be deemed to be the *lex fori* of ICSID tribunals; as well as J Hepburn, *Domestic Law in International Investment Arbitration* (OUP, 2017), 120, considering that *iura novit curia* must extend to all of the applicable law, including any relevant domestic law.

[68] According to Article 39 of the ICSID Convention, in the absence of agreement of the disputing party to the contrary effect, '[t]he majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute'. Rule 1(3) of the ICSID Arbitration Rules further stipulates that '[t]he majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.'

See also art 6.1 LCIA Arbitration Rules providing that '[w]here the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise'; and Article 13(5) ICC Arbitration Rules stipulating that '[t]he sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.'

[69] On this problem, see J Waincymer, 'International Arbitration and the Duty to Know the Law' (2011) 28(3) Journal of International Arbitration 201, at 220. Then again, the problem must not be overstated. In the context of ICSID arbitrations, arbitrators are required to 'exercise independent judgment' (art 14(1) ICSID Convention).

Given these limitations concerning the composition of investment tribunals, one cannot thus identify a general duty on the part of investment tribunals to actually know domestic law and jurisprudence. Indeed, most arbitration rules do not even prescribe any specific qualifications that arbitrators should have. The ICSID Convention, on the other hand, merely demands that arbitrators or conciliators be persons of "recognized competence in the fields of law, commerce, industry *or* finance", even if adding that "competence in the field of law shall be of particular importance" in the case of persons sitting on arbitral tribunals.[70] However, the Convention does not otherwise require that such competence be one concerning any specific field of law – save for the demanding that, in designating the arbitrators, "due regard" shall be paid "to the importance of assuring representation on the Panels of the principal legal systems of the world".[71] Thus, while investment arbitrators will frequently be lawyers by education, they may not necessarily be qualified or educated in the applicable substantive or procedural domestic law. In the end, it is of course the parties that bear primarily responsibility for the appointment of arbitrators and that hence should ensure that, even if not knowledgeable of the applicable law, their appointees are at the very least capable of properly understanding it.[72]

5.2.3.2. Duty to Become Acquainted with Domestic Jurisprudence

In the absence of an obligation on the part of arbitrators to already possess the required knowledge of domestic jurisprudence, the question then necessarily arises as to how the arbitrators are to obtain such knowledge and become familiar with the jurisprudence if they are to apply domestic law in the same way as it is applied in the host State. Facing such a situation in the *Brazilian Loans* case, the PCIJ considered that an international adjudicatory body "may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied", either "by means of evidence furnished to it by the Parties" or "by means of any researches which the Court may think fit to undertake or to cause to be undertaken."[73] The possibility must thus first of all be considered whether investment tribunals are under some sort of general obligation to become acquainted with the relevant judicial precedents for the purposes of interpreting and applying domestic law in the exercise of their mandate.

Conceivably, one could possibly construe such an obligation from their general duties to apply the proper law,[74] and to render an enforceable award. In the context of the ICSID Convention, it is well-established that applicable law provisions are not stating "simple advice or recommendations",[75] but that the non-application of the proper law is capable of amounting to an excess of powers and thus constituting a valid reason for annulment of an award.[76] In the case

[70] ICSID Convention, art 14(1).

[71] ICSID Convention, art 14(2).

[72] ICSID Convention, art 14(1), in fact specifically requires that the appointed arbitrators be persons who "may be relied upon to exercise independent judgment." On this basis, some have therefore suggested that in the context of investment arbitration, the concept of *iura novit curia* must be construed in the relational sense, as to how the law is tethered to the context of a specific dispute and the frame of the submissions of the parties within it, and not in absolute terms, so that law could be deemed to exist and be sought independently. See FG Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill, 2015), 124ff.

[73] *Brazilian Loans* (n 44), 124.

[74] Pursuant to Article 42(1) of the ICSID Convention, tribunals 'shall decide' a dispute in accordance with the rules of law agreed by the parties, and in the absence of such agreement, 'shall apply' the law of the host State and applicable rules of international law. Similarly, pursuant to art 35(1) UNCITRAL Arbitration Rules, tribunals 'shall apply' the applicable rules of law designated by the parties, and failing such designation, they 'shall apply' the law that they determine to appropriate.

[75] Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (Ad hoc Committee Decision on Annulment) (ICSID Case No ARB/81/2, 3 May 1985), [58].

[76] ibid [59], [61]; *Amco Asia Corporation and others v Republic of Indonesia (Ad hoc Committee Decision on the Application for Annulment)* (ICSID Case No ARB/81/1, 16 May 1986) [23], and (Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award) (17 December 1992), [7.19]; *Maritime International Nominees Establishment v Republic of Guinea*

of legal systems where domestic judicial decisions constitute the law, or else in circumstances where judicial decisions can constitute the only evidence of the law, it is certainly possible to interpret the failure to apply a relevant judicial precedent as a failure to apply the proper law. In *Klöckner v. Cameroon* (1985), the absence of any "reference whatsoever to legislative texts, *to judgment*s, or to scholarly opinion" demonstrating the existence of a concrete legal principle of French civil law was sufficient reason for the ICSID Annulment Committee to conclude that the Tribunal failed to apply the proper law.[77] But even in circumstances where, in applying statutory provisions, an investment tribunal omits to take account of how those provisions are interpreted by the competent judicial authorities, grounds could arise for annulment of an award. The obligation to apply the proper law namely entails the obligation to apply *all relevant law*, which in relation to domestic law means the law as applied by domestic courts. In the words of the Annulment Committee in *Soufraki* (2007), the duty is thus "to strive to apply the law as interpreted by the State's highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities."[78] Furthermore, ICSID tribunals can also be taken to be subject to a more specific obligation to familiarize themselves with relevant domestic judicial precedents in the particular circumstances where the applicable statutory provisions are unclear or indeterminate. As Article 42(2) of the ICSID Convention expressly prohibits the finding of *non liquet* on the ground of silence or obscurity of the law, tribunals may have to resort *inter alia* to domestic judicial decisions to clarify such obscurities of the law.[79] Specific duties of this kind do not seem to arise in other types of investment arbitration.

The consequences of non-application of proper law are admittedly somewhat different in the context of non-ICSID investment arbitrations. Under most jurisdictions, the challenges of the ensuing awards are not permitted on the basis that the arbitral tribunal had made a mistake in applying the law on the merits.[80] Nor can recognition and enforcement of an award be refused on such basis.[81] Yet, just like in the ICSID context, a non-ICSID tribunal's failure to apply the proper law to the merits may under many domestic laws still constitute a failure to act in accordance with the arbitration agreement, and thus constitute ground for annulment. [82] Furthermore, the lack of a valid arbitration agreement can be direct ground for annulment of non-ICSID awards,[83] as well as ground for refusal of their recognition and enforcement.[84] Failure to consider domestic jurisprudence in the interpretation or application of domestic law will thus have direct consequences in the circumstances where such law is relevant to determining the

(Decision of the Ad hoc Annulment Committee) (ICSID Case No ARB/84/4, 22 December 1989) [5.03]; *Empresas Lucchetti, SA and Lucchetti Peru SA v The Republic of Peru (Decision on Annulment)* (ICSID Case No ARB/03/4, 5 September 2007) [98]. See generally Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 954 ff.

[77] *Klöckner (Annulment)* (n 75), [71]-[79]; emphasis added. cf *AMCO (Annulment I)* (ibid) [58] – failure to refer to Indonesian case-law (as well as other sources of Indonesian law) was not found to amount to non-application of Indonesian law, as the original tribunal was purporting to apply international, and not domestic law. In specific circumstances, failure to provide legal authorities for an award might also be relied upon in the context of an alleged failure to state reasons, which can be a separate ground for annulment under art 52(1)(e) ICSID. See further Schreuer et al, *ICSID Commentary*, ibid 996-1023.

[78] *Soufraki (Annulment)* (n 51) [96].

[79] cf Schreuer et al, *ICSID Commentary* (n 76), 631, at [247].

[80] cf art 34(2) UNCITRAL Model Law. An exception is the US, where awards can be set aside for 'manifest disregard of the law' (as per *Wilko v Swan* 346 US 427, 74 S Ct 182 (1953)); a possibility which is also available for non-domestic awards (*Shanghai Foodstuffs Import & Export Corp v International Chemical,* No 99 CV 3320, 2004 US Dost LEXI 1423). The standard for 'manifest disregard' is a demanding one, however. Limited review is also possible in the UK. A tribunal exceeds its powers and renders an annullable award under s 68(2)(b) of the Arbitration Act 1996 if the tribunal has applied the wrong system of law to the dispute or particular issues.

[81] cf art V New York Convention.

[82] See on this G Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID' in J van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (2009), at 299-300.

[83] UNCITRAL Model Law, 34(2)(a)(i).

[84] New York Convention, art V(1)(a).

scope and extent of the agreement to arbitrate the investment dispute. The approach adopted in many domestic systems towards reviewing the investment tribunals' jurisdictional determinations has been namely that of a *de novo* review.[85]

All in all, a duty to become acquainted with domestic jurisprudence can thus be said to flow from the general obligation under most *lex arbitri* to apply the proper law to issues of both jurisdiction and merits, as well as from the general obligation ensuing from the various *lex loci arbitri*, as well as the ICSID and the New York Conventions, to render an enforceable award.[86] This duty can be taken to exist in both ICSID and non-ICSID arbitrations.

The duty to familiarize themselves with pertinent judicial precedents, however, does not imply that arbitrators are to become experts in domestic case-law. The duty to consider the relevant jurisprudence in the law ascertainment process is one of due diligence and no consequences can be attached to the improper interpretation or application of domestic law based on a tribunal's incorrect understanding of such decisions. In ICSID annulment practice, the distinction is namely well-established between non-application of the governing law and the erroneous application of such law.[87] Hence, as established by the Annulment Committee in *Soufraki* (2007), errors committed by ICSID tribunals in the interpretation or application of domestic law "in the process of striving to apply the relevant law in good faith" will not necessarily constitute a ground for annulment.[88] As further determined by the Annulment Committee in *TECO v. Guatemala* (2016), an allegation that a tribunal interpreted and applied domestic judicial decisions incorrectly will therefore equally not constitute a valid ground for annulment.[89] This is not to deny that, in some cases, the errors may be of such gravity so as substantially to amount to the non-application of the law. But what is required in such cases is an *egregiously wrong* interpretation or application of the proper law, which only occurs in the event of "[s]uch gross and consequential misinterpretation or misapplication of the proper law which no reasonable person ("*bon père de famille*") could accept", and is thus of greater gravity than even a "serious error" in the interpretation of the law.[90] The distinction between applying the applicable law incorrectly and applying the incorrect applicable law is equally well established in the domestic review of non-ICSID arbitral awards.[91]

5.2.3.3. Duty to Pursue Proprio Motu *Research into Relevant Domestic Jurisprudence*

With the existence of an obligation on the part of investment tribunals to become familiarized with the jurisprudence of domestic courts thus established, it is important to determine upon whom the burden of educating the arbitrators befalls. Is it upon arbitrators themselves to become educated in the applicable law and related jurisprudence by means of their own inquiries; or is it

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[85] See eg *The Republic of Ecuador v Occidental Exploration & Production Company* [2006] EWHC 345 (Comm); [2006] 1 Lloyd's Rep. 773 (Judgment of English High Court) at [7]; or *Ecuador v Chevron / Texpet*, NJB 2014/1779 (Judgment of the Supreme Court of the Netherlands, 26 September 2014), [4.2].

[86] On this general duty more generally, see GJ Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18(2) Journal of International Arbitration 135.

[87] *Klockner I (Annulment)* (n 75), [60]; *Amco I (Annulment),* (n 76) [23]; *Soufraki (Annulment)* (n 51), 85; *CMS v Argentina (Decision of the Ad Hoc Committee on the Application for Annulment)* (ICSID Case No ARB/01/8, 25 September 2007) [49]; or *Malicorp Limited v. The Arab Republic of Egypt (Decision on the Application for Annulment)* (ICSID Case No. ARB/08/18, 3 July 2013) [154]-[155].

[88] *Soufraki (Annulment)* (n 51), 97. For endorsement, see also *Malicorp (Annulment)* (n 87), [155].

[89] TECO Guatemala Holdings, LLC v Republic of Guatemala (Decision on Annulment) (ICSID Case No ARB/10/23, 5 April 2016) [279].

[90] *Soufraki (Annulment)* (n 51), 86.

[91] See eg *CME v Czech Republic (Decision)* Svea Court of Appeal, Case No T 8735-01, 15 May 2003, 91; or *International Thunderbird Gaming Corp v Mexico,* 473 F Supp 2d 80.

primarily upon the parties themselves to sufficiently brief the arbitrators on the relevant domestic case-law?

From the perspective of *lex arbitri*, there is little support for the proposition that, in exercising their duty to familiarize themselves with pertinent domestic judicial authorities, investment tribunals would actually be bound to pursue their own inquiries into issues of domestic law. With the exception of the LCIA Rules of Arbitration, which explicitly empower arbitral tribunals to conduct such enquiries that are necessary to ascertain the applicable law,[92] most international arbitration rules, including the ICSID Arbitration Rules, remain actually silent on the tribunals' powers and duties with respect to the ways that cognition is taken of the applicable law. Neither do most national arbitration laws direct arbitral tribunals to ascertain the content of the governing law in any particular way, and those that do, do so in a permissive manner.[93] In the absence of guidance on this point in most *lex arbitri*, resort must therefore be made to the practice of investment tribunals to determine whether arbitrators had considered themselves under a duty to undertake their own independent research into the relevant jurisprudence.

Apart from formal endorsements of the *iura novit curia* principle, investment tribunals have generally not considered themselves obliged to conduct legal research into the domestic law that had to be applied. Admittedly, in *BP v. Libya* (1979), the Tribunal did consider itself "both entitled *and compelled* to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the Claimant."[94] It can be debated, however, whether the Tribunal really considered itself required to engage in such further research, or whether it merely deemed such research appropriate in the circumstances where the Respondent State was absent from the proceedings, and the Tribunal had solely the benefit of argument presented by the Claimant. More can perhaps be inferred from the proposition advanced by the Tribunal in *CME v. Czech Republic* (2003), which stated that it was not "bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties or the Tribunal to be essential to the Tribunal's decision."[95] For, in the inversed situation where domestic law were essential to the decision, the statement could be taken to mean that a tribunal would have to independently research and find such law.

From the perspective of the broader practice, however, what one may possibly conclude is that investment tribunals have largely considered to have the power, but not the obligation, to pursue their own research into domestic law and jurisprudence. In several cases, tribunals have thus engaged in *proprio motu* inquiries into relevant jurisprudence, without any second thoughts as to whether such inquiries were actually permissible.[96] Indeed, in *LESI – DIPENTA v. Algeria* (2005), the Tribunal considered that it "must then take into consideration the information

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[92] See art 22.1(iii) of the LCIA Arbitration Rules providing in the relevant part that '[t]he Arbitral Tribunal shall have the power, upon the application of any party or […] *upon its own initiative*, but in either case only after giving the parties a reasonable opportunity to state their views […] to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in […] *ascertaining* […] *the law(s) or rules of law applicable* to the Arbitration Agreement, the arbitration and the merits of the parties' dispute'. Emphasis added.

[93] JDH Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (OUP 2013), 156-57. Most notable in this respect is art 34(2)(g) of the English Arbitration Act of 1969, which provides that the tribunal may decide 'whether and to what extent the tribunal should itself take the initiative of ascertaining the facts and the law.'

[94] *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (Awards of 10 October 1973 and 1 August 1974) 53 ILR 297, at 313; emphasis added.

[95] *CME v Czech Republic* (n 91). 411

[96] See eg *Nico Resources (Jurisdiction)* (n 36), 436; *World Duty Free* (n 33), 140, 147, 149, 152, *FW-Oil* (n 32), 178.

provided to it by the Claimant, *as well as information that it has been able to retrieve for itself.*"[97] At the same time, there were also cases where tribunals did not feel the need to engage in their own research into domestic law and jurisprudence, in spite of them having identified a clear need of expert evidence on issues of domestic law. In *Lahoud v. Congo* (2014), for example, the Tribunal expressly requested the parties to tender evidence on the principles of interpretation of Congolese law. Having been provided no such evidence, the Tribunal did not proceed to make its own inquiries into Congolese law, but resorted to general principles of law for the purpose of interpreting the applicable statute.[98] In the end, however, care must be taken in drawing inferences from such scant practice. In most cases where domestic judicial decisions were considered in the law ascertainment process, the relevant judicial precedents were provided by the litigating parties and the experts whose legal opinions had been tendered in support of their case. Even in *MetalTech v. Uzbekistan* (2013), where *jura novit curia* was formally endorsed at the level of principle by an ICSID tribunal, the background information on domestic law was provided for in the academic commentaries that had been filed by Respondent.[99]

Finally, the proposition that arbitral tribunals shall have the power, but not the obligation, to make their own inquires with a view to establishing the contents of domestic law has also been endorsed by academic commentators and arbitrators.[100]

5.2.3.4. Duty to Seek Parties' Views on Relevant Jurisprudence

Absent a direct duty on the part of investment tribunals to conduct their own researches and investigations into the applicable domestic law and related jurisprudence, it is necessary to inquire how tribunals should otherwise acquire relevant knowledge on the contents of domestic jurisprudence.

The tribunals' duty to become familiarized with domestic jurisprudence appears to be, in the first place, a duty that is to be exercised on the basis of the evidence presented to the tribunal by the parties themselves. In *Emmis v. Hungary* (2014), the Tribunal thus held it "must seek to determine the content of the applicable law *in accordance with evidence presented to it as to the content of the law and the manner in which the law would be understood and applied by the municipal courts*".[101] In the second place, it is a duty that is to be exercised by means of requesting additional evidence from the parties, or else by means of studies that tribunals may request to be undertaken.[102]

Under both ICSID and UNCITRAL arbitration rules, investment tribunals certainly have the power to call upon the parties, at any stage of the proceedings, to produce any documents or evidence that may be necessary to decide issues before them.[103] Indeed, requests to brief tribunals on issues of domestic law have not been uncommon in arbitration practice,[104] including requests

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[97] *LESI v Algeria* (n 16), [Ch II, 39]; emphasis added.

[98] *Lahoud v Congo (Award)* ICSID Case No ARB/10/4, 7 February 2014) 281-83.

[99] *MetalTech v Uzbekistan* (n 20), 288.

[100] See G. Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' (2005) 21 Arbitration International 631 at 636.

[101] *Emmis v Hungary (Award)* (n 1), [175]; emphasis added.

[102] See GC Moss, 'Tribunal's Powers Versus Party Autonomy' in P Muchlinski, F Ortino, & C Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP, 2008), 1207-1244, at 1235, similarly concluding that '[t]he duty of the arbitral tribunal to investigate the law seems to consist in asking the parties to produce additional evidence of the law or appointing legal experts, rather than in directly investigating the law'.

[103] ICSID Convention, art 43 and ICSID Arbitration Rules, Rule 34(2); UNCITRAL Rules (2010), art 27(3).

[104] See eg Saar Papier Vertriebs GmbH v. Poland (Final Award) (UNCITRAL, 16 October 1995), [15], [79]; Swembalt AB Sweden v The Republic of Latvia (Award) UNCITRAL (23 October 2000) [44]; Daimler Financial Services AG v Argentine Republic (Award) (ICSID Case No ARB/05/1, 22 August 2012) [111]; or Lahoud v Congo (n 98), [281]-[83].

with respect to domestic judicial authorities.[105] The evidence thus requested may – and frequently will – include expert evidence. Furthermore, both ICSID and non-ICSID tribunals have, or can be taken to have the power to appoint independent experts, who could possibly advise them on issues of domestic law and jurisprudence.[106] Last but not least, investment tribunals operating under ICSID, as well as under other arbitration rules will generally have the power to accept *amici curiae* briefs, which could brief them on issues of domestic law and jurisprudence.[107]

In most cases, requesting the production of evidence on relevant domestic jurisprudence will remain at the discretion of the tribunals. There is, however, also authority for the proposition that, in those circumstances where a question of domestic law is *essential* to their decision, investment tribunals may also be under an *obligation* to seek the parties' views as to the content of domestic law, including on the meaning and effect of any relevant municipal decisions. The existence of such an obligation has seemingly been recognized by the ICSID Annulment Committee the *Fraport*, which annulled the original award precisely because the Tribunal failed to solicit such views.[108] The Tribunal's majority in that case construed the legislation in question on the basis of its own reading of the pertinent provisions, in disregard of the fact that the Philippine Public Prosecutor had previously adopted a different interpretation of that same legislation, and that it had done so after having considered, but expressly rejected the interpretation used by the majority.[109] The dissenting arbitrator, Bernardo Cremades, argued that the majority therefore misconstrued the relevant provisions.[110] The Annulment Committee, however, did not dispute the correctness of the Tribunal's interpretation, but took issue instead with the fact that the question as to the potential violation of the said legislation was not considered in any detail in the expert reports that were filed in the proceedings before the Tribunal, nor by the parties in their post-hearing briefs.[111] Indeed, the Committee eventually found that the failure on the part of the original Tribunal to provide parties with the opportunity to submit evidence on the relevant legislation – and, particularly, to make submissions relative to the way this legislation had been applied by the Philippine Public Prosecutor – constituted a serious departure from a fundamental rule of procedure and was thus ground for annulment.[112] The Committee was of the opinion that, to the extent that Philippine law was applicable, the Tribunal should have given "particular consideration" to municipal decisions as to the construction of the law, that this was "particularly important" since the Tribunal "had not been chosen for its knowledge of Philippine law", and that "the right of the parties to be heard

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[105] *World Duty Free* (n 33) [59]-[60].

[106] According to Rule 34(2) ICSID Arbitration rules, '[t]he Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses *and experts*'; emphasis added. Yet, expert evidence need not be furnished by party-appointed experts, as ICSID tribunals at times proceeded to directly appoint independent experts. See *SARL Benvenuti & Bonfant v People's Republic of the Congo* (ICSID Case No ARB/77/2, 8 August 1980) [1.24] and [4.77]; or *American Manufacturing & Trading, Inc v Republic of Zaire (Award)* (ICSID Case No ARB/93/1, 21 February 1997) [7.19]. In contrast, art 29(1) of the UNCITRAL Rules (2010) allows the tribunal, after consultation with the parties, to 'appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal.' A similar provision can be found in art 21 LCIA Rules.

[107] See eg Rule 37(2) ICSID Arbitration rules allowing the tribunal to allow a person or entity that is not a party to the dispute to file a written submission regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which such submission would assist it in the determination of a legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

[108] Fraport (Annulment) (n 53), [235]-[247].

[109] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines (Fraport I)(Award) (ICSID Case No. ARB/03/25, 16 August 2007), [357]-[382], [396]-[404].

[110] ibid, Dissenting Opinion of Mr. Bernardo M. Cremades, [16].

[111] *Fraport (Annulment)* (n 53), [237]-[241].

[112] ibid 235-47.

importantly includes an opportunity to be heard on the meaning and effect of any such relevant municipal decisions."[113]

The *Fraport* annulment decision might have been the first time where the investment tribunal's duty with respect to obtaining the views of the litigating parties on issues concerning domestic law, including their views on pertinent jurisprudence, has clearly been spelled out. It does seem, however, that the existence of such duty also explains earlier examples of investment tribunals granting latitude to the disputing parties in the production of jurisprudence that had been claimed to be relevant to the interpretation of domestic law.[114]

5.2.3.5. Duty to Apply Accurate Law and Jurisprudence

In most cases, it will be through statements on domestic law and through witness and expert evidence supporting such statements that the relevant jurisprudence will be introduced to international investment tribunals by the litigating parties. In many of those cases, the tribunals may be more than satisfied with the parties' submissions.[115] In others, they may – rightly or wrongly – consider such submissions partisan. The same applies to the additional explanations and clarifications that tribunals may receive from parties as to the meaning and effect of domestic judicial pronouncements, which may ultimately be found one-sided and biased. The question then eventually arises as to the extent to which investment tribunals are free to disregard the evidence of, and the arguments on domestic jurisprudence that the parties themselves have introduced.

The answer to both elements of this question appears relatively straightforward. First, if investment tribunals can be taken to possess the power to pursue their own research on domestic jurisprudence (or cause such research to be conducted), they cannot possibly depend entirely on the legal authorities introduced by the litigating parties and their experts.[116] If they believe that parties may not have presented appropriate or sufficient judicial authorities, or may selectively relied upon them in their construction of applicable law, they are thus at liberty to engage themselves in further research, or cause such further research to be undertaken, if necessary through the appointment of experts. Second, inasmuch as tribunals are bound to apply domestic law in such way as it would actually be applied in the domestic legal system, and therefore to take into account the evidence of the relevant judicial authorities as to the proper construction of that law, they are necessarily not bound to follow the parties' arguments and views on those judicial authorities, but are free to base their decisions on their own understanding of such

[113] ibid [236]; footnotes omitted.

[114] See eg *Siag v Egypt* (n 14), [167], noting how leave was granted to the Respondent to submit additional domestic judicial authorities after the hearing.

[115] See eg *Eli Lilly v Canda* (n 40), [311] (noting how the analysis 'necessarily touches upon aspects of Canadian patent law previously unfamiliar to the Members of the Tribunal' and how '[t]he Tribunal has been greatly assisted by the Parties' submissions and the testimony of their experts and witnesses, and thereby reaches its conclusions with confidence').

[116] Indeed, as a general proposition, investment tribunals cannot be taken to be limited in their inquiry to the authorities provided by the parties. See *RSM Production Corporation v Grenada (Decision on the Application of RSM Production Corporation for a Preliminary Ruling)* (ICSID Case No ARB/05/14, 7 December 2009) [23] ('Although not cited by the Applicant or the Respondent, there are a number of other arbitral decisions which deal with the power of international courts and tribunals to reopen a case for newly discovered evidence. On the basis of the principle of jura novit curia, the Committee is able to consider the relevance of those decisions.'); *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [30] (rejecting that late submission of certain authorities 'affects its ability in this Award to take judicial notice of, refer to, or rely on, any relevant legal principles or judicial or arbitral decisions in accordance with the principle of *jura novit curia*'); and *Daimler Financial Services AG v. Argentine Republic (Decision on Annulment)* (ICSID Case No. ARB/05/1, 7January 2015) [295] ('This Committee is of the view that an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, sua sponte, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it.').

jurisprudence.[117] The leeway enjoyed in this respect by investment tribunals had duly been noted in *MetalTech v. Uzbekistan* (2013), where the Tribunal observed that "when it comes to applying the law, *including municipal law*, as opposed to establishing facts, the principle *iura novit curia* – or better *iura novit arbiter* – allows it to form its own opinion on the meaning of the law."[118] Indeed, given that investment tribunals have "a duty to endeavour to apply that [domestic] law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the State's judicial authorities",[119] they are in fact obliged to set aside possibly incorrect readings of domestic jurisprudence advanced by the parties.[120]

Eventually, the question arises whether investment tribunals are limited to considering the domestic judicial authorities invoked by the parties solely for the purposes of the parties' arguments, or whether they are free to draw other inferences from such authorities, including those giving rise to arguments not directly raised or insufficiently developed by the parties to the proceedings. In arbitral practice, there is generally support for the proposition that, within the boundaries of the relief that is sought, investment tribunals will not be limited to the legal arguments advanced by the parties – provided that the tribunal's own solution and reasoning remains within the legal framework established by the parties.[121] In the context of ICSID arbitrations, it has generally been understood that the possibility to depart from the parties' arguments remains at the discretion of the tribunals.[122] In the context of non-ICISD arbitrations, in turn, tribunals may occasionally be under an obligation to apply a rule of law that has not been adduced – though, this will depend on the *lex loci arbitri*. Referring to the principle of *iura novit arbiter*, for example, the Tribunal in *Oostergetel v. Slovakia* considered that it was "under an obligation to apply the law *ex officio* without being bound by the arguments and sources invoked by the Parties".[123] The source of this obligation, which in the circumstances of that case was deemed applicable to *both* domestic and international law, was in the applicable Swiss arbitration law, which governed that arbitration.

An altogether different question is whether investment tribunals, inspired or induced by particular judicial authorities, may venture to investigate issues of law not addressed or considered at all in the parties' arguments. Particularly in relation to jurisdictional matters, investment tribunals may of course be under a duty to consider certain issues *ex officio*. In non-ICSID arbitrations, investment tribunals may thus be bound to apply particular mandatory provisions of the *lex loci arbitri*, and generally be bound to consider their own jurisdiction if they are to comply with their duty to render an enforceable award.[124] In ICSID arbitrations, it is specifically in the event of a party's default that investment tribunals are under a duty to examine

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[117] cf ILA (Recommendations on Applicable law) (n 61), Recommendation 7.

[118] *MetalTech v Uzbekistan* (n 20), 287; emphasis added.

[119] ibid [96].

[120] See further Waincymer (n 69), 218-219, listing the danger of inadvertent or incompetent behavior on the part of the parties when it comes to the notification of all relevant legal authorities, and the importance that the correct application of the law will have in ensuring stability and predictability among the policy rationales behind the application of the *iura novit curia* principle, and 239, arguing that adjudicators must interpret statutes correctly even if the parties wrongly assert the meaning.

[121] See eg *Klöckner (Annulment)*, (n 75) [91]; *Caratube International Oil Company LLP v The Republic of Kazakhstan (Decision on the Annulment Application)* (ICSID Case No ARB/08/12, 21 February 2014) [92]-[93]. For an example from outside the ICSID context, see eg *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v Republic of Moldova (Award)* (SCC Case No 93/2004, 22 September 2005) [2.2.1]. For a general discussion of arbitral jurisprudence on this point, see E De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2014) 103-07.

[122] Mr Patrick Mitchell v Democratic Republic of the Congo (Annulment) (ICSID Case No ARB/99/7, 1 November 2006) [57].

[123] *Oostergetel v Slovakia* (*Award)* (n 64) [141].

[124] cf UNCITRAL Model Law, art 34(2)(a)(iii); and New York Convention, arts V(1)(a) and (c) and (2).

proprio motu the existence of their own jurisdiction.[125] It is therefore not inconceivable for tribunals to closely scrutinize certain jurisdictional issues, such as whether the investment has not been made illegally or the transaction underlying the investment is not contrary to international public policy, even where the parties may not have addressed those issues at all.

The situation is somewhat different in relation to legal issues that may have a bearing on the merits of the dispute. Whilst arbitration tribunals are generally discouraged from introducing new issues of law that arise during the ascertainment of the applicable law on their own motion, a certain discretion may occasionally be justified, particularly where there are issues that could touch upon public policy.[126] In the context of investment arbitration, it is not unimaginable, for example, for tribunals to take a more active role in the event of weakness of a developing respondent State's representation.[127] However, in view of arbitrators' general duty to respect the parties' fundamental procedural rights,[128] investment tribunals will not only be advised,[129] but also obliged in such cases to provide the parties with the opportunity to respond to any new legal sources introduced by the tribunal and not take the parties "by surprise", or else run the risk of having the award annulled on account of a serious departure from a fundamental rule of procedure for failing to respect the parties' right to be heard in an adversarial procedure.[130]

5.3. Factors Affecting Reception of Domestic Jurisprudence in the Law-Ascertainment Process

At the end of the day, whilst recognizing their general duty to give particular consideration to municipal decisions in interpreting and applying domestic law, investment tribunals were also equally adamant in emphasizing their "independent powers of assessment"[131] when it comes to judge the probative value of evidence presented to them, including in relation to evidence of domestic law.[132] The question then necessarily arises as to the factors that, beyond the mere question of relevance, may potentially influence the propensity of investment tribunals to take into account the jurisprudence of domestic courts. When compared to the situations described in chapter 4, where investment tribunals frequently refused to accord any dispositive effects to prior domestic judicial determinations involving the specific investor and/or its underlying investments, tribunals were, on the whole, better disposed towards drawing on domestic jurisprudence that was unrelated to the dispute before them. But as the following section intends to demonstrate,

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[125] ICSID Arbitration Rules, Rule 42(4).

[126] cf ILA (Recommendations on Applicable law) (n 61), Recomendations 6 and 13. See further P Landolt, 'Arbitrators' Initiatives to Obtain Factual and Legal Evidence' (2012) 28 Arbitration International 173, at 215-216, identifying in particular investment arbitration as an instance where arbitrators should take a more active role in obtaining legal evidence, given the substantial impact that such arbitrations will usually have on the public interest.

[127] See on this A Dimolitsa, 'The equivocal power of the arbitrators to introduce ex officio new issues of law' (2009) 27(3) ASA Bulletin 426, at 428 identifying the situations of party default, weakness of representation, presence of a state party, importance of the issues or amounts at stake, and the probability of the award becoming a precedent as the circumstances under which arbitrators are more advised to exercise proprio motu the power of ascertaining the contents of the applicable law. Similarly also Waincymer (n 69), 218.

[128] ICSID Convention, art Art 52(1)(d); ICSID Arbitration Rules, Rule 6 (impartiality of arbitrators), and Rules 31 and 32 (parties right to be heard in an adversarial procedure, equal treatment of the parties).

[129] cf ILA (Recommendations on Applicable law) (n 61), Recommendation 8.

[130] On the caution to be exercised in reconciling proactiveness with basic principles of due process, see further Dimolitsa (n 127), 432-438; Waincymer (n 69), 228-242; Sourgens et al (n 65), 143-145; and I Kalnina, '*Iura Novit Curia*: Scylla and Charybdis of International Arbitration' (2008) 8Baltic Yearbook of International Law 89, at 101-103. See also G Knuts, '*Jura Novit Curia* and the Right to Be Heard – An Analysis of Recent Case Law' (2012) 28 Arbitration International 669.

[131] cf ICSID Arbitration Rules, Rule 34(1) ('The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value').

[132] See *Fraport (Annulment)* (n 53), [236]; *Emmis* (n 1), [176].

this particular circumstance has not been the only factor to affect the acceptance of domestic jurisprudence on the part of investment tribunals.

5.3.1. Factors Determining the Evidentiary Value of Domestic Jurisprudence

It has sometimes been suggested by investment tribunals that the evidentiary value of domestic jurisprudence in the law-ascertainment process is one to be determined in light of the context of each case.[133] In practice, however, two factors seem to have conditioned the reception of domestic judgments on the part of investment tribunals: the narrower issue of potential bias of the judicial decision-maker (5.3.1.1.), and the broader issue of the propriety of the judicial process as such (5.3.1.2.).

5.3.1.1. Bias of the Judicial Decision-Maker

The propensity of investment tribunals to take specific judicial pronouncements into account in their interpretation of domestic law seems to linked to the question of independence of domestic judicial organs – or better, the potential lack thereof. Independence, in this sense, does not concern so much the problem of impartiality of domestic courts towards the parties in the domestic judicial proceedings, but more the potential bias that such courts could have in favour of the interests of the host State of which they form part. Concerns about the domestic judicial process being misused with a view to affecting the claim before investment have sometimes openly been expressed by investment tribunals in refusing to giving heed to specific judicial pronouncements.[134] Yet, the same concern possibly explains why investment tribunals, conversely, had little objection to taking into account, and relying upon, domestic judicial pronouncements that were unrelated to the investor in question – precisely because such previous case-law was likely to have been delivered in circumstances that did not have an immediate bearing on the claim in question.[135] Concerns about judicial bias, furthermore, explain why tribunals seemed to have had fewer misgivings about taking into account judicial pronouncements – even where these directly concerned the investor in question or its investment – that originated from domestic courts other than those of the host State.[136] Apparently, foreign courts were likely to be more indifferent in relation to the issues at question than the domestic courts of the host State were expected to be.

This of course means, on the other hand, that in the absence of any doubts as to the lack of independence on the part of the judiciary, there should be nothing to prevent investment tribunals from taking account of judicial pronouncements that had been made in relation to the specific investor and had potentially arose directly out of the same set of facts as those underpinning the cause of action before the investment tribunals. This, in the end, is also what has been suggested by the *Fraport* Annulment Committee, when noting that:

> "the decisions of municipal authorities seized of cases against an alien which arise directly out of the same set of facts may need to be scrutinised very carefully by an international

[133] See eg *Petrobart* (n 2), 41, noting that 'a judgment rendered by a foreign court of law may well become relevant as evidence in the arbitration in question,' while suggesting that '[t]he weight, if any, to be attributed to such evidence will depend on the facts and the legal issues involved in the individual case.'

[134] Eg Inceysa Vallisoletana SL v Republic of El Salvador (Award) (ICSID Case No ARB/03/26, 2 August 2006).

[135] *PNG Sustainable Development* (n 31), [316]; *Soufraki (Annulment)* (n 51), 104; *Siag v Egypt* (n 14), *Pey Casado* (n 5), 227; *Lesi v Algeria* (n 16), *Tulip Inn* (n 22), 288; *Khan Resources* (n 11); *Occidental* (n 1), 137-43; *FW-Oil* (n 32), 166-69 and 177-78; *Glamis Gold* (n 10), 37; *Apotex* (n 19), 210; *Accession* (n 26), 93-95, 126, 134-144; *Fraport II* (n 6), 397-462; *World Duty Free* (n 33), 140-53, 161-87; *Nico Resources* (n 36), [436]; *Nykomb* (n 15), 26-27; *Dan Cake v Hungary* (n 7), [109]-[10], [113], [136]; *Micula* (n 18), [450]-[51]; *LETCO* (n 30), [41]; *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB/00/5, 23 September 2003), [345]-[49]; *CME* (n 91), [631]-[632]. See also *Chevron (Track 1B)* (n 25), [167].

[136] *Rumeli Telekom AS v Kazakhstan (Award)* (ICSID Case No ARB/05/16, 29 July 2008); *Nico Resources* (n 36).

> tribunal. The tribunal would need to satisfy itself, *inter alia*, as to the impartiality of the relevant decision-maker, in view of the pendency of proceedings against the state of which that decision-maker is an organ. The tribunal retains the ultimate power to judge the probative value of evidence placed before it.[137]

In the circumstances of that case, the decision concerned a resolution of the Philippine Public Prosecutor, which the Committee found that it should have been taken into account by the original Tribunal, in view of it "being adverse to the interests of the state" and "appeared to have been reached independently."[138] In several other cases, investment tribunals did not have reservations to take into account domestic judicial pronouncements relating to the investor in question.[139]

5.3.1.2. Propriety of the Domestic Judicial Process

A further element that has seemingly controlled the reception of domestic judicial pronouncements on the part of investment tribunals was the question of the propriety of the domestic adjudicatory process leading to the pronouncement in question. Propriety in this respect has sometimes been linked to the question of the validity of the particular judicial decision as a matter of domestic law. In *Micula v. Romania* (2013), for example, it seems that the characterization of a Romanian Supreme Court decision as being potentially *ultra vires* by Claimant's domestic law expert (who also happened to be a former president of that Court) might have contributed to the Tribunal's refusal to consider such decisions as "decisive" to the interpretation of the relevant domestic instrument.[140] However, propriety has more often been linked to the conformity of the judicial process and the ensuing outcome with the minimum standards prescribed by international law in relation to the domestic administration of justice. As already discussed in 4.4.1.3., it has been the absence of such propriety that has primarily been seen by investment tribunals as reason to ignore specific judicial determinations. The prime example in this regards is the partial award in *Chevron/Texpet v. Ecuador (Lago Agrio)* (2015), in which, on the one hand, the desire was expressed to be guided on any relevant issue of Ecuadorean law by decisions of Ecuadorean courts (given that such decisions provide "the best evidence of the content and application of that law to the same or similar situations");[141] while on the other hand, no guidance in this respect was accepted from Ecuadorean court judgments rendered in a case involving the investor in circumstances where those judgments were subject of allegations of multiple denial of justice.[142] While those "very unusual, if not wholly exceptional, circumstances" prevented the Tribunal from relying on those specific judicial pronouncements,[143] the Tribunal had no trouble considering the pronouncements made by the Ecuadorian Supreme Court in an earlier and unconnected case, *inter alia* because Claimants did not seek to impugn those pronouncements "on grounds of any impropriety or denial of justice".[144]

At the end of the day, of course, the problem of judicial bias could easily be subsumed under the broader heading of propriety of the judicial process as such. As further discussed in Part II, the international standards of administration of justice themselves require that justice is delivered by impartial and independent courts. But there is also another reason why propriety of the domestic judicial process should be considered as the singular most important element

[137] *Fraport (Annulment)* (n 53), [242].
[138] ibid [243].
[139] cf *TECO* (n 21), *Mezzanine* (n 26).
[140] *Micula v Romania* (n 18), 451.
[141] *Chevron (Track 1B)* (n 25), [140].
[142] ibid [141]-[42].
[143] ibid [141].
[144] ibid [167].

controlling the reception of domestic judicial pronouncements on the part of investment courts. Focusing too narrowly on the issue of independence of domestic courts might result in an *a priori* presumption of judicial bias in favour of the interests of the host State, which could undermine the authority of domestic judicial pronouncements in circumstances where this might not be warranted.[145] As appositely noted by the *Chevron/Texpet v. Ecuador (Lago Agrio)* Tribunal, however, guidance must be accepted from domestic courts not solely because "courtesy, comity and due respect" should be accorded to the Respondent's judicial branch, but because "[a]s a practical matter, without more, the considered judgments of any municipal court applying its own municipal law, especially an appellate court, are (absent special circumstances) the best evidence of the content and application of that law to the same or similar situations."[146] According to the Tribunal, furthermore, "the publicly stated reasons of a municipal court would ordinarily carry far more weight than the submissions of disputing parties."[147]

5.3.2. The Standard of Review Applicable to Tribunals' Scrutiny of Domestic Jurisprudence

The fact that investment tribunals are bound to apply domestic law in accordance with the jurisprudence of domestic courts implies that tribunals cannot refuse to apply a particular judicial decision on the sole ground that they disagree with such jurisprudence. As pointed out by the PCIJ in the *Brazilian Loans* case, this would otherwise have the inappropriate consequence that the international court would be applying rules other than those actually applied in the specific domestic legal system.[148] In the related *Serbian Loans* case, the PCIJ seemed to suggest that some scrutiny of domestic judgments was nonetheless possible, when finding certain pronouncements of the French Court of Cassation to be "reasonable" ones.[149] In both of the *Loans* cases, however, the PCIJ retained the view that a great deal of deference had to be accorded to domestic judicial pronouncements on those points of law which concern matters where states retain a large degree of regulatory authority.[150] The PCIJ's successor in the *Diallo* case (2000) likewise confirmed that it "does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts."[151] In contrast to the PCIJ, the ICJ did not further suggest that the acceptance of domestic judicial pronouncements could possibly be subject to the test of reasonableness – unlike a State's *own* interpretation of its domestic law, which the Court considered possible to be set aside where such interpretation is "manifestly incorrect" and has been put forward "for the purpose of gaining an advantage in a pending case".[152] Then again, some other international adjudicatory bodies considered it possible to depart from domestic courts' application or interpretation of domestic law in the event that such application or interpretation appears to be "unreasonable".[153]

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[145] Take for example the *Inceysa* award, where the Supreme Court decisions relied upon by the Claimant were actually adverse to the interests of the Respondent state, but the Tribunal nonetheless decided to ignore them on the ground that allowing such decisions to be determinative of the legality of a particular investment would give the State the possibility to redefine the scope and content of its own consent to the jurisdiction of the investment tribunal. [213].

[146] *Chevron (Track 1B)* (n 25), [140]

[147] ibid 140.

[148] *Brazilian Loans* (n 44), 124

[149] *Serbian Loans* (n 46), 46

[150] ibid (the PCIJ explaining that 'It would be a most delicate matter to do so [i.e. setting aside domestic judgments], especially in cases concerning public policy-a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself-and in cases where no relevant provisions directly relate to the question at issue'). For similar observations, see *Brazilian Loans* (n 44), 124-35.

[151] *Ahmadou Sadio Diallo* (n 49), 70.

[152] See ibid [70]; emphasis added.

[153] STL, *Interlocutory Decision* (n 50), [39].

Investment tribunals, on their part, have generally accepted that their task was to apply domestic law as it is, and not as they thought it should be. The Annulment Committee in *Soufraki* explained in this sense that "an international tribunal cannot set aside a substantive law on nationality upon the ground that it does not approve of this law or believes that there is a better or more modern rule."[154] This is not to say that some investment tribunals have not emphasized that they retained some degree of freedom when applying domestic law. The Tribunal in *Emis v. Hungary* thus noted that, while being obliged to determine the content of the applicable law in accordance with the manner in which the law would be understood and applied by domestic courts, it retained "its independent powers of assessment and decision" with regard to questions of domestic law essential to the issues raised by the Parties for its decision.[155] In practice, however, domestic judicial decisions were not subjected to particularly intrusive standards of review. Investment tribunals essentially applied them as they were, without subjecting them to a tests of correctness. In *Eli Lilly v. Canada* (2017), where a Canadian Supreme Court's ruling was reviewed for the sole purpose of assessing the factual basis of Claimant's case (and thus not for judging that ruling against any legal standard), the Tribunal declined to dismiss the Supreme Court's analysis of an earlier precedent on the basis that such analysis was purportedly "unpersuasive", as argued by the Claimant.[156] Furthermore, with respect to another Canadian Supreme Court's judgment, the Tribunal "fundamentally" saw "no basis for questioning the Canadian judiciary's interpretation of its own Supreme Court precedent."[157] In some cases, the suggestion was nonetheless made that the acceptance of particular precedents might nonetheless depend on their reasonableness. In *Rusoro Mining v Venezuela* (2016), the Tribunal expressed the view for example that the conclusion reached by the Venezuela's Supreme Court in a prior precedent was a "rather unobjectionable" one, even if it eventually found the precedent otherwise inapposite.[158] In general, however, it seems that, where domestic judgments were disregarded, this was primarily due to their lack of relevance, not for lack of persuasiveness.[159] In *Micula v. Romania,* where the correctness of a particular Supreme Court judgment was put to doubt, the Tribunal was thus "far from certain that it should revisit as such the validity of the Constitutional Court's decision", finding instead that the decision was simply not decisive for interpreting the nature of the domestic instrument in question.[160] All in all, there is little indication that the deference accorded by investment tribunals depended on the subject matter governed by domestic law.

This is not to suggest that deference was *always* applied in the scrutiny of domestic jurisprudence. As already detailed in the previous section (5.3.1.), investment tribunals were rather consistent in refusing to draw conclusions from judicial precedents, where the propriety of such pronouncements could have been questioned from the perspective of international law. In that, investment tribunals did not depart from the approach of other adjudicatory bodies.[161]

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[154] *Soufraki (Annulment)* (n 51), [60].

[155] *Emmis v Hungary* (n 1), 175.

[156] *Eli Lilly v Canada* (n 40), 327 and 331.

[157] ibid 321.

[158] *Rusoro Mining v Venezuela* (n 8), 339, 338.

[159] See also *EURAM v Slovakia (Second Award on Jurisdiction)* (UNCITRAL, 4 June 2014) [230] ('the Tribunal considers that the facts of the Arkhangelskoe case are sufficiently different from those of the present case that they afford little guidance').

[160] *Micula v Romania* (n 18), 451.

[161] cf eg STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176bis, 16 February 2011) [39]; or Ida Robinson Smith Putnam (USA) v United Mexican States (IV UNRIAA 151, 15 April 1927) 153 ('The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. […] A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law').

Furthermore, and equally in accordance with the practice of other adjudicatory bodies,[162] investment tribunals refused to adopt a non-deferential approach in cases where the statutory construction supported by the particular judicial precedent would not be in conformity with the State's international obligations (even where the propriety of that precedent could not have been otherwise put into question). In *Pey Casado v. Chile* (2008), a domestic judicial decision that purportedly rejected the possibility of outright renunciation of Chilean nationality was thus essentially ignored – as opposed to two other judicial decisions that were simply dismissed for lack of relevance – apparently because the interpretation of the Chilean constitution that would seemingly follow from the former decision was not in accordance with Chile's obligations under the Inter-American Convention on Human Rights and under a bilateral convention on double nationality.[163] Eventually, such an approach accords more broadly with the theory of the supplemental and corrective function that international law is supposed to play in ICSID arbitration generally, even if the theory has essentially only been applied in relation to the law governing the merits of the dispute.[164]

5.4. The Law Ascertainment Process: Legal Methods and Techniques

Having discussed the practical reasons justifying, as well as the legal reasons necessitating resort to domestic jurisprudence in the law ascertainment process, including the scope of the tribunals' duties in relation to obtaining such jurisprudence and admitting it into the law ascertainment process, it is finally worth examining how such jurisprudence was actually used by investment tribunals in determining questions of domestic law.

In the ideal case, investment tribunals would have had at their disposal judgments of sufficient relevance and specificity to allow for immediate transposition of judicial pronouncements to the issues of domestic law before them. What if, however, among the available judgments, none really contains dicta of direct relevance to the issue? Or what if no jurisprudence exists to which avail could be made? Or what if domestic jurisprudence is unable to provide a clear answer because it is contradictory and is capable of supporting different readings of the same domestic statute? The following sections discuss this type of situations and examine how investment tribunals have resolved the challenges posed in the domestic law ascertainment process in circumstances where the available domestic jurisprudence was not immediately relevant to the legal issues before the investment tribunal (5.4.1), where there was no jurisprudence available on the matter (5.4.2.), where there were no positive laws applicable to the situation (5.4.3.), and where the available jurisprudence was unsettled and conflicting (5.4.4).

5.4.1. Methods of Jurisprudential Analysis: Analogies and Adverse Inferences

Investment tribunals did not always have the luck of being provided with domestic judicial pronouncements that actually addressed the specific issue of domestic law of which resolution was required, and were thus exactly applicable to the peculiar situation that was before them for determination. What were then investment tribunals to make of such domestic judgments that the disputing parties invoked and relied upon in justifying their own understanding of the legal

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[162] Eg *STL (Applicable Law)* (n 161) [39]. cf also *Serbian Loans* (n 46), 46-47 ('[i]t is French legislation, as applied in France, which really constitutes French law, and *if that law does not prevent the fulfillment of the obligations in France* in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.' Emphasis added).

[163] *Pey Casado* (n 5), 306-07, 314.

[164] cf *Klockner (Annulment)* (n 75), [69]; *AMCO (Annulment)* (n 76), [148]; or *LETCO* (n 30). On the theory, as well as its criticism, see E Gaillard and Y Banifatemi, 'The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 ICSID Review 375, at 389ff.

issue? Though frequently rejecting such judgments for lack of relevance,[165] surprisingly often investment tribunals also found ways to draw from those judgments all kind of inferences that assisted in deciding the issues of domestic law.

One way of drawing inferences was by the usual way of *analogy*. In the simple form, analogies were based on potential similarities between cases. In *Nykomb v. Latvia*, for example, the Tribunal saw nothing wrong in interpreting the price clauses in the electricity purchasing contract entered into by Claimant's subsidiary by reference to the interpretation that had been given by Latvian courts to a similar price clause in domestic judicial proceedings involving another electricity supplier.[166] Sometimes, analogies took more complex forms, as the rationales of particular decisions were also taken into account. Thus, in *Pey Casado v. Chile*, for instance, the Tribunal found support for the proposition that a waiver of Chilean nationality was only prohibited if leading to a situation of statelessness in the ruling of a Chilean court where the renunciation of nationality was made conditional upon the acquisition by the plaintiff of the nationality of Nicaragua.[167] On the other hand, investment tribunals also had the habit of drawing *adverse inferences* from case law. Particularly common in this respect was to relying on the absence of judicial pronouncements demonstrating the contrary proposition. In construing a statutory provision, the Tribunal in *Fraport v. Philippines II* took thus the view, for example, that there was "nothing […] in prior judicial interpretations" indicating that a narrower reading was required.[168] The Tribunal in *Chevron v. Ecuador (Lago Agrio)* similarly placed emphasis on the fact that "the Supreme Court did not reject the possibility" of an Ecuadorian court entertaining a particular type of claim.[169]

Admittedly, investment tribunals have often taken a cautious approach in drawing inferences from domestic case-law. In *Emis v. Hungary* (2014), for example, care was taken when drawing conclusions from a particular domestic judgment to distinguish Claimant's factual position from the position of the plaintiff in the domestic case.[170] In *Chevron v. Ecuador (Lago Agrio)* (2015), likewise, note was taken of the different factual positions of the plaintiffs in the domestic cases under review.[171] In *Micula v. Romania* (2013), on the other hand, care was taken not to draw unwarranted conclusions – be it by way of analogy, be it by way of adverse inferences – from a judicial decision that concerned financial incentives provided under a different law than those provided to the Claimant.[172] Likewise, in *Fraport v. Philippines II* (2014), care was taken not to draw unwarranted conclusions from a domestic decision dealing with a regulatory enforcement regime different than the one provided for in the statute under interpretation.[173]

This is not to say, however, that there have not been cases where domestic judicial decisions had perhaps been used in an overly creative, albeit not necessarily incorrect way. An interesting example is the award in *PNG Sustainable Development v. Papua New Guinea* (2015), where the existence in the law of Papua New Guinea of a principle of statutory interpretation analogous to that of *effet utile* was inferred from the fact that the Supreme Court of Papua New Guinea recognized as applicable in the legal system of Papua New Guinea the English common law principles that had been in force at the time of that State's independence, and the fact that in

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[165] *Siag v Egypt* (n 14); or *Pey Casado* (n 5) [307]; *EURAM v Slovak Republic* (n 159), [230]; *Rusoro Mining* (n 8) [338].

[166] *Nykomb v Latvia* (n 15), 26.

[167] *Pey Casado v Chile* (n 5), [309]-[310].

[168] *Fraport v Philippines II* (n 6), [421].

[169] *Chevron (Track 1B)* (n 25), [172].

[170] *Emmis v Hungary* (n 1), [247]-[248].

[171] *Chevron (Track 1B)* (n 25), [173].

[172] *Micula v Romania* (n 18), [450]-[452].

[173] *Fraport v Philippines II* (n 6), [430].

accordance with a contemporary decision of the UK House of Lords such principle of statutory interpretation had already been recognized under common law at the relevant time.[174] From the perspective of common law practice, such approach might be permissible; however, if the law of Papua New Guinea indeed recognized such principle of statutory interpretation, one would have expected the Tribunal to cite pertinent authorities from the judicial practice of PNG courts.

It must also be noted that the inferences that investment tribunals have drawn in some cases were very far reaching. The clearest example is perhaps *Teco v. Guatemala* (2013). In spite of the fact that, in the judgment under the Tribunal's scrutiny, the Constitutional Court had not decided whether the national energy regulator had the obligation to give serious consideration to an expert commission's recommendations, or to give reasons for a decision to depart from them (since that was also not requested from the Court), the Tribunal nonetheless inferred from that judgment that the Constitutional Court "obviously" could not have intended to say that the regulator could arbitrarily and without reasons disregard the recommendations. Justification for such inference was found in the fact that nowhere in its decision did the Constitutional Court say that the regulator enjoyed complete discretion, as well as the fact that an unlimited discretion would be manifestly at odds with the regulatory framework.[175] Instead, what the Constitutional Court was deemed to have "intended to say" in its judgment was "clearly" that the regulator could not delegate powers to the expert commission.[176]

5.4.2. Obstacles to law ascertainment – Issue not Addressed by Courts

In the less ideal situations, investment tribunals had no jurisprudence whatsoever that could assist them in the law ascertainment process. The most common response in such situations was to construe the relevant statutory provisions on the basis of a plain reading of the text, potentially aided by the expert opinions on issues of domestic law that were tendered to the tribunals by the disputing parties. What is interesting, however, is that in many such situations, the very absence of domestic judicial pronouncements was invoked as a reason for adopting a particular construction of the applicable domestic statute. In *Fraport v. Philippines II*, for example, the position was taken that, insofar neither party had pointed to a judicial decision, the Tribunal had to determine for itself whether a violation of the relevant statute required knowledge on the part of the persons involved, which in the end it did by construing the provision in accordance with its plain meaning.[177] Similarly, in *Lahoud v. Congo* (2015), the Tribunal considered that, in the circumstances where the elements of a statutory provision had not been further defined in the particular law or in Congolese jurisprudence, it had no choice but to give those elements their ordinary meaning.[178] Conversely, in *Clayton v. Canada* (2015), the Dissenting Arbitrator Mc Rae considered the fact that the Tribunal "did not have the benefit of a determination by a Canadian federal court on the matter" as a reason why the Tribunal should have refrained from concluding that Canadian law had been violated by Canadian authorities in that case.[179]

Of particular interest, however, is also the practice of drawing adverse inferences from the absence of jurisprudence demonstrating the contrary. Illustrative of such approach is the award in *Saba Fakes v. Turkey* (2010), where the question arose whether the provision of Article 413 of the Turkish Commercial Code, which required share certificates to be signed by at least

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[174] *PNG Sustainable Development* (n 31), [316].

[175] *Teco v Guatemala* (n 21), [561]-[562].

[176] ibid [564].

[177] *Fraport v Philippines II* (n 6), [427].

[178] *Lahoud v Congo* (n 98), [305].

[179] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada (UNCITRAL, PCA Case No 2009-04, 10 March 2015) Dissenting Opinion of Professor Donald McRae, [34].

two persons authorized to sign on behalf of the company, also applied to temporary share certificates. Though Respondent maintained that a joint signature was also a prerequisite for the validity of temporary certificates,[180] the Tribunal placed emphasis on the Respondent's expert's admission that such requirement was neither expressly contemplated in the Turkish legislation, nor addressed by Turkish courts.[181] The Tribunal thus drew adverse inferences from the absence of an express legislative stipulation: "To the extent that there appears to be no case law or legal provision in Turkish law requiring a double signature on a temporary share certificate, the Tribunal considers that in the present case the Respondent did not meet the burden of proof of the compulsory nature of such requirement in Turkish law."[182]

5.4.3. Obstacles to Law Ascertainment – Issue not Addressed by Legislator

A different kind of difficulties have arisen in the law ascertainment process in circumstances where there was no legislation that was capable of accommodating a particular factual situation (that is, in circumstances where there may have been a *non liquet* in relation to positive law). Considering that under Article 42(2) of the ICSID Convention, investment tribunals are prohibited from bringing in a finding of *non liquet* on the ground of silence or obscurity of the law, tribunals have come up with two types of responses to this problem. One way to resolve the problem was to avoid taking a position on the disputed point of domestic law, by deciding the issue on the basis of factual elements. An example of such approach can be found in *Accession Mezzanine Capital v. Hungary* (2015), where the question arose whether Hungarian law recognized the notion of "chose in action", in the sense of a separate right to enforce another right, as recognized in the common law tradition. Giving rise to this question was the Claimant's alternative argument that it possessed such a chose-in-action with respect to the right to enter into a new broadcasting agreement as a lawful winner of the tender process. The Tribunal took the view that it "cannot take a stab in the dark on a complex question of national law in respect of which it has had no assistance from the Parties' legal experts";[183] for, "[d]iscerning the necessary elements for the existence of a chose-in-action is likely to be a complex matter in Hungarian law — assuming that the concept is even recognised under that law — just as it is in the national legal systems with which the Tribunal is more familiar."[184] But this did not mean that the Tribunal left the issue undecided. Besides rejecting the chose-in-action claim for being presented too late, the Tribunal also found that the such claim would have faced "insurmountable difficulties" in circumstances where Hungarian courts, having invalidated the tender procedure, had no power to declare Claimant as the winner of the tender and therefore no power to make a declaration to the effect that the national radio broadcasting regulator must enter into a new broadcasting agreement with a particular bidder.[185]

Another way to resolve the problem was to speculate as to the position that a domestic tribunal would have taken had it been presented with the contested issue of domestic law. Illustrative of such approach is the lesser-known award in *F-W Oil Interests v. Trinidad and Tobago* (2006). The Tribunal in that case had to determine whether the Claimant had acquired rights of contractual or other nature in relation to an offshore oil and gas development and production project that would be capable of falling within the protection of the applicable investment treaty. The Claimant alleged to have acquired such rights through a public tender process, out of which it emerged as the winner. Though admitting that it had not obtained a definitive operating

[180] *Saba Fakes v Turkey* (Award) (ICSID Case No ARB/07/20, 14 July 2010) **[**127]-[28].

[181] ibid [128].

[182] ibid [129].

[183] *Accession Mezzanine Capital* (n 26), [66].

[184] ibid.

[185] ibid [68].

agreement in relation to the exploitation of the specific oil field, Claimant maintained in particular that in the course of its dealings with State-owned entities a "process contract" came into existence which made legally binding provision for the way in which a final contract was to be arrived at. The ICSID Tribunal faced the problem, however, that such contracts have not yet been recognized under the laws of Trinidad and Tobago, in the sense that "the entire field of relevant law does not yet exist, since the legislature and the courts have not had occasion to address it".[186]

The Tribunal therefore considered that the only possibility for it to resolve that question was to "speculate" on how a domestic court would proceed, in the absence of direct local guidance, if faced with a claim as presented by the Claimant.[187] For that purpose, the Tribunal assumed that the domestic courts would have arrived at conclusions "generally similar to its own, even if not identical in expression or details."[188] In thus stepping into the shoes of a court of Trinidad and Tobago, the ICSID Tribunal considered that the local judges would have adopted a two-stage inquiry: initially, by approaching the matter "from first principles, and in particular the general principles of the law of contract which can safely be assumed to be broadly similar in Trinidad and Tobago to those developed by the common law throughout the Commonwealth"; and thereafter, by examining how common law courts elsewhere have reasoned in similar situations, which would involve "the accumulation of a body of authorities, such as that placed before this Tribunal, which the court would marshal to see what ideas, perspectives, theories and reasoning could be deduced and applied to the matter in hand."[189] The Tribunal was further of the opinion that such court would be inclined to look particularly at the English cases (given the historical legacy of that source with the law of Trinidad and Tobago) and reported cases from Canada (as the problem there had been discussed intensively at all levels).[190] In the end, it was particularly on the basis of the latter that the Tribunal found common law to recognize the possibility of a process contract and identified general principles applicable to such contracts, as well as specific rules concerning particular situations.[191] At the same time, the Tribunal concluded that none of the Canadian precedents would actually be relevant to the Claimant's situation, since all concerned events occurring before something like a process contract came into existence.[192] Reverting therefore to the principles of common law from which the domestic court would be obliged to proceed in the situation like that concerning the Claimants, the Tribunal considered that, though legal systems recognize an obligation on the parties to work towards a contract in a way consonant with good faith, the English common law of contracts which applied in Trinidad and Tobago did not (yet) recognize a contract to negotiate as having any binding force (relying, in particular, on the opinions of Lord Denning M.R. and Lord Diplock in *Courtney v. Tolani* (1975) decided by the Court of Appeal of England and Wales).[193] In the view of the Tribunal, therefore, Claimants' have not obtained a legally enforceable right under the law of Trinidad and Tobago that could thus be capable of falling under the protection of the investment treaty.

Admittedly, however, the approach taken by the Tribunal in *F-W Oil Interests* was exceptional in many ways. First, the question as to the possibility of a process contract was actually not essential to the decision, since the Tribunal already concluded on the facts of the case

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[186] *FW Oil Interests* (n 32), [152].

[187] ibid [152].

[188] ibid [171].

[189] ibid [153].

[190] ibid [154].

[191] ibid [166]-[168]ff.

[192] ibid [173].

[193] *Courtney and Fairburn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 All ER 716 (Court of Appeal of England and Wales) [173], [177]-[78].

that no legally enforceable commitments could possibly have come into existence in view of the disclaimers attached to the public tender procedure.[194] The reasons why the Tribunal nonetheless wished to speculate as to how the Courts of Trinidad and Tobago would hypothetically have proceed was apparently solely to do justice to the voluminous pleadings that had been made on that point by the parties.[195] Second, the Tribunal itself – composed as it was of pre-eminent common law practitioners[196] – possessed sufficient knowledge of the law to make a decision on such complicated legal issue. Third, the whole approach was solely possible because the legal system with respect to which the Tribunal had to make a decision was one of common law, where – in contrast with civil law systems – the possibility is generally accepted of the law being developed through judicial decisions. At the same time, it must be noted that, despite its general propensity to speculate on a question of domestic law on which neither the legislators nor the courts of Trinidad and Tobago had yet taken position, the Tribunal adopted a very cautious approach in drawing inferences and conclusions from the jurisprudence of other common law jurisdictions. As to the English judicial authorities, the Tribunal was aware that, though seemingly based on generally accepted principles of English Law, these might have been decisively influenced by European Community Law. As to the Canadian precedents, the Tribunal was aware that those were decided against the background of formal tendering structures and contractual practices unrelated to those existing in Trinidad and Tobago And were thus unsafe to be followed directly.[197]

5.4.4. Obstacles to Law Ascertainment – Jurisprudence Unsettled or Contradictory

A different kind of problem has arisen in the law ascertainment process where the domestic jurisprudence invoked by the disputing parties turned out to be unsettled or outright contradictory. Such problem was particularly acute where the available judicial pronouncements contradicted, or otherwise raised doubts about the plain meaning of a particular domestic statute. How should international tribunals proceed in such cases, particular if account is taken of their duty to construe domestic law in accordance with domestic judicial pronouncements? Shall they ignore the available judicial decisions altogether and construe the relevant provisions of domestic law autonomously, without basing themselves on any available judicial pronouncements? Or shall they review domestic pronouncements and chose the approach that they consider to be the most reasonable one?

The International Court of Justice has opted for the second approach, explaining in the *ELSI* case that "[w]here the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law'."[198] Such approach was not unprecedented, as the Court was in fact weaving forth on the position taken on this issue by its predecessor in the *Brazilian Loans* case. Investment tribunals, on their part, have not taken a uniform position on this matter, but came up with different solutions to the problem of conflicting jurisprudence: while many of them refused to take a position as to which judicial decisions are the preferable or the

[194] *FW Oil Interests* (n 32), [165], [182].

[195] ibid [165].

[196] The Tribunal was presided over by Fali S Nariman, a distinguished Indian Constitutional jurist and senior advocate to the Supreme Court of India, and composed of Sir Franklin Berman, a British barrister and former FCO legal adviser, and Lord Mustill, serving at that time as Lord of Appeal in Ordinary.

[197] ibid [155]-[56].

[198] *ELSI* (n 49) [62], quoting from (*Brazilian Loans,* 124).

better one (5.4.4.1.), some had little reservations from deciding which of those decisions is most in the conformity with the domestic law (5.4.4.2.).

5.4.4.1. Refusal to Take Position on Unsettled or Contradictory Jurisprudence

Amongst those refusing to take a position on unsettled jurisprudence, some tribunals proceeded to interpret the relevant statute for themselves. In *Petrobart v. Kyrgyz Republic* (2003), for instance, inconsistent domestic judgments were simply disregarded and the Tribunal sustained its decision on an autonomous interpretation of the relevant provisions of domestic law. In the circumstances of that case, the issue arose whether Claimant was a foreign investor within the meaning of the Kyrgyz Foreign Investment Code. In order to confirm such proposition, Claimant relied on an earlier decision that the Bishkek City Court had rendered in the context of Claimant's contractual claims, which purportedly recognized, in express terms, the Claimant as a "foreign investor". In dismissing such proposition, Respondent instead relied on a later ruling of the same Court, which apparently concluded that Claimant had made no foreign investment within the meaning of the Code and thus arguably implied that Claimant was not a foreign investor. Facing the alleged inconsistency, the Tribunal concluded that neither of the decisions "can serve as a basis for conclusions" and thus limited its analysis to a literal construction of the Code, which the Tribunal itself interpreted "against the background of the facts and circumstances presented to it".[199]

Most other tribunals facing inconsistent or contradictory jurisprudence, however, preferred to entirely avoid deciding a disputed point of domestic law, premising their analysis instead on other considerations. In *Feldman v. Mexico* (2003), for example, the Tribunal was facing the question whether Claimant's company had a right under Mexican tax legislation to obtain tax rebates on cigarettes that it exported. The entitlement to the latter depended on whether or not the exporter was capable of producing invoices stating the excise tax paid on the cigarettes – a requirement that the Claimant's company, for reasons unrelated to the Respondent's authorities, had never been able to comply with. At a certain point, the company challenged the constitutionality of the invoicing requirements, but obtained divergent answers from Mexican courts.[200] Against this background, and while recognizing that the Mexican courts' discussion of domestic legal issues provided "necessary background" to its understanding of these issues "as required for a proper application of NAFTA and international law", the Tribunal was "not inclined" to give those decisions "significant weight".[201] This was because of several reasons. First, neither of the disputing parties had suggested that those decisions were controlling. Second, some of the domestic proceedings were not final. Third, the conflicting positions taken by the domestic courts had the effect of "creating a conflict which this Tribunal cannot and should not try to resolve". Fourth, the courts were applying Mexican law which did not necessarily provide the same results as the provisions of NAFTA and international law applied by the Tribunal. And fifth, the court decisions were not claimed to have been breaching the international law standard for denial of justice.[202] In the circumstances of the case, the Tribunal could actually afford not to decide the contradictions in Mexican jurisprudence, since it was never disputed that the relevant

[199] *Petrobart v Kyrgyz Republic* (2003) (n 2), 43.

[200] *Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1 82-83, 16 December 2002) [82]-[83]. While the first instance Fiscal Tribunal held that the tax administration could not require itemized invoices due to the company's impossibility to comply with such requirement, a Circuit Court subsequently took the position that the requirement was not contradictory with the zero percent tax rate, whereas a Court of Appeals conversely again held that the company did have a constitutional right to the rebates notwithstanding its inability to produce invoices showing the tax amounts separately. At the time of the Tribunal's award, the proceeding remained *sub judice* before the competent federal courts which were yet to deliver the final decision.

[201] ibid [84].

[202] ibid [84].

provisions of Mexican Tax legislation at all relevant times prescribed the invoicing requirements. Hence, the outcome of the domestic proceedings in that case would not have affected the Tribunal's findings in relation to Claimant's expropriation claim, for even if Mexican courts had ultimately decided that the denial of rebates was unconstitutional, Claimant could not have reasonably argued that post investment changes in the law destroyed its investment.[203]

Similarly reluctant to take a definite stance towards contradictory domestic decisions was the Tribunal in *EnCana v. Ecuador* (2006). A central question in that case was whether foreign oil companies operating in Ecuador were entitled to refunds of value added tax (VAT). Pursuant to Ecuador's Tax Code, manufacturers in general could seek a refund of VAT paid on goods produced in Ecuador for export. But the Code was unclear as to the scope of activities that were to fall under manufacture. As of a certain point, the Ecuadorian Tax Authorities began to deny oil companies the right to VAT refunds on the ground that crude oil could not be considered a "fabricated" (manufactured) good. Some of these oil companies, including EnCana's Ecuadorian subsidiaries, challenged the Tax Authorities' decisions in Ecuadorian Tax Courts, but those challenges resulted in contradicting judicial decisions.[204] The majority of the arbitrators in that case was ultimately not willing to take a position on the conflicting jurisprudence, taking the view that "[t]he Tribunal cannot pick and choose between different and conflicting national court rulings in order to arrive at a view as to what the local law should be."[205] According to the majority, "[c]onsistent with well-established international principle and doctrine", the availability of a clause under the applicable BIT protecting the Claimant against uncompensated expropriations did "not convert this tribunal into an Ecuadorian tax court".[206] The majority could afford such reluctance since, in the circumstances of that case, it was actually in a position to decide the question of expropriation "on the assumption (without deciding) that EnCana is correct on the substantive issues of Ecuadorian law".[207]

Similarly reluctant was the stance of investment tribunals in situations where particular judgments were claimed to depart from established domestic jurisprudence. In *Mamidoil v. Albania* (2015), the impugned judgment of Albania's Supreme Court was claimed to have "surprisingly deviated from previous case law" and thus denied Claimant justice. While the Claimant's expert had not provided case materials in support of such proposition, the Respondent's legal expert produced another decision of the Supreme Court, allegedly confirming that the impugned judgment applied the law correctly.[208] The Tribunal took the view that

> "it is not its role to make a final judgment over the disputed Albanian legal questions. Both legal experts have given reasoned opinions. The Supreme Court was divided over the correct answers. Both the majority and the dissenting minority have presented reasons

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[203] ibid [119].

[204] *EnCana v Ecuador* (2006) (LCIA Case No UN 3481, UNCITRAL, 3 February 2006), [88]-[92]. In two cases brought by EnCana's subsidiaries, the City Oriente and City Investing cases, the Ecuadorian District Tax Court held that the applicable provision of the Tax Code was indeed not applicable to oil companies for reason of them not being manufacturers, though granted a partial VAT refund on the basis of a different provision of the Tax Code. The Supreme Court in the same cases upheld the lower court's reasoning. In contrast, in the Bellwether case brought by a different plaintiff, the same Supreme Court a few months had earlier rejected idea that Article 69A would not be applicable for reason of oil companies not being manufacturers. And yet again, the District Tax Courts in other cases, including for example in the Repsol case, reportedly continued to deny VAT refunds on the basis of Article 69A, this being possible due to the fact that Supreme Court decisions did not have the status of binding precedent until the Supreme Court has ruled the same way three times.

[205] ibid [200] fn 138. Elsewhere, the Tribunal observed that the legality of tax measures is a matter to be determined by the courts of the host state ([142(1)]).

[206] ibid, fn 138 to [200].

[207] ibid.

[208] Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania (Award) (ICSID Case No ARB/11/24, 30 March 2015) [767].

> for their decision and opinion. It is not the Tribunal's role to take sides. It has also not been given evidence to determine whether the Supreme Court deviated from former court practice."[209]

Without therefore taking a position whether the impugned judgment deviated from previous jurisprudence, the Tribunal concluded that it was not clearly improper, discreditable or in shocking disregard of Albanian law, basing itself on "a review of the material before it and a careful reading of the Supreme Court's decision".[210] In *Eli Lilly v. Canada* (2017), the Tribunal likewise avoided taking a definite stance as to certain Canadian court precedents that were adduced to prove the subsequent reversal of Canadian patent law in the *AZT* decision of Canada's Supreme Court. Whereas the Claimant's and Respondent's legal experts provided conflicting assessments of those precedents, the Tribunal found both of these experts "credible and competent" and as each had made "a reasoned case", the "only appropriate conclusion, then, in the Tribunal's view, is that reasonable minds may differ in the interpretation of the cases."[211] The Tribunal, again, was in a position to avoid taking a definite stance on the alleged contradiction in jurisprudence, as it had already determined, on the basis of its own reading of the *AZT* decision, that there was no reversal from prior law.[212]

5.4.4.2. Picking and Choosing from Available Jurisprudence

In some of the cases, investment tribunals were more disposed to picking and choosing from contradictory or inconsistent domestic jurisprudence. The clearest example is the award in *Occidental v. Ecuador* (2004), where the Tribunal took a less cautious approach towards the same conflicting decisions of Ecuadorian courts that were also at issue in the *EnCana* case. Not only did the *Occidental* Tribunal have no trouble forming its own views as to the manufacturers' entitlement under the Ecuadorian Tax Code to obtain VAT refunds,[213] but the Tribunal held that its interpretation of the Code actually found support in the decisions of the Ecuadorian Supreme Court. Though admitting that there were "contradictions" in this jurisprudence,[214] the *Occidental* Tribunal had no trouble with picking and choosing the two Ecuadorean court decisions that it deemed most supportive of its interpretation of the Code.[215] The Tribunal concluded that under Ecuadorian tax legislation the Claimant was "entitled to such a refund, particularly as it has been held by the Ecuadorian courts that such a right pertains to exporters generally, whether involved in manufactures or in production."[216] But this was somewhat of an overstatement, as the Tribunal conveniently ignored another Supreme Court's decision, which the Tribunal itself acknowledged as not supporting its interpretation of the Code.[217] At the end of the day, perhaps, the approach taken in *Occidental* was most in line with the principle enounced in *ELSI* that it rests with the international tribunal or court to select the interpretation that can be considered most in conformity with domestic law.

A somewhat different approach was later followed by the Dissenting Arbitrator in the *EnCana* case. In his dissenting opinion, Arbitrator Grigera Naón did not consider that the final determination of issues under domestic law had to be entrusted to the national courts of the

[209] ibid [768].
[210] ibid [769].
[211] *Eli Lilly v Canada* (n 40), 333.
[212] ibid 328-32.
[213] *Occidental v Ecuador* (n 1), 136.
[214] ibid 137.
[215] ibid 141.
[216] ibid 143.
[217] ibid 138-39.

state.[218] For an international tribunal, in his view, the local laws were to be considered as "*facts* to be freely evaluated by arbitrators to determine if the foreign investor's entitlement to protection under international law has been infringed at a specific moment in time or not."[219] Accordingly, Ecuadorian court decisions were not treated as potential source of domestic law, but merely as evidence of State conduct.[220] Indeed, Arbitrator Naón sought to make clear that he was not "advocating any review by an international arbitral tribunal constituted under the Treaty of local court determinations as to the meaning or 'right' interpretation" of the relevant provisions of the Tax Code, nor was he advocating "the exercise by such tribunal of functions inherent in an appeals court in respect of local court findings or conclusions as to how such provision is or should be interpreted and applied locally."[221] Rather, what an international arbitral tribunal was bound to examine was "whether measures based on such interpretation – considered as a fact – constitute an expropriatory taking under the Treaty."[222] In other words, the problem of conflicting jurisprudence was to be resolved by treating the issue as one of fact, instead of one of law.

An altogether different approach was followed in the jurisdictional award in *Siag v. Egypt* (2007), where the alleged contradictions in domestic jurisprudence were eventually resolved through a careful scrutiny of the domestic decisions in question. In the circumstances of that case, the question arose whether one of the claimants effectively lost its Egyptian nationality as a result of obtaining the nationality of Lebanon. Pursuant to Egypt's nationality law, a person seeking permission to obtain a foreign nationality was entitled at the same time to seek permission to retain the Egyptian nationality; though, if the latter permission was granted, the person was entitled to retain the Egyptian nationality provided that a formal declaration was made within a year expressing the wish to take advantage of such benefit.[223] Respondent, however, argued that here was no unanimity of opinion among the more recent decisions of the Egyptian courts as to whether such declaration was actually required, having introduced several domestic cases that allegedly supported the opposite view.[224] In seeking to determine the proper construction of Egypt's nationality law, the ICSID Tribunal did not seek to resolve the alleged jurisprudential inconsistencies by simply selectively endorsing the judicial authorities submitted by the Claimants, which attested that the making of the declaration was required. The Tribunal actually dismissed all of Respondent's case law for lack of relevance to the Respondent's interpretation of the law.[225] In other words, the Tribunal substantively engaged with the jurisprudence presented to it, ultimately resolving that there were no actual inconsistencies. Accordingly, the Tribunal thus held that it was "settled" under Egyptian law that a formal declaration had to be made, which meant that the Claimant, having made no such declaration, effectively lost his Egyptian nationality.[226]

5.4.4.3. Assessment

In the end, the different approaches pursued by international investment tribunals in dealing with uncertain or unsettled domestic jurisprudence do not substantially diverge from those of other

[218] Partially dissenting opinion of Arbitrator Grigera Naón in *EnCana* (LCIA Case No UN3481, UNCITRAL, 30 December 2005) [10]-[11].

[219] ibid [12].

[220] See eg [56].

[221] ibid [72].

[222] ibid.

[223] *Siag v Egypt* (n 14), 163.

[224] ibid 105-06, 166-67.

[225] ibid 168-69 (Some of the cases were found not to support the Respondent's interpretation of the provision, some were found not to touch on the application of the relevant provision at all, while a case was found not to involve any detailed analysis of the relevant legal provision, and thus not to allow for any inferences to be made).

[226] ibid 172.

international adjudicatory bodies. In the practice of the PCIJ and the ICJ, for example, one can find thus precedents where the Court had opted for one of the possible lines of authority in domestic jurisprudence,[227] to precedents where potentially contradictory domestic jurisprudence had simply been left aside and the Court proceeded with its own interpretation of domestic law,[228] to precedents where the Court had simply refused to conclusively determine points of domestic law where the jurisprudence was inconclusive or uncertain.[229]

5.5. Conclusions

All in all, the conclusions one can possibly draw are the following. Investment tribunals had frequent resort to the jurisprudence of domestic courts in interpreting or applying domestic law. Such jurisprudence was considered for a variety of reasons: with a view to clarifying concrete statutory provisions whose interpretation or application gave rise to uncertainty, for the purpose of determining questions of domestic law that could otherwise not be resolved by simple application of statutory provisions, or merely because of certain factual information provided for in domestic jurisprudence that was indirectly of assistance in the law ascertainment process.

But as this chapter proceeded to demonstrate, reasons for recourse to domestic judicial pronouncements ought not be sought in mere convenience. In being adjudicatory bodies applying a law originating from a legal order other than the one to which they owe their existence, investment tribunals are actually bound to consider such jurisprudence when determining points of domestic law that are essential to their decision. While investment tribunals cannot be presumed to literally "know" the law (there is, in fact, no obligation requiring that arbitrators have any expertise in the domestic law which they may be required to apply), it is possible to say that arbitrators are nevertheless under an obligation to familiarize themselves with any domestic law and jurisprudence that they may have to apply. This duty of education may not translate into an autonomous obligation on the part of investment tribunals to engage *proprio motu* in their own research of relevant jurisprudence. It does, however, entail that arbitrators are at the very least required to seek the views of the litigating parties as to any domestic jurisprudence that may be pertinent to the interpretation or application of domestic law before them. In the end, investment tribunals retain their independent powers of assessment and decision, and are therefore permitted to draw different conclusions from the case-law than those presented to them by the parties – subject, of course, to the general obligation that they interpret and apply domestic law in such way as it would actually be applied in the domestic legal system.

In exercising their independent powers of assessment and decision, investment tribunals are not expected to blindly follow domestic jurisprudence presented to them by the litigating parties.

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[227] *Serbian Loans* (n 46), 45-47. Although each of the parties adduced jurisprudence of French courts that allegedly supported their own different reading of Article 1895 of the French Code Civile (as to whether or not the provision suspended the application of gold clauses), the PCIJ concluded that "according to the information furnished by the Parties, the doctrine of French courts, after some oscillation, has now been established in the manner indicated by the French Government." (47). The PCIJ followed the same approach in the *Brazilian Loans* (n 44), 125.

[228] In the *Péter Pázmány University* case (1933), 235-36, the PCIJ was presented by the parties with divergent jurisprudence of Hungarian Courts as to the legal status of the Péter Pázmány University under Hungarian law. The PCIJ considered that the relevant statements in the domestic judgments were merely 'of an incidental character (*obiter dicta*)' and, accordingly, was 'not inclined to attach importance to them'. Instead, it preferred to rely upon its own appreciation of the relevant provisions of Hungarian. See *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University), Czechoslovakia v Hungary (Judgment)* PCIJ ser A/B No 61 (15 December 1933) 235-36.

[229] In the *ELSI* case (n 49), [63], the Chamber of the ICJ was presented with different decisions of the Court of Cassation that purportedly demonstrated that it was possible to directly invoke provisions of an FCN Treaty before Italian courts. The jurisprudence was inconclusive, but the Chamber did not proceed to determine, on the basis of its own reading of the Italian Code of Procedure, whether an action based on the treaty could have been successful. Rather, the Chamber concluded that 'it was for Italy to show, as a matter of fact, the existence of a remedy'.

As the present chapter also demonstrated, two factors have strongly influenced the investment tribunals' attitude towards particular case-law: the potential bias of the judicial decision-maker from which the case-law originated, and the propriety of the judicial process leading to the relevant case-law more generally. Apart from that, investment tribunals have largely adopted deferential standards of review and have not conditioned their acceptance of particular judicial decisions upon the correctness of the latter as a matter of domestic law. Indeed, this is also expected from them, as arbitrators are not chosen for their particular knowledge of domestic law. Lacking such expertise, it is perhaps not surprising that, in determining questions of domestic law, investment tribunals have frequently sought a basis for their determinations in the available jurisprudence, even if this occasionally entailed a large part of creativity on their part. Indeed, tribunals did not shy away from drawing analogies and adverse influences from available judicial pronouncements, and where necessary, conclusively determined points of domestic law even in circumstances where the domestic jurisprudence was unsettled or uncertain. It has been especially in such circumstances that tribunals proceeded to perceive domestic courts as partners proper.

* * *

In retrospect, when compared to the findings in chapter 4, the conclusions reached in chapter 5 may lead to a somewhat paradoxical, if not contradictory proposition that, on the one hand, domestic judicial determinations may not be taken to generate preclusive effects on investment tribunals, and yet those same tribunals may still be required, on the other hand, to consider domestic courts' pronouncements when interpreting and applying domestic law.[230] In reality, this paradox is more apparent than real. The apparent contradiction is but the consequence of the fact that domestic judgments, as any other outcome of adjudication, generate effects at both the concrete and the abstract level.[231] While at the concrete level, it should be possible for investment tribunals to ignore how a specific judgment had determined the particular controversy between the litigating parties, it may not be possible for them to ignore the specific contributions that judgments generally make in relation to law-ascertainment and -clarification at the abstract level.

As both chapter 4 and chapter 5 further suggest, however, distinctions between concrete and abstract dimensions of prior judicial determinations may gradually loose on importance, as investment tribunals increasingly treat the question of *propriety* as determinative of whether or not prior judicial determinations will be accepted. That is, regardless of whether a prior judgment is relevant because of concrete pronouncements *in casu*, or because of general pronouncements *in abstracto*, such pronouncements will mostly be accepted, as long as they are unimpeachable from the standpoint of international law. From the perspective of the present inquiry, domestic courts will thus be treated as *partners* in the law-ascertainment process, as long as their overall conduct does not make them *suspects*. The circumstances under which this will happen are discussed in the next part of the present inquiry.

[230] The paradox was inadvertently captured by the Tribunal in *Emmis v Hungary (Award)* (n 1), [176], when denying that 'decisions of municipal courts arising directly out of the same set of facts will be necessarily dispositive of the question before an international tribunal' while at the same time conceding that 'determinations of municipal courts as to the content of the municipal laws that they are mandated to apply are likely to be of great help to an international tribunal.'

[231] See *supra* I.3.