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Jurisdiction of Arbitral Tribunals

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Vasily N. Anurov

Domestic Law and Jurisdiction of Arbitral Tribunals in International Investment Disputes

Key words:
domestic law | international law | international investment arbitration | jurisdiction of Arbitral Tribunals | rule of law | foreign investor | host State

Abstract *| The role of domestic law in establishment of jurisdiction of Arbitral Tribunals is underestimated in arbitration and court practice. International arbitrators are used to apply more familiar sources of law, particularly, principles and rules on international law rather than ascertain the content of domestic law. Such attitude endangers a perspective of international investment arbitration in many host States as they are losing trust in arbitration and searching for a substitute to settle international investment disputes. These negative consequences will be examined in the example of the YUKOS case and the Achmea issue. These examples were intended to pay more attention to the above said problems and encourage arbitrators to increase the role of domestic law in considering particular cases.*

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I. Introduction

2.01. International investment arbitration is intended to fulfill one of the main functions in protecting investments made by foreign corporations and persons into the host State's economy. Following the traditional view on arbitration, the contending parties need to achieve a consent to bring their dispute before an Arbitral Tribunal. There is no doubt that foreign investors are willing to use the above said mechanism of dispute resolution as arbitration is associated with a neutral forum composed of unbiased and independent arbitrators who feel free from any influence carried out by State authorities. The situation is more complicated in relation to the host State's consent. Even though investments usually trigger capital flow, involvement of additional production and labor resources, that positively affect any economy, the host State may be exposed to claims submitted by foreign investors when they consider that the host State violated the relevant treaty. By expressing its consent to arbitration, the host State automatically derogates its sovereignty by excluding jurisdiction of the State courts. In this case domestic law remains the most important remedy for the host State to protect its interest in the arbitration proceedings. Unfortunately, the role of domestic law is 'under-appreciated' as noted by author Jarrod Hepburn noted in his book, DOMESTIC LAW IN INTERNATIONAL INVESTMENT ARBITRATION.[1]

2.02. Having an independent status, arbitrators seem to not demonstrate a great willingness to ascertain the content of domestic law in most of the cases. They prefer to directly invoke principles and rules of international law using their power of discretion and to ban judicial review of awards set out in many legal orders. This article will analyze, first the interaction between domestic and international law and then deal with the role of the former in establishment of jurisdiction of Arbitral Tribunals. The most disputable issues will be illustrated with examples from recent cases in arbitration and court practice in the European Union (EU).

II. Interaction Between Domestic and International Law

2.03. Domestic law seems to be the most familiar legal instrument to be applied by Arbitral Tribunals for settlement of cross-border

[1] JARROD HEPBURN, DOMESTIC LAW IN INTERNATIONAL INVESTMENT ARBITRATION, Oxford (2017), et. 103.

commercial disputes. The starting point of any legal analysis is establishment of the applicable law which will govern the relevant relationship between the contending parties and deal with all arguments submitted by them during the arbitration proceedings. This algorithm also keeps its effectiveness in settlement of international investment disputes even though the respondent in each proceeding is not a private party but a host state. The Arbitral Tribunal still needs to have a source of law if its mandate is based on a conservative model of arbitration, i.e., the arbitrators doesn't act as *amiable compositeurs* or decide *ex aequo et bono*, but should stick to strict application of legal rules. Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 18 March 1965 (The Washington Convention) follows the above said model by adoption of two rules. The first one allows the parties to designate the law as applicable to the dispute. The second rule addresses the situation when the parties failed to reach such an agreement. In this case, 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. In an attempt to comprehend the meaning of the wording cited above and find out the mutual intent of the Contracting States there have been many disagreements. As one of the founders of the Washington Convention, Aron Broches noted in his special course reading in the Hague Academy of International Law that was devoted to interpretation of the Washington Convention, the initial idea of an opportunity to invoke domestic and international law had been strongly opposed by delegates of the developing countries and therefore corrected to achieve a compromise.[2] It serves no purpose to second-guess this decision, but it is important to try to access its ramifications in arbitration practice.

2.04. The first proposal how to define an applicable law in the absence of the relevant agreement between the parties comes from the *ad hoc* Committee in the *Klockner* case.[3] Having considered the law of the host State and 'such principles as may be applicable', this Committee attributed to international law

[2] Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 HAGUE ACADEMY OF INTERNATIONAL LAW COLLECTED COURSES ('*RECUEIL DES COURS*') 390 (1972).

[3] *Klockner Industrie-Anlagen GmbH and others* v. *United Republic of Cameroon*, ICSID case № ARB/81/2 (*Klockner* v. *Cameroon*). Complementary and corrective function of international law was confirmed by later cases, *inter alia*: *Amco Asia Corporation, P.T. Amco, Pan American Development Limited* v. *Republic of Indonesia*, ICSID case № ARB/81/1 (*Amco* v. *Indonesia*), *Liberian Eastern Timber Corporation* v. *Republic of Liberia*, ICSID case № ARB/83/2 (*LETCO* v. *Liberia*) and *AGIP S.p.A.* v. *People's Republic of the Congo*, ICSID case № ARB/77/1 (*AGIP* v. *Congo*).

only as a complementary and corrective function. Although this interpretation endowed the foreign investor with a right to revise a lacuna or inconsistency of domestic law, the later had an advantage over international law whose role was boiled down to a subsidiary legal source. Emmanuel Galliard and Yas Banifatemi strongly objected to such approach referring to the history of the Washington Convention and its *travaux preparatoires*.[4] There is no express wording neither in the text of the Washington Convention nor in the Report of the Executive Directors on the Washington Convention or any other documents prepared during Legal Committee Meetings that trigger application of international law subject to existence of lacuna in the domestic law or detection of an inconsistency. The problem remains unsolved. Even the *ad hoc* Committee in the *Wena* case didn't shed enough light on this obscure area.[5] It recognized two equal systems of law in governing international investment disputes but didn't create any guidelines in which one case should prevail over the other.[6]

2.05. When the *ad hoc* Committee in the *Klockner* case mentioned principles, it must be remembered that these are not rules of law. Further it specified its position when it stated that 'arbitrators may have recourse to the "principles of international law" only after having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to one principle, even a basic one) and after having applied the relevant rules of the State's law'.[7] Although one may argue that the definition of 'principles of law' includes rules of law or reflects the most general and fundamental rules, it needs to make some reservations, supporting the difference between the two definitions in question.

2.06. Adoption of traditional legal sources in international law (treaties, customs) mostly depends on convergence of wills, expressed by States in international conferences or their

[4] Emmanuel E. Gaillard & Yas 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*, 18(2) ICSID REVIEW: FOREIGN INVESTMENT LAW JOURNAL 382 (2003).

[5] *Wena Hotels Limited* v. *Arab Republic of Egypt*, ICSID case № ARB/98/4 (*Wena* v. *Egypt*).

[6] The *ad hoc* Committee interpreted Article 42(1) of the Washington Convention in the following way: 'What is clear that the sense and meaning of the negotiations leading to the second sentence of Article 42 (1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit' (*Wena* v. *Egypt*, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated 8 December 2000 in the above matter, 5 February 2002 (*Wena* v. *Egypt* (Decision on Annulment), paragraph 40 available at: https://www.italaw.com/sites/default/files/case-documents/ita0903.pdf (accessed on 15 August 2021).

[7] *Klockner* v. *Cameroon*, Ad hoc Committee Decision, 3 May 1985 (*Klockner* v. *Cameroon* (Decision on Annulment)), paragraph 122 available at: https://www.italaw.com/sites/default/files/case-documents/italaw11161.pdf (accessed on 15 August 2021).

reaction on challenges caused by escalation of relationships with other States. Such an agreement is hardly achieved in the relevant negotiations due to opposite and sometimes contradicting interests pursued by States. Therefore, the Contracting Parties managed to fix only a general approach to address disputable issues in hope that this approach will be later clarified by the Parties' subsequent behavior and practice regarding implementation of the agreed terms. Apparently, this general approach or principle cannot be qualified as a fully-fledged rule of law that is supposed to provide a sufficient legal regulation of the relationship arising between the parties in the future. Thus, international law has less opportunities to give its sources a normative character in comparison with domestic law and settle disputes without broadening the discretion power of arbitral tribunals. W. Reisman has interpreted Article 42(1) of the Washington Convention based on the restrictive role of international law which is supposed to be applied in case of inconsistency of domestic law with non-derogatory norms or rules of *jus cogens*[8] (in Russian doctrine these norms are called principles). Scholars from the opposite camp, including Galliard and Banifatemi, argue that international law is a 'body of substantive rules' and may fulfill the independent function to govern 'a particular issue presented to an ICSID tribunal'.[9]

2.07. Adherence to the conservative perception of law requires one to find out the appropriate rule, which is capable of dealing with disputable issues not in an abstract manner but take into account all details contained in each case. To do so arbitrators need to follow, at least in their mind, some consistency in analysis of the relevant legal sources. It is not a hierarchy of two systems of law: national and international law, which was rejected by Broches,[10] but a mere attempt to put thoughts in order and structure the subject-matter of the examination.[11] Any favor granted by Arbitral Tribunals to one of the legal sources, being under analysis entails creation of a new hierarchy. For instance, in the *APPL* case the Arbitral Tribunal recognized the BIT as a primary source, general international law and the host State

[8] Michael W. Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15(2) ICSID REVIEW: FOREIGN INVESTMENT LAW JOURNAL 375 (2000).

[9] Gaillard, Banifatemi, supra note 4, at 397, 403.

[10] A. Broches made a special note in his comments to Article 42(1) that 'the order in which the two systems of law are mentioned, national law first and international law second, does not denote their hierarchical order.' (Broches, supra note 2, at 390).

[11] This consequence of analysis is clearly fixed in the following A. Broches' comments: 'The Tribunal will first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law.' (Broches, supra note 2, at 392).

law as a supplementary source. Such hierarchy is substantiated by tacit and mutual agreement achieved by the parties in their submissions or inferred from the relevant BIT.[12]

2.08. The turning point in interpretation of Article 42(1) happened when the Arbitral Tribunal in the *CMS* case declared 'a more pragmatic and less doctrinaire approach', excluding any preference or consequence in application of international and domestic law.[13] In accordance with this approach there will no longer be any limits on arbitrators' freedom to establish an applicable law: choice-of-law mechanism and motivation to implement strict rule of law without any substitutes, such as sources of so-called 'soft law' comprising private codifications, guidelines, recommendations and draft of articles to be incorporated into future treaties. Ironically, the argument made by Galliard and Banifatemi against the 'Klockner-Amco doctrine' may be used against this pragmatic approach as it was rejected in the preparation of the Washington Convention in favor of application of international and domestic law cumulatively rather than as alternatives.[14] However, it is worth noting that domestic law is not mentioned in the following treaties at all: North American Free Trade Agreement on 17 December 1992 (NAFTA) replaced by United States-Mexico-Canada Agreement on 30 November 2018 (USMCA) and Energy Charter Treaty on 17 December 1994 (ECT). These treaties directly give a preference to applicable rules of international law, including them as well in settlement of international investment disputes.[15]

2.09. Besides a high level of abstraction that occurs in most of the principles and rules of international law, Arbitral Tribunals face other challenges restricting their power of discretion. The first group of limits relates to a fixed choice-of-law mechanism set out in the relevant treaty. This mechanism is

[12] *Asian Agricultural Products Limited* v. *Democratic Socialist Republic of Sri Lanka*, ICSID case № ARB/87/3, Final Award, 27 June 1990 (*AAPL* v. *Sri Lanka* (Award)), paragraphs 20-22 available at: https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf (accessed on 15 August 2021). The key role of BIT is supported in later cases: *MTD Chile S.A., MTD Equity Sdn. Bhd.* v. *Republic of Chile*, ICSID case № ARB/01/7, Award, 25 May 2004 (*MTD* v. *Chile* (Award), paragraphs 86-87 available at: https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf (accessed on 15 August 2021); *ADC Affiliate Limited and ADC* & *ADMC Management Limited* v. *The Republic of Hungary*, ICSID case № ARB/03/16, Award of the Tribunal, 2 October 2006 (*ADC* v. *Hungary* (Award), paragraphs 290-292 available at: https://www.italaw.com/sites/default/files/case-documents/ita0006.pdf (accessed on 15 August 2021).

[13] *CMS Gas Transmission Company* v. *The Republic of Argentina*, ICSID case № ARB/01/8, Award, 12 May 2005 (*CMS* v. *Argentina* (Award)), paragraph 116 available at: https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (accessed on 15 August 2021). Also see: *Sempra Energy International* v. *Argentine Republic*, ICSID case № ARB/02/16, Award, 28 September 2007 (*Sempra* v. *Argentina* (Award)), paragraphs 236, 240, available at: https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf (accessed on 15 August 2021).

[14] ANTONIO R. PARRA, THE HISTORY OF ICSID, Oxford (2012), et. 306.

[15] See Article 1131(1) of NAFTA; Article 14.D.9(1) of USMCA and Article 26(6) of ECT.

incorporated in Article 42(1) of the Washington Convention. However, arbitrators may muster their efforts in examining of international law and neglect similar research of domestic law. Due to the binding effect of the award and obligations of each Contracting State to recognize and enforce the pecuniary obligations imposed by that award, as it is prescribed by Article 54(1) of the Washington Convention, local courts have no right to interfere or somehow influence an arbitrators' decision in relation to the applicable law. The second group of limits may be demonstrated by the example of arbitration proceedings conducted based on the ECT and UNCITRAL Arbitration Rules in edition of 1976 and 2010 (UNCITRAL Rules). In this case arbitrators are not tied to apply domestic law, that is not mentioned in the relevant Article 26(6) of the ECT. However, they should consider that the award will be checked by a local court for compliance with requirements enumerated in the New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 10 June 1958. Although the award cannot be reviewed on merits by the local court, the latter may have a different view on interpretation of international law and refer to local public policy as a ground for refusal to recognize and enforce the award. Therefore, both groups of limits require Arbitral Tribunals to draw special attention to domestic law in settlement of international investment disputes.

III. The Role of Domestic Law in the Establishment of Jurisdiction of Arbitral Tribunals

2.10. There is no doubt that Article 42(1) of the Washington Convention is devoted to the choice of substantive law governing the merits of the dispute. This Article does not address jurisdiction of the ICSID Tribunal and gives no guidelines which law should be applied to solve such issues. We can see the same situation in other treaties, including the ECT. Therefore, Arbitral Tribunals are entitled to use a broad power of discretion to establish a consent to arbitration expressed by the host State in the relevant terms of treaties and considered as a standing offer in accordance with the arbitration without the privity approach proposed by Jan Paulsson.[16] He asserted that based on the well-known principle of competence-competence,

[16] Jan Paulsson, *Arbitration Without Privity*, 10(2) ICSID REVIEW, FOREIGN INVESTMENT LAW JOURNAL 256 (1995). Also see: CHRISTOPH H. SCHREUER, CONSENT TO ARBITRATION, The Oxford Handbook of International Investment Law, Oxford (P. Muchlinski, F. Ortino and C. Shreuer eds., 2008), et. 836.

arbitrators do not care whether the consent to arbitration is recognized by official authorities or courts of the host State. As Gus Van Harten noted, Arbitral Tribunals' propensity to broad interpretation of treaties, frequently in favor of investors may be explained by arbitrators' strong motivation 'to expand the system's appeal to potential claimants and, in turn, their own prospects for future appointment'.[17] Apparently, it is not acceptable for host States that are losing their trust in arbitration and trying to replace it by international courts to be established for settlement of international investment disputes. One of the key reasons to do so is a natural desire to be judged by a predictable and understandable attitude for interpretation and implementation of rules of law. Unfortunately, neither international law nor discretion of arbitrators can provide that. The only source capable to meet with Contracting States' requirements is domestic law or Union of States law which has a special court capable to secure uniform interpretation of such law, for instance EU law. Further consider its effectiveness in two of the most notorious events in recent arbitration practice: the *YUKOS* case and the *Achmea* issue.

2.11. The jurisdiction of the Arbitral Tribunal in the *YUKOS* case could not be considered without application of the Russian law to access whether the provisional application of the ECT is consistent with the Russian Constitution, laws or regulations. As the Russian Federation only signed the ECT but did not ratify it and even notified the ECT Depository of its intention not to become a party to the ECT, provisional application of the ECT in the Russian Federation envisaged in Article 45 of the ECT remained the sole basis for the Arbitral Tribunal's jurisdiction. Several forums took the opposite views on this subject and the issue is still not finalized pending a decision of the Supreme Court of Netherlands. First, the Arbitral Tribunal concluded that the ECT, including its dispute resolution provision set out in Article 26 of the ECT is inconsistent with Russian law and dismissed the objections to the jurisdiction raised by the Russian Federation. To make this decision the arbitrators examined the Russian Federation's Law on Foreign Investment in the 1991 and 1999 editions (LFI 1991 and LFI 1999 correspondingly), Civil Code of the Russian Federation and even the ECT Explanatory Note to the Duma (lower chamber of the Russian Parliament). This directly stipulated that the ECT 'is consistent with the provisions of the existing law on foreign investment and does

[17] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, Oxford (2007), et. vii.

not require the acknowledgement of any concessions or the adoption of any amendment to the abovementioned Law'.[18] This wording was reviewed by the Hague District Court and its interpretation produced an opposite result in comparison with the Arbitral Tribunal's finding. The Court elucidated that the opinion of the Russian government cannot be ascribed to the legislative power and the fact that the ECT was never ratified refuted a presumption that the above said opinion prevailed in Russian law. Also, the ECT Explanatory Note did not address provisional application of Article 26 of the ECT which is contrary to Russian law.[19]

2.12. The third round of the debate on the provisional application of the ECT occurred in the Court of Appeal of the Hague. It did not agree with the view taken by the lower court (the Hague District Court) and quashed the latter's judgment. The Court of Appeal clarified the subject of the analysis by locating any grounds or support in sources of Russian law, including LFI 1991, LFI 1999, the ECT Explanatory Note and explanatory notes to other BITs referred by the Russian Federation for conclusion that international investment arbitration is inconsistent with Russian law. The Court of Appeal found no grounds or support to this position and directly noted that it cannot be deduced from the Russian law.[20]

2.13. The *YUKOS* case demonstrates the significant role of domestic law in solving of one of the essential issues of jurisdiction – the host State's consent to arbitration. Both courts (the Hague District Court and Court of Appeal of the Hague) made a thorough and independent analysis of Russian law to check the correctness of the decision on jurisdiction made by the Arbitral Tribunal. The scope of examination covers so many acts of the Russian legislation, articles of the Russian scholars and witness statements of the prominent experts in Russian law,

[18] *Hulley* v. *The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (*Hulley* v. *Russia* (Award on Jurisdiction), paragraph 367 available at: https://www.italaw.com/sites/default/files/case-documents/ita0411.pdf (accessed on 15 August 2021); *Yukos* v. *The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (*Yukos* v. *Russia* (Award on Jurisdiction), paragraph 367 available at: https://www.italaw.com/sites/default/files/case-documents/ita0910.pdf (accessed on 15 August 2021); *Veteran* v. *The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (*Veteran* v. *Russia* (Award on Jurisdiction), paragraph 367 available at: https://www.italaw.com/sites/default/files/case-documents/ita0891.pdf (accessed on 15 August 2021).

[19] *De Russische Federetie t. Yukos Universal Limited*, № C/09/477162/HA ZA 15-2; *De Russische Federetie t. Hulley Enterprises Limited*, № C/09/481619/HA ZA 15-112, Rechbank Den Haag, Vonnis, 20.04.2016 (*De Russische Federetie t. HVY* (Vonnis)), paragraph 5.60 available at: https://www.italaw.com/sites/default/files/case-documents/italaw7255.pdf (accessed on 15 August 2021).

[20] *De Russische Federetie t. Yukos Universal Limited*, № C/09/477162/HA ZA 15-2; *De Russische Federetie t. Hulley Enterprises Limited*, № C/09/481619/HA ZA 15-112, Gerechshof Den Haag, Arrest, 18.02.2020 (*De Russische Federetie t. HVY* (Arrest)), paragraphs 4.7.56.-4.7.57 available at: https://www.italaw.com/sites/default/files/case-documents/italaw10079.pdf (accessed on 15 August 2021).

that designates the provision of the ECT on dispute resolution as a rule of law rather than the usual offer addressed to potential investors. To understand the meaning of such rules of law it needs to go beyond the arbitrators' discretion, their skills to interpret treaty provisions and delve into details of the host State law including all its legal sources: legislation, court practice and doctrine.

2.14. The *Achmea* issue was raised by several EU States in the arbitration proceedings to convince the Arbitral Tribunals that settlement of intra-EU investment disputes in arbitration is inconsistent with the EU law. The first attack against international investment arbitration was carried out by the European Court of Justice (ECJ) on 6 March 2018. Actually, the ECJ proclaimed that the EU law, particularly Article 267 (preliminary rulings procedure) and Article 344 (settlement of disputes concerning the interpretation and application of the EU treaties) of the Treaty on the Functioning of the European Union on 13 December 2007 (TFEU), precludes an investor from one of the EU States to initiate arbitration proceedings against the other EU State if the latter is alleged to violate a BIT concluded between these two EU States. As an arbitral tribunal does not belong to the EU judicial system there is a great concern that certain values of the EU legal order may be exposed by the award: principles of mutual trust, sincere cooperation and uniform interpretation of the EU.[21] However, arbitrators prefer to apply only Article 26 of the ECT as a sole legal source relating to issues of jurisdiction. The EU law and ECJ judgment on the *Achmea* issue mentioned above are not to be considered since they do not constitute general principles of international law.[22] Even Article 344 of the TFEU which must have derogated from Article 26 of the ECT in part due to *lex posterior* effect, cannot restrict the power of discretion used by the arbitrators to continue arbitration proceedings.[23] They merely state that there

[21] *Slowakische Republik* v. *Achmea BV*, Court (Grand Chamber), case № C-284/16, Judgment, 6 March 2018 (*Slovakia* v. *Achmea* (Judgment)), paragraph 57-58 available at: https://www.italaw.com/sites/default/files/case-documents/italaw9548_0.pdf (accessed on 15 August 2021).

[22] *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krummel GmbH & Co. oHG, Kernkraftwerk Brunsbuttel GmbH & Co. oHG* v. *Federal Republic of Germany*, ICSID case № ARB/12/12, Decision on the Achmea Issue, 31 August 2018 (*Vattenfall* v. *Germany* (Decision on the Achmea Issue), paragraphs 129, 133, 166-167 available at: https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf (accessed on 15 August 2021). Also see: *Eskosol S.p.A. in liquidazione* v. *Italian Republic*, ICSID case № ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019 (*Eskosol* v. *Italy* (Decision on Inapplicability of ECT to Intra-EU Disputes), paragraph 121 available at: https://www.italaw.com/sites/default/files/case-documents/italaw10512.pdf (accessed on 15 August 2021).

[23] Bukhard Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, 3 MAX PLANK INSTITUTE LUXEMBURG FOR PROCEDURAL LAW RESEARCH PAPER SERIAS 16 (2018).

is no identity of subject matter between the EU law, including TFEU and the ECT or the relevant BIT – a precondition for application of Article 30 of the Vienna Convention on the Law of Treaties on 23 May 1969, giving a priority for a successive treaty.[24]

2.15. The similar formalistic approach is demonstrated by Arbitral Tribunals in not recognizing the next attempt made by the EU States to express their negative attitude to international investment arbitration – adoption of the Declaration of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union on 15 January 2019 signed by 22 EU States (Declaration 2019).[25] The binding effect of this Declaration was denied by the Arbitral Tribunal in *Addiko* case because of lack of identity between the original intent of the Contracting parties (Austria and Croatia) during BIT negotiations and their new shared understanding enshrined in the Declaration 2019.[26] We can hope that the Agreement for the termination of bilateral treaties between the Member states of the European Union on 29 May 2020 will put an end to the uncertain regime of intra-EU disputes.

IV. Conclusion

2.16. In the *YUKOS* case and cases concerning the *Achmea* issue the host States desperately tried to challenge jurisdiction of the Arbitral Tribunals invalidating the provisions on dispute resolution set out in the relevant treaties. The host States invoked all admissible remedies to show their disinclination to settle the investment dispute in arbitration, but the arbitrators were not

[24] *Eastern Sugar B.V.* v. *Czech Republic*, SCC case № 008/2004, Partial Award, 27 March 2007 (*Eastern Sugar* v. *Czech Republic* (Award), paragraphs 159-160 available at: https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf (accessed on 15 August 2021); *Jan Oostergetel and Theodora Laurentius* v. *Slovak Republic*, UNCITRAL case, Decision on Jurisdiction, 30 April 2010 (*Oostergetel* v. *Slovak Republic*, Decision on Jurisdiction)), paragraphs 74-75 available at: https://www.italaw.com/sites/default/files/case-documents/ita1073_0.pdf (accessed on 15 August 2021); *EURAM* v. *Slovak Republic*, Award on Jurisdiction, 22 October 2012 (*EURAM* v. *Slovak Republic* (Award on Jurisdiction)), paragraphs 184-185 available at: https://www.italaw.com/sites/default/files/case-documents/italaw4226.pdf (accessed on 15 August 2021); *Electrabel S.A.* v. *The Republic of Hungary*, ICSID case № ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (*Electrabel* v. *Hungary* (Decision on Jurisdiction)), paragraph 4.176 available at: https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf (accessed on 15 August 2021); *Eskosol* v. *Italy* (Decision on Inapplicability of ECT to Intra-EU Disputes), paragraphs 146-147; *Vattenfall* v. *Germany* (Decision on the Achmea Issue), paragraph 214.

[25] There are two more Declarations signed by other EU States: Declaration of 5 Member States on the enforcement of the *Achmea* Judgment on 16 January 2019 and Declaration of Hungary on the Legal consequences of the *Achmea* Judgment on 16 January 2019.

[26] *Addiko Bank AG and Addiko Bank d.d.* v. *Republic of Croatia*, ICASID case № ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020 (*Addiko* v. *Croatia* (Decision on Inapplicability of BIT with EU Acquis), paragraph 289 available at: https://www.italaw.com/sites/default/files/case-documents/italaw11546.pdf (accessed on 15 August 2021).

persuaded by such efforts. The tactic victories achieved by the investors in particular cases led to a loss of trust in arbitration as a fair mechanism for settlement of disputes and enhanced a search for its substitute – international courts. Probably investment arbitration will soon leave the international stage and the emergence of new treaties and cases at the beginning of this century, which was compared with the 'baby boom' will be transferred to a stampede of the host States from the arbitration area.

2.17. The reasons for such a negative scenario lie on the surface as they derive from the history of investment arbitration, particularly the history of the Washington Convention. The great concern expressed by developing countries that comprise a majority of host States was to have sufficient legal guaranties to protect their interest in arbitration proceedings. One of these guaranties was the application of domestic law. Unfortunately, most of Arbitral Tribunals neglect this concern and prefer to concentrate their attention at international law rather than finding out an appropriate and detailed answer in domestic law. This is true in relation to the merits of the dispute as well as jurisdiction of the Arbitral Tribunal. A host State deserves the right to be judged by the rules of law belonging to its own legal order and only if these rules contradict with international law, should the latter be considered.

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Summaries

DEU [***Das nationale Recht und die Gerichtsbarkeit von Schiedsgerichten in internationalen Investitionsstreitigkeiten***]

Die Rolle des innerstaatlichen Rechts betreffend die Gerichtsbarkeit von Schiedsgerichten wird in der schiedsgerichtlichen und gerichtlichen Praxis vernachlässigt. Internationale Schiedsrichter sind es gewöhnt, bekanntere Rechtsquellen anzuwenden – insbesondere die Grundsätze und Regeln des internationalen Rechts – anstelle den Inhalt des jeweiligen nationalen Rechts in Erfahrung zu bringen. Dieser Ansatz verheißt in einer Reihe von Gastländern nichts Gutes für die Aussichten des internationalen kommerziellen Schiedsverfahrens, denn diese Länder verlieren damit ihr Vertrauen in das Schiedsverfahren und suchen nach alternativen Beilegungswegen für internationale Investitionsstreitigkeiten. Der Autor bewertet diese nachteiligen

Folgen am Beispiel der YUKOS-Entscheidung und des Problems Achmea. Diese Beispiele sollten die o.g. Probleme in den Brennpunkt des Interesses rücken und Schiedsrichter anregen, dafür zu sorgen, dass dem nationalen Recht künftig bei der Verhandlung nnd Entscheidung von konkreten Rechtssachen eine größere Rolle eingeräumt wird.

CZE [***Vnitrostátní právo a pravomoc rozhodčích soudů v mezinárodních sporech z investic***]
Úloha vnitrostátního práva ohledně pravomoci rozhodčích soudů se v rozhodčí a soudní praxi podceňuje. Mezinárodní rozhodci jsou zvyklí aplikovat známější prameny práva, zejména zásady a pravidla mezinárodního práva, spíše než zjišťovat obsah práva vnitrostátního. Tento přístup ohrožuje perspektivu mezinárodní obchodní arbitráže v řadě hostitelských zemí, neboť tyto země přestávají rozhodčímu řízení důvěřovat a hledají náhradní řešení mezinárodních sporů z investic. Tyto negativní důsledky autor posuzuje na příkladu rozhodnutí ve věci YUKOS a problému Achmea. Tyto příklady měly za cíl zviditelnit výše uvedené problémy a pobídnout rozhodce k tomu, aby zajistili, že při projednávání konkrétních věcí bude vnitrostátní právo hrát větší roli.

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POL [***Prawo krajowe i kompetencje sądów arbitrażowych w międzynarodowych sporach inwestycyjnych***]
Głównym celem artykułu jest podkreślenie kluczowej roli prawa krajowego w zakresie kompetencji sądów arbitrażowych w odniesieniu do międzynarodowych sporów inwestycyjnych. Analiza prawna składa się z dwóch części: pierwsza część została poświęcona wzajemnym relacjom między prawem krajowym i międzynarodowym, w drugiej części omówiono rolę prawa krajowego w odniesieniu do kompetencji sądów arbitrażowych. Autor pokazuje najbardziej kontrowersyjne problemy w drugiej części na przykładzie orzeczenia w sprawie YUKOS i problemu Achmea – dwóch istotnych sporów w ostatnim czasie, które prawdopodobnie wpłyną na rozwój międzynarodowego arbitrażu inwestycyjnego w Unii Europejskiej.

FRA [***Le droit national et la compétence des tribunaux arbitraux dans les litiges internationaux relatifs aux investissements***]
Le principal objectif du présent article est de souligner le rôle que joue le droit national en ce qui concerne la compétence des

tribunaux arbitraux dans les litiges internationaux relatifs aux investissements. L'analyse juridique présentée se fait en deux temps : tout d'abord, l'auteur examine les relations qui existent entre les droits national et international, puis il réfléchit sur le rôle du droit national par rapport à la compétence des tribunaux arbitraux. Dans cette deuxième catégorie, l'auteur illustre les cas les plus controversés : la décision rendue dans l'affaire YUKOS et l'affaire Achmea, deux importants litiges récents, qui sont susceptibles d'influencer l'avenir de l'arbitrage international d'investissement dans l'Union européenne.

RUS [***Национальное право и компетенция арбитражных судов в международных инвестиционных спорах***]
Главная цель настоящей статьи заключается в том, чтобы подчеркнуть ключевую роль национального права в установлении юрисдикции арбитражных трибуналов, рассматривающих международные инвестиционные споры. Правовое исследование состоит из двух частей: первая часть – взаимодействие между национальным и международным правом и вторая – роль национального права в установлении юрисдикции арбитражных трибуналов. Автор иллюстрирует наиболее спорные вопросы второй части на примере дела YUKOS и вопроса Achmea – двух значительных недавних событий, которые вероятно окажут влияние на развитие международного инвестиционного арбитража в Европейском союзе.

ESP [***Derecho nacional y competencia de los tribunales de arbitraje en los litigios de inversión internacionales***]
El objetivo principal de este artículo es destacar el papel clave de la legislación nacional en lo que respecta a la competencia de los tribunales de arbitraje en materia de los litigios de inversión internacionales. El análisis jurídico consta de dos partes: en la primera se indaga sobre la interrelación entre el derecho nacional y el derecho internacional, mientras que la segunda parte da cuenta del papel del derecho nacional con respecto a la competencia de los tribunales de arbitraje. El autor presenta las cuestiones más controvertidas expuestas en la segunda parte y las demuestra con el ejemplo de los laudos relativos al caso YUKOS y Achmea, dos importantes litigios recientes que muy probablemente influirán en la evolución del arbitraje de inversiones internacional en la Unión Europea.

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