



Universiteit
Leiden
The Netherlands

The Role of the Domestic Law of the Host State in Determining the *ratione materiae* Jurisdiction of Investment Treaty Tribunals: The Partial Revival of the Localisation Theory

Eftekhar, R.

Citation

Eftekhar, R. (2019, December 19). *The Role of the Domestic Law of the Host State in Determining the *ratione materiae* Jurisdiction of Investment Treaty Tribunals: The Partial Revival of the Localisation Theory*. Retrieved from <https://hdl.handle.net/1887/82077>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/82077>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/82077> holds various files of this Leiden University dissertation.

Author: Eftekhar, R.

Title: The Role of the Domestic Law of the Host State in Determining the *ratione materiae* Jurisdiction of Investment Treaty Tribunals: The Partial Revival of the Localisation Theory

Issue Date: 2019-12-19

Chapter 4: Ascertaining the Contents of the Host State Law

1. Having dealt with the question of the legal basis for referring to the laws of the host state, an arbitrator deciding upon the legality requirement issue and/or the question of the creation and existence of rights/interests underlying investments in an investment treaty case should answer a second question which is the modality of establishing the contents of the host state law that the arbitrator is not familiar with.¹ No arbitrator could be expected to know the domestic laws of all individual states. Even very eminent arbitrators who might have decided myriads of cases lodged against or initiated by different states might have only dealt with a very small bit of the colossal legal systems of those countries to the extent that the issues related to the cases before them required the application of those small fractions of municipal laws.² Indeed, as one commentator has opined, the “very nature of international arbitration entails that the arbitrators are not necessarily trained in *lex causae*... The arbitrators may ... come from different legal cultures and may not have any background in, or knowledge of, the *lex causae*.”³ In this regard, the PCIJ admitted in the *Brazilian Loans* case that the Court should not be expected to know the law of all individual states:

Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries.⁴

¹ In this respect, see Y Banifatemi ‘The Law Applicable in Investment Treaty Arbitration’ in K Yannaca-Small (ed) *Arbitration under International Investment Agreements* (OUP 2010) 191-192 (distinguishing between various stages of (i) the identification of the applicable law; (ii) the subsequent investigation concerning the determination of the content of the applicable law; and (iii) the actual application of the applicable law).

² In a seminal article published by Arbitration International, Prof. Gabrielle Kaufmann-Kohler, an obviously eminent and reputable figure in contemporary international arbitration, quite candidly admitted that she had decided myriads of cases based on domestic laws of various countries spread in the five continents of the world while she did not know those laws at the time the proceedings in each case had commenced. She also said that even after deciding these cases she did not master these laws. She indicated that:

Reflecting back on the cases in which I have been involved as an arbitrator, and certainly forgetting some of them, I realized that I have resolved disputes under German, French, English, Polish, Hungarian, Portuguese, Greek, Turkish, Lebanese, Egyptian, Tunisian, Moroccan, Sudanese, Liberian, Korean, Thai, Argentinean, Colombian, Venezuelan, Illinois, New York ... and Swiss law. Do I know these laws? Except for New York law, which I learned many years ago and would not pretend to now know, and Swiss law which I practice, although not that often as you see, the answer is clearly no.

G Kaufmann-Kohler, ‘The Arbitrator and the Law: Does He/She Know it? Apply It? How? And a Few More Questions’ (2005) 21(4) *Arb Int'l* 631. See also P Landolt, ‘Arbitrators’ Initiatives to Obtain Factual and Legal Evidence’ (2012) 28(2) *Arb Int'l* 173.

³ G Knuts, ‘Jura Novit Curia and the Right to Be Heard – An Analysis of Recent Case Law’ (2012) 28(4) *Arb Int'l* 671.

⁴ *Payment in Gold of Brazilian Federal Loans Contracted in France (France v. Brazil)*, Judgment, P.C.I.J. Rep. Series A, No. 21, 1929 (12 July 1929), p 124.

2. In other words, in a case before an international adjudicatory forum, “the principle of *iura novit curia* applies to international law, it does not apply to matters of national law.”⁵ In the *Fisheries Jurisdiction* case, the ICJ approved that the Court knows international law and has the duty to apply it even if the parties have not pleaded it before the World Court. Thus, in the circumstances that the Government of Iceland had failed to appear in order to plead its objections or to make its observations on the United Kingdom’s arguments and contentions in law, the Court held that:

The Court [...] as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.⁶

3. Despite the fact that international adjudicators master international law, as mentioned above, arbitrators appointed in investment treaty arbitrations are, in most instances, unfamiliar with the laws of the host state.⁷ Such an understandable lack of knowledge regarding the internal laws of many different individual states in individual investment treaty cases warrants obtaining reliable information about the laws of the host state in question and how they are applied in practice. This information should be acquired by a method that is observant of the ‘right of the parties to be heard’.⁸ Therefore, the role of the evidence presented by the disputants

⁵ J Crawford (ed), *Brownlie’s Principles of Public International Law* (8th Edition, OUP 2012) 52.

⁶ *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)* Merits, Judgment of 25 July 1974, p 10 [17]. See also J Paulsson, ‘International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law’ (2006) 3(5) TDM 14; E De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2014) 109-110.

⁷ Party-appointed arbitrators appointed by host states are sometimes nationals of the host state. However, even in such cases, the party-appointed arbitrator is sometimes appointed because of his fluency in international law and arbitration rather than the domestic law of the host state. Bearing this point in mind, in many cases where a national of the host state is appointed as an arbitrator by the respondent state, the nominated person should not be expected to master the nuances of the internal law of the host state. Besides, even if the appointed person is fluent in the law of the host state, the fact that one member of the tribunal is knowledgeable about the domestic law does not make the whole tribunal an expert of the municipal law.

In practice also, the requirement that the arbitrators should have knowledge of the applicable host state law substantially narrows down the parties’ range of choices for the appointment of competent arbitrators. J Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 113.

⁸ The principle that disputing parties must be heard on all the relevant issues (including legal matters) is one of the most fundamental rules of procedure. C Schreuer, L Malintoppi, A Reinisch & A Sinclair, *The ICSID Convention: A Commentary* (CUP 2009) 987-991. As was noted in Chapter 2, the *Fraport* award was annulled by the ICSID Annulment Committee, on the basis that there was “a serious departure from a fundamental rule of procedure”. The departure from a fundamental rule of procedure in that case was that the tribunal did not permit submissions from the parties on heavily relied upon evidence. As such, the Committee held that since the right to be heard and the right to have adequate opportunity for rebuttal had not been observed by the tribunal, there was a serious departure from the

to introduce the law of the host state is of critical significance. Indeed, there are two principal ways by which an arbitral panel can obtain information about the laws of a given state: (i) submissions and evidence presented by the parties; and (ii) independent research conducted by the tribunal itself.⁹ The PCIJ properly identifies the two ways by which the contents of the applicable law could be ascertained. It said in the *Brazilian Loans Case* that:

All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, 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.¹⁰

4. It must be noted that to respect the right of the parties to be heard, whereas an investment treaty tribunal has the right to conduct its own independent research and analysis – in particular, in jurisdictional matters that require a ‘proactive’ role to be carried out by the tribunal¹¹ – its conclusion should primarily be informed by the submissions of the parties to the dispute, or the comments that the parties provide on the arbitral tribunal’s independent research and inquiry. This proposition is confirmed by the tribunal in *Emmis v. Hungary* which pinpointed that the submissions of the parties regarding the contents of the applicable municipal law and how it is applied in practice are of fundamental significance in framing the tribunal’s mind with regard to local law issues at stake:

Where the Tribunal is presented with a question of municipal law essential to the issues raised by the Parties for its decision, the Tribunal, whilst retaining its independent powers of assessment and decision, 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.¹²

5. This is precisely why the International Law Association (“ILA”) in its famous Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration provides that “[a]rbitrators should primarily receive information about the contents of the applicable law from the parties.”¹³ This is all the more so in cases where the application of that body of law is outcome-determining:

principles of natural justice. See *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 [177]-[178], [218], [227], [246]-[247].

⁹ For different approaches to determining the contents of the applicable law, see JDM Lew, LA Mistelis & S Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 440-444; G Knuts (n 3) 672.

¹⁰ *Payment in Gold of Brazilian Federal Loans Contracted in France (France v. Brazil)* (n 4) p 124.

¹¹ J Hepburn (n 7) 165.

¹² *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 [175].

¹³ International Law Association Rio De Janeiro Conference (2008) International Commercial Arbitration, Final Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, Clause 5.

When it appears to the arbitrators that the contents of applicable law might significantly affect the outcome of the case, arbitrators should promptly raise that topic with the parties and establish appropriate procedures as to how the contents of the law will be ascertained (in submissions with materials attached, through experts, witnesses or otherwise).¹⁴

6. Furthermore, the research undertaken by a court or tribunal should be checked with the parties to the dispute. In this respect, two specific clauses of ILA's above-mentioned Recommendations should be taken into consideration, which are based on the concern to assure 'due process' and tend to prevent 'taking the parties by surprise':

Before reaching their conclusions and rendering a decision or an award, arbitrators should give parties a reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties, or any of them, or that are based on legal issues not raised by or with the parties

[...]

If arbitrators intend to rely on sources not invoked by the parties, they should bring those sources to the attention of the parties and invite their comments, at least if those sources go meaningfully beyond the sources the parties have already invoked and might significantly affect the outcome of the case. Arbitrators may rely on such additional sources without further notice to the parties if those sources merely corroborate or reinforce other sources already addressed by the parties.¹⁵

7. Therefore, in threshold jurisdictional issues like the legality requirement and the existence and creation of rights/interests underlying an investment, in which the issues are outcome-determinative, reliance on the information and comments provided by the parties becomes much more important and necessary.
8. Having dealt with the methods to ascertain the contents of the host state law, the next question is the means through which one can identify and grasp the rules of local law. Undoubtedly, such information should be obtained by the submission and consideration of certain materials. Some of such materials are listed by the WTO Appellate Dispute Settlement Body in *US — Carbon Steel*: "Such evidence 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. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."¹⁶

¹⁴ *ibid*, Clause 3.

¹⁵ *ibid*, Clauses 8 and 10.

¹⁶ *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, Report of the Appellate Body, WT/DS213/AB/R, Report No AB-2002-4, Doc No 02-6520, 28th November 2002, World Trade Organization [WTO] [157].

9. In practice, most disputants do their best to persuade the tribunal that their interpretation of domestic law is more to the point. In so doing, they usually file one, two, or sometimes, several of the materials mentioned above. They undertake to translate the relevant provisions of host state law (if necessary) in the way they see right, file relevant academic texts, and submit and translate (if necessary) decisions by municipal courts of the host state with regard to the issue in question. Moreover, if they are so lucky to find them, the parties would invoke the decisions of other international *fora* concerning the same legal issue of the relevant domestic law. Another significant way to assist the tribunal in understanding the host state law is through the submission of legal expert opinions on the pertinent issues of domestic law.¹⁷ As pointed out by one commentator, “[w]hile the meaning of a statute or the interpretation of a case may not be apparent at a glance by the arbitrators, expert testimony might clarify the meaning and propose an interpretation of domestic law that is consistent with other sources before the tribunal.”¹⁸
10. It is clear that the starting point for any investment treaty tribunal is the text of the domestic law or regulation in question. However, not all statutory texts are unambiguous. Furthermore, in certain instances, although the legal text is clear, it does not cover the whole picture which is the domestic legal system of the host state in its totality. A law translated and presented to the tribunal may have been repealed, amended, or superseded by another law.¹⁹ Another possibility is that the law at issue may be construed and implemented totally differently in the host state in practice in a way that does not conform to the understanding and education of the arbitrators deciding the investment treaty case. Consequently, as one scholar has commendably suggested, it is a necessity to look beyond the text of the domestic regulation or statute.²⁰ As noted above, there are several ways to look behind the legal texts themselves.
11. As will be delineated in Chapter 7, of vital importance amongst the pieces of evidence proffered for establishing the contents of host state law are documents showing the application of the law of the host state in practice. In this regard, decisions of municipal courts (in particular, the highest of such courts) are of critical significance. In this connection, in the PCIJ case of the *Serbian Loans*, the Court noted that:

For the Court itself to undertake its own construction of municipal law, 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 and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court

¹⁷ For instance, in *Nagel v. Czech Republic*, the claimant had provided the tribunal with three legal expert opinions with respect to Czech law. The respondent had also relied upon an opinion of a legal expert for the explication of its laws. *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 09 September 2003 [71], [306]-[307]. In certain cases, the tribunal relies upon the legal expert testimony submitted by the parties to reach a conclusion. See, for instance, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 [136]-[137].

¹⁸ J Hepburn (n 7) 134.

¹⁹ Along the same lines, see PB Stephan, ‘International Investment Law and Municipal Law: Substitutes or Complements?’ (2014) 9(4) CMLJ 357 (stating that: “the observer may fail to anticipate secondary rules that call off the primary rules that appear to apply to the transaction at hand, or the government may simply ignore its announced rules.”)

²⁰ J Hepburn (n 7) 169-177.

has been established and would not be compatible with the principles governing the selection of its members.²¹

12. Similarly, in this respect, the Annulment Committee in *Fraport v. Philippines* stated that an arbitral tribunal should give particular consideration to decisions of municipal courts as to the construction of the internal laws in question in order to determine how it would be applied within the overall domestic legal system. The Committee went on to note that “[t]his was particularly important in the present case as it is recognised that the Tribunal had not been chosen for its knowledge of Philippine law.”²² Therefore, legal findings of municipal courts of the host state are treated as ‘evidence’ of municipal law in investment treaty arbitrations and serve the purpose of establishing the contents of the local law of the recipient state.²³

Conclusion

13. It is obvious that members of an arbitral tribunal seized of deciding an investment treaty case do not possess vast knowledge regarding sophisticated issues of municipal laws of all the individual states that happen to be respondents in investment treaty cases. For instance, in a dispute where the central question is whether an investor acquired enforceable contractual rights upon being announced as the winner of a bidding process in country A, no foreign arbitrator can be expected to know all the laws and regulations and administrative and/or judicial jurisprudence regarding bidding processes in that state. In this respect, to sail in safe waters, members of the tribunal should be oriented by the parties and become acquainted with the laws, regulations, and jurisprudence of the host state through the submissions and evidence presented by the disputants. Of course, the tribunal remains free to conduct its own independent research. However, if the issue the tribunal has independently surveyed is crucial to the outcome of the case, the tribunal should invite comments by the parties.
14. While several materials can assist an investment treaty tribunal in understanding the contents of the host state law (including the text of the laws and regulations in question (when necessary, a translation of such texts), legal expert testimony, doctrinal authorities on host state law as well as the practice of the courts of the host state on legal matters at issue, etc.), the most helpful and trustworthy tool for obtaining information regarding the meaning of the law in question seems to be through the jurisprudence of the courts of the host state (in particular, those of a higher rank) which determine how municipal law is implemented and interpreted in practice. As a matter of fact, courts of the host state are specialists and practitioners of host state law and they apply that body of law on a daily basis. Subsequently, unless negative circumstances exist that eliminate trust in specific court findings in question or the judicial system of the host state as a whole, investment treaty tribunals shall give due consideration and particular weight to the pertinent decisions of host state courts as the prime means for ascertaining the contents of host state law.

²¹ *Payment of Various Serbian Loans Issued in France (France v. Yugoslavia)*, Judgment, P.C.I.J. Rep. Series A, No. 20, 1929 (12 July 1929) p 46.

²² *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010 [236].

²³ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014 [509].