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May Misapplication of EU Law Give Rise to International Responsibility of the Member State Under Investment Treaties?

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Abstract

This paper seeks to answer the question whether Member States may be responsible for violation of investment standards by misapplication of EU law. It consequently deals with a number of preliminary issues. First, it asks whether liability for breaches of EU law lies within the exclusive domain of the Member States courts and the Court of Justice of the European Union. Second, it analyzes the status of EU law under investment treaties, while having regard mainly to substantive aspects. Subsequently, it integrates misapplication of EU law into the matrix of state responsibility under investment treaties. Finally, the paper offers some thoughts on how misapplication of EU law is treated under the Comprehensive Economic and Trade Agreement between the EU and Canada. The overall conclusion of the paper being that misapplications of EU law have remained important in the context of investment protection.

Keywords

Comprehensive Economic and Trade Agreement; European Union Law; Investment Protection; International Responsibility; Investment Treaties; Investor; Misapplication; Standards of Investment Protection.

1 Introduction

It is the Opinion 1/17 of the Court of Justice of the European Union ("CJEU") that has sparked the author's interest in this paper's topic. The CJEU has found that the investment tribunals competent to decide disputes under the Comprehensive Economic and Trade Agreement ("CETA") has

no jurisdiction to interpret or apply EU Law.[1] One of the repercussions of Opinion 1/17 being that the CETA tribunals should not be entitled to find Member States responsible for misapplication of EU law under investment treaties, for the tribunals may not apply EU law (see 9.1 below).

First and foremost, it seems that Opinion 1/17 is in a clear contradiction to the one the CJEU reached in the *Achmea* case, in which it considered EU law as a law originating from international law as well as forming part of Member States' legal orders.[2] However, in the latter case, the CJEU declared that investment disputes arising from bilateral investment treaties ("BIT" in singular or "BITs" in plural) are disputes concerning interpretation and application of EU law, where such treaty refers expressly to the domestic law of the Member State as its party. If the intra-EU BIT refers to the domestic law of the party, the resolution of an investment dispute lies in the exclusive competence of the CJEU.

Given the significance of EU law in the context of international investment law, it has appeared counter-intuitive that an infringement of EU law could never give rise to an investment claim under CETA.

Nonetheless, one may go one step further and ask whether, if EU law is applicable to the substance of investment disputes under (both intra- and extra-EU) BITs, may a misapplication of an EU law rule give rise to international responsibility for violation of one more standards of investment protection?

The present topic continues to be relevant, notwithstanding the two CJEU's rulings. Firstly, investment tribunals have refused to decline their jurisdiction, in spite of the *Achmea* dictum.[3] Secondly, *Achmea* does

1 EU-Canada Comprehensive Economic and Trade Agreement (CETA). *European Commission* [online]. [cit. 24. 7. 2021]. Available at: https://ec.europa.eu/trade/policy/in-focus/ceta/

2 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republic vs. Achmea BV*, Case C-284/18.

3 See, e.g., Award of the ICSID of 16 May 2018, *Masdar Solar & Wind Cooperatief U. A. (Claimant) vs. Kingdom of Spain (Respondent)*, Case ARB/14/1, para. 162; Award of the ICSID of 9 October 2018, *UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale (Claimant) vs. Hungary (Respondent)*, Case ARB/13/35, para. 252–267; Decision on the Achmea Issue of the ICSID of 31 August 2018, *Vattenfall AB; 2. Vattenfall GmBH; 3. Vattenfall Europe Nuclear Energy GmBH; 4. Kernkraftwerk Krümmel GmBH & Co. OHG; 5. Kernkraftwerk Brunsbüttel GmBH & Co. OHG Claimants and Federal Republic of Germany Respondent*, Case Arb/12/12, para. 232 ii et passim.

not seem to apply to investment treaties between Member States and third states. Thirdly, it seems that the conclusions of *Achmea* apply only to the investment treaties between Member States that do list domestic law, incorporating EU law, as applicable.

The mere fact that EU law forms part of the Member State's legal order does not make it applicable in the particular case before the investment tribunal.[4] Although, the case may involve an EU element, despite the fact that the intra-EU BIT does not refer to the Member State's domestic law. Yet, this will not be the case in all intra-EU investment arbitrations. For instance, it would be absurd to argue that EU law applies to the substance of the case where an investor argues that a wrong application of domestic criminal law has caused harm to its investment.[5] Lastly, the CJEU Opinion 1/17 has revived interest in the role of EU law within the area of international investment protection (see 9 below).

Thus, this paper will seek to give answers to the following research questions. First, does EU judiciary have monopoly over interpretation and application of EU law? Second, what is the status of EU law in the context of the international law of investment protection? Third, may Member state incur international responsibility under investment treaties and CETA for misapplication of EU law?

2 The Methodological Discussion and Limits

This paper is based predominantly on an abductive approach. It is thus founded on reflexive contemplations about the consequences of misapplication of EU law by a Member State within the context of international investment law. There are then two hypotheses. First, EU law can be misapplied by Member States to the extent that it may cause legally relevant harm

4 FANOU, M. Intra-European Union Investor-State Arbitration post-Achmea: RIP? An assessment in the aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of 6 March 2018, EU:C:2018:158. *Maastricht Journal of European and Comparative Law,* 2019, Vol. 26, no. 2, p. 325; *contra* SOLOCH, B. CJEU Judgment in Case C-248/16 Achmea: The Single Case and its Multi-Faceted Fallout. *The Law and Practice of International Courts and Tribunals,* 2019, Vol. 18, pp. 9–10.

5 Final Award of the Stockholm Chamber of Commerce, Arbitration Institute, of 10 March 2017, *IP Busta & JP Busta (Claimants) vs. Czech Republic (Respondent)*, Case V 2015/14, para. 304–308.

to foreign investors. Second, EU law does not offer an adequate mechanism for enforcement of the investor claims stemming from EU law. In any case, there is no monopoly of the CJEU and Member States over resolution of investment disputes stemming from misapplications of EU law.

The paper is further based on the assumption that the same set of facts may give rise to breach of an investor right and, as a result, state's responsibility under more systems of law, viz. international, EU, and domestic law. Consequently, a misapplication of EU law may be classed as a violation of international law, including investment treaties, without excluding liability of the Member State under EU or domestic law. There is the clear limit of prohibition of double compensation to the investor though (see 5 below).

Moreover, there seems to be no reason to erect an impenetrable wall between the enforcement of the rights stemming from EU law and international (investment) law.[6] As a consequence, this paper is focused on the confluence of EU and international investment law with regard to the state responsibility arising from these legal systems, rather than a conflict between the two legal systems.

Furthermore, although this paper starts from the premise of pluralism, it does not fully adopt its main conclusion, that international and EU legal systems lack any shared, meta-legal principles that would resolve incompatibilities and conflicts among them.[7]

Thus, it is submitted that two such principles exist. First, it is *pacta sunt servanda*.[8] Thus, Member States must observe all their obligations, whether their origin being international or EU law. This principle then finds reflection in national constitutions.[9]

6 For instance, the CJEU has recently qualified the breach of provisions of the General Agreement on Trade and Services as an infringement of EU law. See Judgment of the CJEU (Grand Chamber) of 6 October 2020, *European Commission vs. Hungary*, Case C-66/18, para. 139 and 156.

7 For the critical analysis of the concept of legal pluralism employing the conclusion of Santi Romano's institutional theory of law see FONTANELLI, F. Let's Disagree to Disagree. Relevance as the Rule of Inter-Order Recognition. *The Italian Law Journal,* 2019, Vol. 4, no. 2, pp. 320–323.

8 Art. 26 Vienna Convention on the Law of the Treaties ("VCLT"); Judgment of the CJEU (Grand Chamber) of 6 October 2020, *European Commission vs. Hungary*, Case C-66/18, para. 92.

9 See, e.g., Art. 1 para. 2 in conjunction with Art. 10 and 10a of the Constitution of the Czech Republic.

Second, access to justice for individuals, including investors, is the principle shared by the three legal systems. While the concept of access to justice is not short of ambiguities, the bottom line seems to be that individuals, including investors, ought to have a real and effective, not theoretical or illusory, possibility to enforce their claims.[10]

Therefore, it may be assumed that investors should have as wide an access to justice as possible, which should not include only Member State courts or (to a limited extent) the CJEU, but also international investment tribunals (see below). Access to justice thus includes also the choice of the forum where investors pursue their claims, including the corresponding qualification of the claim fitting to the legal order of the forum. This is not, in and of itself, something deplorable.[11]

Moreover, EU and investment protection share some substantive principles, like that of prohibition of unjustified discrimination.[12] Thus, this is another important intersection between the two legal systems.

Nevertheless, this paper's vantage point is that of public international law, namely its specific regime of investment protection. Accordingly, EU law will be viewed either as a specific sub-system of international law or part of domestic law (see below). Moreover, the concept of "autonomy" of EU law repeated as a mantra in both Opinion 1/17 and *Achmea* does not seem to be a formidable obstacle for the investment tribunals to apply EU law.[13]

As will be seen, it is a difficult task to build a bridge between the status of EU law under investment treaties and the responsibility for violation of standards of investment protection. This task will entail three steps. First the very status of EU law under investment treaties needs to be explained.

10 Judgment of the ECtHR of 9 October 1979, *Airey vs. Ireland*, Application no. 6289/73, para. 24.

11 NAGY, C. I. Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back". *German Law Journal,* 2018, Vol. 19, no. 4, p. 1003 (forum shopping might be "reprehensible", but is not legally prohibited).

12 SATTOROVA, M. Investor Rights under EU Law and International Investment Law. *The Journal of World Investment & Trade,* 2016, Vol. 17, no. 6, p. 898.

13 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 32–37; Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 70–76.

Second, the existence of international legal obligation reflecting EU law as one of the essential requirements for responsibility must be proved. Third, the EU law must be situated within the structure of international responsibility of states under international investment law.

Investment treaties may be concluded between Member States or the Member State and third state. It seems plausible that EU law plays different role in the two kinds of investment treaties. In intra-EU BITs, EU law remains binding on both parties. This has an impact on interpretation of the treaty (see below). However, it terms of a (mis)application of EU law, there appears to be no dramatic difference between intra- and extra-EU investment treaties, as EU law is binding on the host state in both types of treaties. Thus, breaches of EU law may lead to international responsibility in both cases.

There are important limits of this paper. First, this paper examines only the role of EU law in the investor-state dispute resolution under investment treaties, leaving aside the dimension of inter-state investment disputes.[14] Second, it deals only with breach of international obligation, thus leaving aside the additional necessary condition for international responsibility to arise, i.e., whether the conduct may be attributed to the Member State or the EU.[15] Thus, this paper considers only misapplications of EU law attributable to the Member State, which is bound by an investment agreement. Third, this paper does not focus on the relation between application of EU law and recognition and enforcement of arbitral awards. Four, this paper does not delve into the question whether arbitrators are obliged to search for EU law or to have it served by the parties. However, this paper presumes that it is the part of the arbitrator's mission in investment arbitration to look for the applicable rules, independently on the parties' submissions.

14 See thereto HAZARIKA, A. *State-to-state Arbitration Based on International Investment Agreements: Scope, Utility and Potential.* Cham: Springer, 2021, p. 19.

15 Art. 4-11 Draft Articles on Responsibility of States for Internationally Wrongful Acts ("DARSIWA"). *United Nations Office of Legal Affairs* [online]. [cit. 24. 7. 2021]. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; Art. 6-9 Draft Articles on the Responsibility of International Organizations. *United Nations Office of Legal Affairs* [online]. [cit. 24. 7. 2021]. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

3 Misapplication of EU Law in the Context of Investment Protection

First and foremost, it is important to elucidate whether and how EU law applies in international investment arbitration, before identifying the consequences ensuing from its misapplication. Although, more precisely, it is an EU legal rule that is misapplied and the object of the breach is the investor's right stemming from this rule.

Furthermore, there is no universally accepted definition of "application" of law within the legal doctrine.[16] Nevertheless, "application" refers to the process whereby legal rules are applied to the facts of the case, whereas "interpretation" denotes the notion of giving meaning to the legally binding text.[17] The prevailing view is that the application of a legal rule requires its previous interpretation.[18] Thus, the concept of misapplication will include misinterpretation of EU law.

The question of (mis)application of EU law in the investment context assumes legal issues common to both areas exist. These are of two kinds; procedural and substantive. Regarding the procedural aspect, arbitration and Member State courts concur in their jurisdiction to resolve a variety of disputes.[19] As to the substantive aspect, investment protection and EU law may involve the same business sectors. Thus, Member States have obligations towards investors stemming from the sources of EU law. There are then corresponding rights, e.g., the right to establishment or protection against anticompetitive conduct on the internal market (see 7.1 below).[20] It Is thus reasonable to examine misapplication of EU law only insofar as the EU law lays down some rights of the investors.

However, the important methodological caveat is that it will not be always clear that it is useful to subsume specific rights stemming from EU law

16 See, e.g., WRÓBLEWSKI, J. *The Judicial Application of Law*. Dordrecht: Springer, 1992, p. 1.
17 BARAK, A. *Purposive Interpretation in Law*. New Jersey: Princeton University Press, 2007, p. 3.
18 Ibid., p. 4.
19 PAPP, K von. *EU Law and International Arbitration*. Oxford: Hart, 2021, pp. 6–7 and 59–68.
20 Art. 49–55 (right to establishment), and Art. 101 and 102 (competition law) Treaty on the Functioning of the European Union ("TFEU").

under general standards of investment protection. In this connection, one may argue that the enforcement of specific rights is more predictable and efficient than relying on ambiguous legal standards.[21] Nevertheless, as will be shown below, investment arbitration as a dispute resolution system balances this (possible) disadvantage of investment law.

Also, it would be difficult to see an EU law element in, for instance, the most of criminal law cases, in which area the EU has had also limited competence.[22] In such case, it makes little sense to consider breaches of EU law as a basis for international responsibility under investment treaties.

Moreover, the fact that investment treaties and EU law concern the same or similar business activities does not imply that the application of the former excludes application of the latter, and *vice versa*. Investment tribunals have declared that EU law and investment treaties neither cover the same subject matter in terms of procedure, nor substance, and therefore may be applied simultaneously.[23]

In addition, misapplication of EU law overlaps, in part, with non-implementation of EU law. While implementation of directives includes transposition and implementation in the strict sense, regulations are implemented, without normally requiring a legislative act that would incorporate EU law into the Member State's legal order.[24]

In the following, the regard will be had to specific implications such misapplication may have for investors rather than systemic consequences of non-implementation of EU law. Thus, this paper concerns situations where the Member State's organs have completely omitted to apply an EU regulation giving a subjective right to the investor or they require the investor to meet obligations that do not actually arise under the EU legislative acts.

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21 KLEINHEISTERKAMP, J. Financial Responsibility in European International Investment Policy. *The International and Comparative Law Quarterly,* 2014, Vol. 63, no. 2, p. 465.

22 SCHROEDER, W. Limits to European Harmonisation of Criminal Law. *The European Criminal Law Associations' Forum* [online]. 2020, no. 2, pp. 144–148 [cit. 24. 7. 2021]. Available at: https://eucrim.eu/media/issue/pdf/eucrim_issue_2020-02.pdf#page=82

23 KRIEBAUM, U. The Fate of Intra-EU BITs from an Investment and Public International Law Perspective. *ELTE Law Journal,* 2015, no. 1, p. 31.

24 SCHÜTZE, R. *An Introduction to European Law.* Cambridge: Cambridge University Press, 2012, p. 120.

Nonetheless, it should be borne in mind that an act or omission of the Member State may be legal under EU law, but violate standards of investment protection.[25] Nevertheless, the relationship between compliance with EU and violation of investment standards is more complex than this (see the analysis below).

Furthermore, non-application of EU law is an emblematic example of its misapplication. This is the situation where the Member State's court refuses to apply an EU regulation giving a right to the investor. While it is an objective fact whether EU law was applied or not, non-application may arise only when the application should have taken place. Admittedly, this may be a matter of (subjective) perspective.

Finally, it may well be that the misapplication of EU law inflicts no legally relevant harm on the investor. In such case, it is more likely than not that the investor will have no claim under the investment treaty and/or will not be awarded damages for its violation.[26]

4 Does the EU Judiciary Have Monopoly to Interpret and Apply EU Law?

The preliminary question arises as to whether CJEU and Member States' courts being two pillars of EU judiciary have monopoly over interpretation and application of EU law. The answer is both yes and no, depending on whether one adopts an internal or external perspective of EU law.

Viewed from the EU internal perspective, the CJEU found in *Achmea* that resolution of intra-EU disputes concerning interpretation and application of EU law must lie within the exclusive jurisdiction of the CJEU.[27] As a result, Member States may not submit these disputes to investment arbitration, since investment arbitrators called upon to interpret and apply EU law

25 KLEINHEISTERKAMP, J. Financial Responsibility in European International Investment Policy. *The International and Comparative Law Quarterly,* 2014, Vol. 63, no. 2, p. 461.

26 The breach of an investment standard has been found, but no compensation has been awarded. In Award of the ICSID of 24 July 2008, *Biwater Gauff (Tanzania) Ltd. vs. United Republic of Tanzania*, Case ARB/05/22, para. 807.

27 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 32.

by virtue of investment treaties neither ensure its uniform interpretation through the preliminary ruling procedure nor effectiveness of EU law.[28]

However, imagine a commercial arbitration seated in Switzerland, in which arbitrators are to decide a dispute between a French and Italian company. The French company insists that the Italian company caused damages to the former by abusing its dominance on the relevant market. The resolution of the dispute would require application of European competition law.[29]

Accordingly, CJEU cannot exclude by its case law that an arbitral tribunal sitting in Switzerland may apply EU law in a commercial dispute before it. It is for the arbitral tribunal, which bears responsibility for the arbitral process and its outcome, to decide how it interprets and applies (EU) law. The same holds true for the classification of EU law as law as opposed to fact (see 6.2.3 below).[30]

As a result, this single example of commercial arbitration outside the territory of Member States reveals the fact that no CJEU's monopoly over interpretation and application of EU law has ever existed.[31] There are also numerous other examples of judicial or quasi-judicial bodies applying EU law, as the European Court of Human Rights ("ECtHR").[32]

The reason behind this lack of monopoly over interpretation and application of EU law is not that one could not imagine that CJEU and Member States' courts were only bodies allowed to interpret and apply EU law. Yet, this is not possible in all situations as a matter of the limits of the EU judiciary

28 Ibid., para. 43, 46, and 49.

29 Art. 102 TFEU; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, pp. 1–19.

30 This has to do with the principle of *jura novit curia*. A fresh look at the principle in the international law has recently been put forward by TANZI, A. M. On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings. *Leiden Journal of International Law,* 2020, Vol. 33, no. 1, pp. 60–62, et passim.

31 See CARDUCCI, G. A State's Capacity and the EU's Competence to Conclude a Treaty, Invalidate, Terminate – and "Preclude" in Achmea – a Treaty or BIT of Member States, a State's Consent to be Bound by a Treaty or to Arbitration, under the Law of Treaties and EU Law, and the CJEU's Decisions on EUSFTA and Achmea. Their Roles and Interactions in Treaty and Investment Arbitration. *ICSID Review,* 2018, Vol. 33, no. 2, p. 599.

32 For an overview see COUNCIL OF EUROPE. Case-law concerning the European Union. *European Court of Human Rights* [online]. [cit. 24. 7. 2021]. Available at: https://www.echr.coe.int/documents/fs_european_union_eng.pdf

power.[33] Hence, in a Spinozian understanding of law: a big fish can eat a small fish, because, and only if, it can do so.[34]

In summary, there is no monopoly of the EU judiciary over interpretation and application of EU law. As a consequence, the EU judiciary has no monopoly to decide whether the Member State has misapplied EU law and what are the legal consequences ensuing thereof.

5 Does Enforcement of an EU Right as an Investment Claim Make a Sense?

The investor may pursue its EU law right both in national courts and investment arbitration, as this does not constitute a situation of *lis pendens* in the eyes of international law.[35]

All the same, it may be no bed of roses for an investor to go both ways. First of all, the investment treaty may contain a fork-in-the-road clause, which would preclude the investor from suing the state in the second forum.[36] In addition, the investor would not be able to request double compensation, as either the investment tribunal or domestic court may refuse to order the state to pay the compensation of damages the latter has already paid to the investor in other proceedings.[37]

33 It does not seem that the Swiss award would be annulled or refused recognition due to a mere fact that arbitrators applied EU competition law, in particular if the arbitrators applied EU law in conformity with the CJEU's case law in competition law matters.

34 SPINOZA, B. *Tractatus Theologico-Politicus/Traité Théologico-Politique*. Paris: Presses Universitaires de France, 1999, p. 504: *"Ex. gr. pisces a natura determinati sunt ad natandum, magni ad minores comedendum, adeoque pisces summo naturali jure aqua potiuntur et magni minores comedunt. Nam certum est naturam absolute consideratam jus summum habere ad omnia, quae potest, hoc est, jus naturae eo usque se extendere, quo usque ejus potentia se extendit."* The present author is aware of the fact that the above interpretation of the Spinoza's concept of law is a "popular" one, which might not withstand the scrutiny of the connoisseurs of his work. However, it is also this author's view that Spinoza pays attention to the fact that the real power to enforce rights is an important consideration. See BALIBAR, É. *Spinoza et la politique. Réimpression de la 3e Edition*. Paris: Presses Universitaires de France, 2005, pp. 72–78.

35 NOVÝ, Z. Lis Pendens Between International Investment Tribunals and National Courts. In: ŠTURMA, P. (ed.). *Czech Yearbook of Public & Private International Law. Vol 8*. Prague: Czech Society for International Law, 2017, pp. 539–544.

36 McLACHLAN, C. *Lis Pendens in International Litigation. Pocketbooks of the Hague Academy of International Law*. Leiden/Boston: Martinus Nijhoff, 2009, pp. 66, 262–268.

37 CRAWFORD, J. *State Responsibility. The General Part*. Cambridge: Cambridge University Press, 2014, pp. 673–674.

Is it then more convenient for the investor to commence proceedings before Member States courts seeking damages caused by the breach of EU law by the latter, or to dress up the claim stemming from EU law in the attire of an investment claim?

It is submitted that investment arbitration offers a more efficient protection of investor rights derived from EU law than through the EU judiciary for three reasons.

Firstly, investment arbitration offers the mechanism of enforcement of the EU investor rights, in which they stand on equal footing with states.[38] This mechanism has no equivalent in EU law.[39] Secondly, investment law guarantees broad substantive protections, *inter alia*, against indirect expropriation, or FET. Comparable protections cannot be found in the EU law.[40] Thirdly, international investment awards may be enforced either on the basis of the New York Convention or International Centre for Settlement of Investment Disputes ("ICSID") Convention worldwide.[41]

Moreover, the enforcement of investor rights through EU law has a number of disadvantages.

For instance, it is national courts of the delinquent Member State who will decide whether the conditions for state liability for breach of EU law are met.[42] An investor's claim for damages for breach of EU law before national courts presupposes that the justice served by domestic courts respects the requirements of the rule of law and is of sound quality, which is far from granted.

38 SADOWSKI, W. The Rule of Law and the Roll of the Dice. The Uncertain Future of Investor-State Arbitration in the EU. In: BOGDANDY, A. von, p. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI and M. SCHMIDT (eds.). *Defending Checks and Balances in EU Member States.* Berlin: Springer, 2021, p. 354.

39 NAGY, C. I. Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back". *German Law Journal,* 2018, Vol. 19, no. 4, p. 994.

40 SADOWSKI, W. The Rule of Law and the Roll of the Dice. The Uncertain Future of Investor-State Arbitration in the EU. In: BOGDANDY, A. von, p. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI and M. SCHMIDT (eds.). *Defending Checks and Balances in EU Member States.* Berlin: Springer, 2021, p. 355.

41 It remains to be seen whether the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters will be an efficient and practical instrument.

42 Judgment of the CJEU of 29 July 2019, *Hochtief Solutions AG Magyarországi Fióktelepe vs. Fővárosi Törvényszék*, Case C-620/17, para. 66 (1).

Thus, in *Tempel vs. the Czech Republic*, the ECtHR described the judicial ping-pong among Czech criminal courts as follows: *"the particular succession of events in the present case strongly indicates a dysfunction in the operation of the judiciary, vitiating the overall fairness of the proceedings."*[43]

Connected therewith, EU law does not offer any remedy against malfunctioning of Member States courts.[44]

In addition, while the legal basis for the enforcement of EU liability is a domestic statute, it may be nigh on impossible for the investor to invoke the liability for certain misapplications of EU law by the Member State. This is the reason responsibility of the state under international law does not depend on whether it is liable under its national law.[45]

In summary, it does not seem reasonable to leave the protection of investors solely in the hands of Member States' courts.

6 Integrating (Mis)application of EU Law Into the Matrix of International Investment Law

The applicable law in international investment law has two main components:

- The law applicable to procedure;
- The law applicable to the substance of the dispute.[46]

It is not uncommon that host states' non-investment obligations find their place in the decision-making of investment tribunals.[47] This holds true, in particular, for international human rights norms.[48]

EU law may enter the sphere of investment treaties in two ways.

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43 Judgment of the ECtHR of 25 June 2020, *Tempel vs. Czech Republic*, Application No. 44151/12, para. 71.

44 SATTOROVA, M. Investor Rights under EU Law and International Investment Law. *The Journal of World Investment & Trade,* 2016, Vol. 17, no. 6, p. 900; GAMBARDELLA, M. and D. ROVETTA. Intra-EU BITs and EU Law: What to Learn from the Micula Battle. *Global Trade and Customs Journal,* 2015, Vol. 10, no. 6, p. 197.

45 Art. 3 and 12 DARSIWA.

46 ALTER, C. and S. LEUNG WING CHEUNG. Post-Achmea Investment Treaty Arbitration: A departure from the EU-centric approach. In: MEULEMEESTER, D. de, M. BERLINGIN and B. KOHL (eds.). *LIBER AMICORUM 50 years of solutions – 50 ans de solutions – 50 jaar oplossingen Cepani 1969–2019*. Mechelen: Wolters Kluwer, 2019, p. 337.

47 BRABANDERE, E. de. *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*. Cambridge: Cambridge University Press, 2014, p. 129.

48 Ibid., pp. 134–135.

Firstly, the customary rule reflected in Art. 31 para. 3 letter c) of the VCLT requires to take into account in the interpretation of the investment treaty *"relevant rules of international law applicable in the relation between the parties"*.[49] However, the EU law will be "relevant" for interpretation of the investment treaty, as EU law is binding between Member States. Thus, EU law must be deemed a specific (treaty) regime of international law for the purposes of systemic interpretation, for there is no meta-legal norm allowing a cross-fertilisation between international and EU legal orders (see 6.2.2 below).[50]

Secondly, EU legal rules may become part of applicable law to the substance of the dispute. This latter case will lie at the heart of our interest in the following analysis.

6.1 Do Investment Tribunals Have Jurisdiction Over Claims Based on Misapplication of the EU Law?

The host state's consent expressed in the investment treaty's dispute resolution clause is an indispensable condition for the investment tribunal's jurisdiction to resolve the dispute concerning violations of one or more investment standards laid down in the investment treaty. The tribunal bases its jurisdiction on the twofold basis consisting of host state's offer to arbitrate and its acceptance by the investor by commencing the investment arbitration.[51]

The investment tribunal's jurisdiction under an investment treaty and violation of standards of investment protection are relatively independent issues. In other words, not all breaches of investment standards may be heard by the investment tribunal.[52]

A broad wording of a dispute resolution clause, as *"any dispute which may arise between an investor of one Contracting Party and the Other Contracting Party*

49 Art. 31 para. 3 letter c) VCLT.

50 This is expressed, e.g., in the Decision on the Achmea Issue of the ICSID of 31 August 2018, *Vattenfall AB; 2. Vattenfall GmBH; 3. Vattenfall Europe Nuclear Energy GmBH; 4. Kernkraftwerk Krümmel GmBH & Co. OHG; 5. Kernkraftwerk Brunsbüttel GmBH & Co. OHG Claimants and Federal Republic of Germany Respondent*, Case Arb/12/12, para. 165.

51 NOVÝ, Z. and B. WARWAS. The Recent Developments in Arbitration and the European Regulatory Space. In: ALMEIDA, L. de, M. CANTERO GAMITO, M. DJUROVIC and K. P. PURNHAGEN (eds.). *The Transformation of Economic Law. Essays in Honour of Hans-W. Micklitz*. Oxford: Hart Publishing, 2019, p. 253.

52 Breaches of some standards may be reserved to inter-state investment arbitration. See, e.g., *e contrario* Art. 8 para. 1, in conjunction with Art. 9 of the Czech-UK BIT.

in connection with an investment",[53] could allow the tribunal to hear the whole spectrum of claims based not only on the investment treaty in issue, but also international customary rules, other international treaties, or a contract with the host state (as to the latter see 6.2.5 below).[54]

Thus, the existence of the investment tribunals' jurisdiction for a self-standing claim stemming from EU law is not wholly unimaginable. However, the essential, and far from self-evident, condition must be fulfilled, that EU law is considered to form part of international law (see the discussion in 6.2.2 below). As a consequence, the claim will no longer be considered as an EU law claim, but one stemming from international law.

Alternatively, EU law may be considered a mere fact, which may form part of a broader factual matrix underlying a breach of standard of investment protection or be part and parcel of domestic law, to the extent the latter is applicable under the treaty (see below).

Moreover, it seems that the investor would have to prove, in order to establish the tribunal's jurisdiction over a claim stemming from EU law, that the claim is in relation to the investment.

Nonetheless, the host state may argue that its offer to arbitrate contained in the dispute resolution clause does not include breaches of EU law. After all, the state might not have been member of the EU at the time when the parties concluded the treaty.

In resolving this matter, the choice between static and evolutionary interpretation of dispute resolution clauses will be of utmost importance for finding whether a misapplication of EU law falls within the tribunal's jurisdiction or not.[55]

53 See, for instance, the dispute resolution clause in Art. 9 para. 1 Agreement concerning the promotion and reciprocal protection of investment with exchange of notes (Signed at Copenhagen on 30 March 1992 between Denmark and Lithuania).

54 DEMIRKOL, B. Non-treaty Claims in Investment Treaty Arbitration. *Leiden Journal of International Law*, 2018, Vol. 31, no. 1, pp. 90–91; PARLETT, K. Claims under Customary International Law in ICSID Arbitration. *ICSID Review – Foreign Investment Law Journal,* 2016, Vol. 31, no. 2, pp. 444–453.

55 The static interpretation reflecting the principles of "contemporaneity" seems to have prevailed in investment law thus far. Yet, there are also signs of evolutionary approach to interpretation of investment treaties. See TRIANTAFILOU, E. E. Contemporaneity and Its Limits in Treaty Interpretation. In: CARON, D. D., S. W. SCHILL, A. COHEN SMUTNY and E. E. TRIANTAFILOU (eds.). *Practising Virtue Inside International Arbitration.* Oxford: Oxford University Press, 2015, pp. 474–482.

Misapplication of EU law may be subsumed under standards of investment protection, even though the host state was not member of the EU at the time of the conclusion of the investment treaty. Such a presumption may be upheld on the basis of evolutionary interpretation. It is difficult to argue that the investment treaty parties intended to freeze its provisions in time, without taking into consideration the changes that have arisen in domestic laws of the parties as well as international law during decades since the moment the treaty came into force.[56] As a result, the tribunals possess jurisdiction over EU law issues being subsumed under the standards of investment protection at the time of the resolution of the dispute.

In addition, the question arises as to whether the Member State against which the investor has invoked its EU right coloured as an investment claim may successfully raise the argument that the infringement procedure under Art. 258 of the TFEU is the exclusive means of legal redress against the breaches of EU law by the Member State.

As evidenced, *inter alia*, by the Micula case, the Member State may face both investment arbitration and the infringement procedure before the CJEU.[57] The member state thus remains bound by both obligations flowing from investment and EU law. Thus, the Member State may not successfully invoke its own infringement of EU law as a justification for violation of standards of treatment under investment treaties.

At the end of the day, the safest way to involve EU law for the purposes of jurisdiction is to subsume the latter under a standard of the treaty, for the breaches of which the tribunal has had the express legal basis in the dispute resolution clause.[58]

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56 Judgment of the ICJ of 13 July 2009, *Case Costa Rica vs. Nicaragua (Dispute regarding Navigational and Related Rights)*, para. 66–67.

57 Award of the ICSID of 11 December 2013, *Ioan Micula, Viorel Micula, SC European Food S.A., S. C. Starmill S.R.L. and Multipack S. R. L. vs. Romania*, Case ARB/05/20; STRUCKMANN, K., G. FORWOOD and A. KADRI. Investor-State Arbitrations and EU State Aid Rules: Conflict or Co-existence. *European State Aid Law Quarterly,* 2016, Vol. 15, no. 2, p. 263.

58 Some dispute resolution clauses thus refer to other provisions of the treaty containing the particular standard of treatment. See, e.g., Art. 8 para. 1 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investment with Protocol. *UNCTAD* [online]. Prague, 10 July 1990, with an Amending Exchange of Notes. Prague 23 August 1991 [cit. 24. 7. 2021]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1243/czech-republic---united-kingdom-bit-1990-

6.2 Applicable Law to the Substance of Dispute in Investment Arbitration

Applicable law to the substance of the investment disputes combines sources of international law, first of all the investment treaty, with domestic law.[59] International customary law remains important as a source of applicable law, namely for (quite a number of) questions not regulated by the investment treaty in issue.[60]

The rules of applicable law may be expressly laid down by the state parties in the investment treaty or the treaty may foresee that the parties' have chosen the applicable law and provides applicable rules in case that parties have not used this option.[61] Also, as will be examined below, if the state and investor choose the law applicable to their contract, that law, including EU law where applicable, will have an important consequences for their investment dispute under an umbrella clause (see below 6.2.5).

Alternatively, the treaty may be silent on an applicable law. EU law has not usually been mentioned in investment treaties among the sources of applicable law. As a result, it seems that EU law must qualify either as international or domestic law of the Member State to be applied to the substance of the dispute. Let us have a look at the status of EU law under investment treaties in the following.

6.2.1 EU Law Applicable to the Substance of Disputes in International Investment Law

The treatment of EU law as the law applicable to the substance of the dispute is a different question to that whether the tribunal has jurisdiction to find international responsibility for breaches of EU law.

In the eyes of international law, EU law may be applied as a specific regime of international law or a part of domestic law of the Member State.[62]

59 SCHREUER, C. Investment Arbitration. In: ROMANO, C. P. R., K. J. ALTER and Y. SHANY (eds.). *The Oxford Handbook of International Adjudication.* Oxford: Oxford University Press, 2013, p. 368.

60 Ibid., p. 369.

61 Art. 42 ICSID Convention.

62 FANOU, M. Intra-European Union Investor-State Arbitration post-Achmea: RIP? An assessment in the aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of 6 March 2018, EU:C:2018:158. *Maastricht Journal of European and Comparative Law,* 2019, Vol. 26, no. 2, pp. 324–325.

Moreover, if the parties choose the law of the Member State as applicable to the merits of their dispute, e.g., by virtue of Art. 42 of the ICSID Convention, then EU law should apply as its integral part, unless its application is expressly excluded by the parties.

As a result, EU law is law, if it is a sub-system of international law or if the investment treaty expressly commands that domestic of law of the Member State must be applied. It is rare in practice that investment treaties would refer expressly to EU law. Thus, if the applicable law under the investment treaty includes domestic law, then it must be treated as law by virtue of the parties' will so expressed. In other cases, EU law will be treated as a mere fact (see 6.2.3 below).

6.2.2 EU Law as International Law

Investment tribunals must apply the investment treaty itself and other rules contained in the sources of international law, as enumerated in the Art. 38 para. 1 of the Statute of the International Court of Justice.[63] On the other hand, a legal basis for their application of EU law is less clear.

Nonetheless, the misapplication of EU law may be subsumed under an investment standard (see 7 below).

It seems that some investment tribunals consider EU law as a sub-system of international law, and thereby the EU law receives the treatment as law. Accordingly, in *Electrabel*, the tribunal found that: *"EU law has a multiple nature: on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member States, it becomes also part of these national legal orders* … [reference omitted]."[64]

The tribunal in *Electrabel* has finally inclined more to the concept of EU law as international law. It has recalled the idea that EU law is based on international treaties.[65] Yet, according the tribunal not only primary law, but also secondary EU legislative acts are of international legal origin *(sic)*.[66]

63 UNITED NATIONS. Handbook on the Peaceful Settlement of Disputes between States. *United Nations* [online]. P. 62 [cit. 24. 7. 2021]. Available at: https://www.un.org/law/books/HandbookOnPSD.pdf

64 Award of the ICSID of 25 November 2015, *Electrabel S. A. vs. Hungary*, Case ARB/07/19, para. 4.118.

65 Ibid., para 4.120.

66 Ibid., para 4.122.

Nonetheless, should one stick to the classification of EU law as international law, it seems that regulations, directives and decisions as binding sources of the secondary legislation would be considered the acts of EU as an international organisation.[67] This conclusion is fraught with difficulties, given the common acceptance that EU is a supra-national organisation.

Furthermore, the tribunal has declared that EU law is a regime of international law and only once incorporated into domestic law becomes part of it. Following this approach, it may seem, EU law is international law, hence law, unless having been introduced into domestic law, thereby becoming a mere fact.[68]

The fact that EU law becomes incorporated into national law, however, does not deprive EU law of its international law character.[69] The *Electrabel* tribunal puts it clearly thus: *"there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law."*[70]

In summary, EU law may be viewed as a specific regime of international law for the purposes of international investment law. The conception of EU law as domestic law will be examined in the following.

6.2.3 Domestic Law Under General International Law

General international law recognizes only international and domestic law: *tertium non datur*. It thus does not specifically address the status of EU law. Besides the approach adopted by the tribunal in *Electrabel,* EU law may be considered to be domestic law.

Consequently, general international law has perceived domestic law as fact (see also 9 below).[71] This has three important consequences. First, domestic

67 See MALENOVSKÝ, J. *Mezinárodní právo veřejné – obecná část – a poměr k jiným právním systémům*. Brno: Masaryk University, 2020, p. 171.

68 Award of the ICSID of 25 November 2015, *Electrabel S. A. vs. Hungary*, Case ARB/07/19, para. 4.127–4.128.

69 Ibid., para. 4.124.

70 Ibid., para. 4.126.

71 HEPBURN, J. *Domestic Law in International Investment Arbitration*. Oxford: Oxford University Press, 2017, p. 104.

law is not applicable, since only "law" seems capable of being "applied". Second, states do not usually bear international responsibility for a mere breach of domestic law. Third, Art. 3 of Draft Articles of State Responsibility stipulates that: *"the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."*[72] Thus, the state's compliance with its domestic law, including EU law, may not exonerate it from responsibility under general international law.

6.2.4 Domestic Law Under Investment Treaties

International investment law is a *lex specialis* to general international law.[73] This means*, inter alia*, that the specific regime of investment law may treat domestic law differently to general international law.[74]

Investment treaties may contain general and specific references both to domestic law of the investor's state and the host state (viz. Member State). The general reference denotes the express listing of the domestic law among the sources of applicable law in the investment treaty, whereas the specific reference means, for instance, that the investment must be made *"in accordance with domestic law"*.[75]

If there is such general reference to domestic law, then the treaty masters' will that domestic law be treated as law must be respected.[76]

On the other hand, if a reference to domestic law as applicable lacks in the investment treaty, the rules of general international law apply, including the treatment of domestic law as fact. The latter approach to domestic law

72 Art. 3 DARSIWA.

73 See the discussion in SIMMA, B. and D. PULKOWSKI. Chapter 5. International Investment Agreements and the General Body of Rules of Public International Law. 1. Two Worlds, but Not Appart: International Investment Law and General International Law. In: BUNGENBERG, M., J. GRIEBEL, S. HOBE and A. REINISCH (eds.). *International Investment Law.* Baden-Baden: Nomos, 2015, pp. 362–367; see also McLACHLAN, C., L. SHORE and M. WEINIGER. *International Investment Arbitration: Substantive Principles.* Oxford: Oxford University Press, 2017, pp. 17–22.

74 As to the secondary rules of responsibility see Art. 55 DARSIWA.

75 See, e.g., Czech-UK BIT.

76 With reference to Art. 42 ICSID Convention see GAILLARD, E. L'avis 1117 rendu le 30 avril 2019 par la Cour de justice de l'Union européenne revêt une importance capitale pour le droit des investissements. *Journal du Droit International*, 2019, no. 3, p. 852.

is based on the assumption that the parties' intention behind this silence must be interpreted as implying that domestic law ought to be treated in the same manner as under general international law. Accordingly, the tribunal in *AES Summit vs. Hungary* stated that *"the Respondent's acts/measures are to be assessed under the ECT and the applicable law but that the EC law is to be considered and taken into account as a relevant fact"*.[77]

6.2.5 Umbrella and "Other Rules" Clauses

EU law may become part of the applicable rules in international investment arbitration through umbrella clauses. These clauses bring contractual disputes between the investor and the host state under the protective umbrella of the investment treaty.[78] Thus, if the host state does not honour its (mostly contractual) commitments towards a foreign investor, international responsibility for the breach of an umbrella clause may arise.[79] When the contract between the investor and the Member State is governed by the law of the latter, EU law may come into play, to the extent it regulates the contractual relationship between the host state and investor or has a direct impact thereupon.[80]

Misapplication of EU law seems to be relevant also under "provisions on application of other rules" contained in investment treaties.[81] These clauses maintain application of other rules of domestic or international law, which may be more favourable to investors than the investment treaty provisions.[82] Arguably, EU law might be more favourable than the treaty provisions, namely

77 Award of the ICSID of 23 September 2010, *AES Summit Generation Limited AES-Tisza Erömű KFT vs. Republic of Hungary*, Case ARB/07/22, para. 7.6.12.

78 E.g., Art. 10 para. 1 Energy Charter Treaty ("ECT"); Art. 2 para. 3 Czech-UK BIT.

79 See REINISCH, A. and C. SCHREUER. *International Protection of Investments. The Substantive Standards.* Cambridge: Cambridge University Press, 2020, p. 859.

80 One can imagine that not only rules that directly regulate contracts, but also, e.g., EU rules on public procurement, for instance, may come into play here.

81 See the complex treatment of these clauses in CISÁR, I. Provision on Application of Other Rules in Bilateral Investment Treaties. In: DRLIČKOVÁ, K. and T. KYSELOVSKÁ (eds.). *COFOLA INTERNATIONAL 2016. Resolution of International Disputes Public Law in the Context of Immigration Crisis.* Brno: Masaryk University, 2016, pp. 196–210.

82 See, e.g., Art. 8 Agreement between the Czech Republic and the Kingdom of Saudi Arabia for Encouragement and Reciprocal Protection of Investments. *Ministerstvo financí České republiky* [online]. [cit. 24. 7. 2021]. Available at: https://www.mfcr.cz/cs/legislativa/dohody-o-podpore-a-ochrane-investic/prehled-dohod-o-podpore-a-ochrane-invest

if the former provide a specific obligation of the Member State *qua* host state, which may not be inferred easily from the text of the treaty or which has come into existence after the conclusion of the investment treaty.[83]

However, there are some caveats related to this type of clause. First, it cannot compensate for the tribunal's lack of jurisdiction to decide on a misapplication of EU law (see 6.1 above). Second, investment tribunals might be cautious not to anchor investment claims in other sources of law than the investment treaty (and standards of protection contained therein). Third, it remains unclear whether these clauses only maintain application of more favourable rules to the investor or whether they provide also more favourable regime of the host state's responsibility.

6.2.6 Should EU Law Be Treated in the Same Manner as Domestic Law?

It is not self-evident that EU law should be treated in the same way as domestic law. However, the Member State's legal order contains EU norms and domestic norms *stricto sensu*. If domestic law is perceived as one system, no difference appears between the two kinds of norms within it, in terms of their interpretation and application. As a result, investment tribunals should not treat them differently.

The international legal conception of domestic and EU law forming one legal system, i.e., a monistic approach, presents both advantages and disadvantages for the treatment of EU law.[84] The advantage is that the norms originating in EU law will never be treated worse than the norms of domestic law *stricto sensu*. The disadvantage is that EU law will never gain an upper hand over it, as the primacy of EU law would normally command (external perspective), unless the domestic law itself so requires (internal perspective).[85]

As a result, it is submitted that EU law may be treated in the same manner as domestic law for the purposes of application under investment treaties.

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83 See Art. 11 Czech-UK BIT.

84 On the concept of monism with relation to domestic and EU law see GRAGL, P. *Legal Monism: Law, Philosophy, and Politics*. Oxford: Oxford University Press, 2018, pp. 251–290.

85 See, e.g., 1A and 7A European Union (Withdrawal Agreement) Act 2020. *legislation.gov.uk* [online]. [cit. 24. 7. 2021]. Available at: https://www.legislation.gov.uk/ukpga/2020/1/contents

7 Does Misapplication of EU Law as Domestic Law Give Rise to International Responsibility of the Member State for Violation of an Investment Treaty?

A legal obligation to be "international" must stem from a formal source of international law, typically international treaty or custom.[86] International customary law does not seem to contain an express duty to observe EU law. Nor does it lay down an overarching duty for states to observe their own law, and thus EU law as part of it. It thus remains for an international treaty to set forth such duty. It is the Treaty on European Union which lays down such duty of Member States.[87]

However, as has been alluded to in the previous text, the proper legal basis of the international responsibility of the Member State would be the investment treaty binding on the Member State. Nonetheless, the host states' obligations are embodied by standards of treatment in investment treaties, which are formulated in general fashion and to a considerable extent vaguely. As a result, it remains for investment tribunals to provide interpretation of these standards, including whether a misapplication of an EU law duty may give rise to their breach.

Moreover, it is questionable whether the mere fact that domestic law is listed among applicable sources in the investment treaty, implies that the state bears international responsibility under the treaty for breach of domestic, and hence EU law.

In addition, not all misapplications of domestic or EU law will amount to violation of standards of investment protection.

First of all, a number of Member States entered into intra-EU BITs before their accession to the EU. It is, therefore, hard to see how a reference to the host state's law in such treaties could include EU law. In other words, EU law as a part of domestic law could not have been considered by the parties when concluding the investment treaty in, for instance, 1990.[88]

86 Art. 38 para. 1 letter a) and b) Statute of the International Court of Justice.
87 Art. 4 para. 3 Consolidated Version of the Treaty on European Union.
88 See the analysis in BURGSTALLER, M. European Law and Investment Treaties. *Journal of International Arbitrtion,* 2009, Vol. 26, no. 2, p. 195.

It would require an evolutionary interpretation of the concept "the law of the contracting party" under the investment treaty, to allow application of EU law by the virtue of the former. It is imaginable that the express formulation "the law of the contracting party" is amenable to evolutionary interpretation as per the criteria defined by the International Court of Justice ("ICJ").[89]

Yet, what if the treaty does not refer to domestic law? Ought static interpretation to be used? While static interpretation would equal to a stabilization clause for the investors, which would need to be contained in a contract between the investor and the host state.[90] The investment treaty, in and of itself, does not suffice to freeze the content of the term "domestic law" for ever.[91]

Furthermore, it would seem difficult to sustain the argument that the breach of EU law is, without more, equally or even more serious than violation of a domestic statute. Some misapplications of EU law will be of sufficient gravity to amount to the violation of an investment treaty, some will not. Thus, the outcome of such cases will be fact-sensitive.

In the light of the above considerations, it seems sensible to use as a starting point the analysis by *Jarrod Hepburn*, who aptly systemised the relationship between domestic law and standards of investment protection, namely fair and equitable treatment ("FET") and the prohibition of arbitrary measures, as follows:

- Domestic legality may contribute to compliance with investment standards;
- Domestic illegality may contribute to breach of investment standards;
- Domestic legality is irrelevant;
- Domestic legality is a contributory factor to breach of investment standards;
- Domestic legality as a proxy for breach of investment standards.[92]

89 Judgment of the ICJ of 13 July 2009, *Costa Rica vs. Nicaragua (Dispute regarding Navigational and Related Rights)*, para. 66–67.

90 See GEHNE, K. and R. BRILLO. Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment. *Martin-Luther-Universität Halle-Wittenberg* [online]. Pp. 6–8 [cit. 24. 7. 2021]. Available at: https://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20143.pdf

91 For the concept of stabilisation clauses see ibid., p. 6.

92 However, the author focuses predominantly on FET and arbitrary conduct of the state, excluding impliedly expropriation. HEPBURN, J. *Domestic Law in International Investment Arbitration*. Oxford: Oxford University Press, 2017, pp. 13–40.

Based on this classification, the misapplication of EU law will not be completely irrelevant to violations of investment standards, provided that EU law is relevant to the case before the arbitral tribunal (see the discussion above). Compliance with EU law may, albeit does not necessarily have to, contribute to compliance with standards of investment protection. Along similar lines, non-compliance with EU law, in particular an arbitrary refusal to apply it, could contribute to the breach of investment standards under the investment treaty.[93] If the breach of EU law is of a technical nature, it could turn out to be irrelevant for the resolution of the investment case.

7.1 Violation of Standards of Investment Protection and EU Law

Whether as a specific regime of international law or part of domestic law, EU law plays an important role in international investment law. However, what about the role of EU law in finding of violation of standards of investment protection?

In the vast majority of cases, the host state is internationally responsible for a distinct violation of one or more standards of investment protection laid down, typically, in an investment treaty. Depending on the treaty, the standards include: FET, full protection and security ("FPS"); prohibition of expropriation or measures with equivalent effect; prohibition of arbitrary and/or discriminatory measures; national and most-favoured-nation treatment.[94]

EU law may be highly relevant to the substance of the dispute in international arbitration.[95] As a result, (mis)application of the EU law may be decisive for the outcome of the dispute. The examples of EU law's areas having had an intersection with substantive investment protection is banking or competition law to name but few.[96]

93 See ibid., p. 34.

94 See generally REINISCH, A. and C. SCHREUER. *International Protection of Investments. The Substantive Standards.* Cambridge: Cambridge University Press, 2020, 1056 p.

95 See PAPP, K. von. *EU Law and International Arbitration.* Oxford: Hart, 2021, p. 95.

96 ACHTOUK-SPIVAK, L. Banking and Financial investment arbitration: past, present and future post *Achmea* and Opinion 1/17. In: MERSCH, Y., L. ACHTOUK-SPIVAK, G. AFFAKI, C. CONTARTESE and R. V. PUIG (eds.). *The new challenges raised by investment arbitration for the EU legal order. European Central Bank Legal Working Paper Series* [online]. 2019, no. 19, p. 35 [cit. 24. 7. 2021]. Available at: https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp19~e4d0a59cea.en.pdf

In the context of investment arbitration, a misapplication of EU law may lead to the violation of one or more of the standards.

For instance, imagine a foreign-owned company ("FOC") incorporated in one of the Member States, which agreed to buy products exclusively from another, local, company, the sole distributor of the products on the market in the Member State. The FOC becomes very successful, hence a strong competitor to the local company. The latter therefore seeks to destroy the business of FOC by refusal to supply it its products on various pretexts. This would be found as a breach of right to supply under EU based on the abuse of dominance pursuant to Art. 102 of the TFEU.[97] The competition authority of the Member State refuses to do anything about the breach of EU law though.[98]

The above situation would qualify as a violation of FET standard, as it is not fair, if the Member State turns a blind eye to destroying of the FOC's business. In addition, the omission of the competition authority may amount to a discriminatory treatment by the Member State, being contrary to FET, and depending on the circumstances, also arbitrary and/or discriminatory conduct, as well as breach of the national treatment standard. The competition authority's omission to undertake steps to prevent the continuation of the anticompetitive conduct may violate the standard of FPS, because the Member State cannot sustain the argument that it protected the FOC's investment by doing virtually nothing.

Furthermore, consider another scenario. A parent company ("PC"), having its seat in France, owns a subsidiary company ("SC") incorporated in the Czech Republic ("CR"). The PC's moveable asset of a considerable value is situated in the premises of the SC in CR.

A Czech court declares SC bankrupt. The bankruptcy trustee appointed by the court thereafter seizes the moveable asset, and includes it into the SC's bankruptcy estate. With the permission of the Czech court, the trustee sells the moveable asset in a public auction to satisfy the SC's local creditors.

97 Consolidated Version of the TFEU.

98 See Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

It is submitted that an erroneous assumption[99] of bankruptcy jurisdiction over the debtor's assets, who does not have the centre of main interests under the EU Insolvency Regulation in the state of the bankruptcy court, might arguably violate standards of FET under the Czech-French BIT.[100]

Moreover, if the PC is irreversibly deprived of the asset in a public auction, the wrongful assumption of jurisdiction may be considered not only as a breach of FET, but also as an initial step in the incremental process of creeping expropriation.[101] As Judge *Fitzmaurice* remarked in his Separate Opinion to the Barcelona Traction case, this may amount to *"a disguised expropriation of the undertaking"*.[102]

In summary, the Member State, which does not comply with its obligations owed to the investor under EU law, may violate a number of the standard of investment protection.

8 Summary of Situations Where Misapplication of EU Law May Give Rise to International Responsibility Under International Treaty

If the investment treaty expressly refers to the domestic legal order of the Member State as one of the sources of applicable law, then

99 Insolvency seems to be a highly specialized area of EU law, which requires specialized courts and judges. See Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Preamble 86; it has been also remarked that an uneven situation regarding the availability of specialized insolvency courts and judges exists in the EU. See WOLF, A. and H. MARJOSOLA. The Evolution of European Insolvency Law from Regulatory Competition to Harmonization. In: ALMEIDA, L. de, M. CANTERO GAMITO, M. DJUROVIC and K. P. PURNHAGEN (eds.). *The Transformation of Economic Law. Essays in Honour of Hans-W. Micklitz*. Oxford: Hart, 2019, pp. 203–204.

100 Art. 3 Accord entre la Republique Federative Tcheque et Slovaque et la Republic Francaise sur l'encouragement et la protection reciproques des investissements.

101 See also the discussion in Decision on Jurisdiction and Liability of the ICSID of 24 August 2015, *Dan Cake (Portugal) S. A. vs. Hungary (Respondent)*, Case ARB/12/9, para. 158–160 (with the result that no violation of the investment treaty has been committed by selling the investor's assets in public auction).

102 Separate Opinion of Judge Fitzmaurice (to the Barcelona Traction Case). *International Court of Justice* [online]. Para. 71 [cit. 24. 7. 2021]. Available at: https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-04-EN.pdf

the responsibility for misapplication of EU law as part of the domestic law may arise.

If EU law is part of the host state law applicable to a contract between an investor and the host state under a choice-of-law clause contained therein or, in the absence of the latter, by virtue of rules of private international law, then EU law may become an indirect source of responsibility for the state through an umbrella clause, provided that the latter is contained in the investment treaty.

If EU law is a sub-system of international law, then state responsibility for breach of an norm laid down in EU law may arise. For instance, the breach of the right to establishment under EU law gives rise to the violation of an investment standard.

EU law is treated as fact, when the parties are silent on the application of domestic law. Hence, the misapplication of EU law, as such, cannot give rise to the violation of the investment treaty. Yet, it may nevertheless become part and parcel of a violation of one or more investment standards.

9 The CETA

The foregoing analysis has demonstrated that misapplication of EU law may amount to the breach of a standard of investment protection. In the following, a critical look will be had at how CJEU treats EU law in interpreting the CETA Agreement, as well as whether Member State may incur international responsibility for misapplications of EU law under CETA.

The CETA has been one of the most closely observed treaties concluded by the EU recently.[103] It is intended to be binding on the EU and its Member States.

The CETA has come under fire due to the allegedly lacking legitimacy of the new system of investment courts, which should replace (said

103 Comprehensive Economic and Trade Agreement. *European Commission* [online]. [cit. 24. 7. 2021]. Available at: https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

to be already problematic) arbitral tribunals under BITs between Member States and Canada.[104]

As the procedural mechanism in CETA is international courts, not arbitral tribunals, it might seem that a point of comparison between the two is lacking.[105] However, it is submitted that the content of applicable (substantive) law under intra-EU investment treaties and CETA may be reasonably compared.[106]

The CETA's Chapter 8, dedicated to investment protection establishes tribunals for the resolution of investment disputes, including procedural matters necessary to their functioning. It also sets forth the standards of investment protection. The breadth of these standards is limited by a list of qualifications and exceptions (see 9.2 below).

9.1 Opinion 1/17

Belgium contested the compatibility of CETA with the EU law, and therefore asked the CJEU to give its opinion thereupon under Art. 218 para. 11 TFEU.[107]

In its extensive Opinion 1/17, CJEU found, *inter alia*, that *"the CETA does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of that agreement"*.[108]

If this statement is put into the context of the entire Opinion 1/17, the conclusion seems quite clear: EU law as applicable law is out of play.[109]

104 BUNGENBERG, M. and A. REINISCH. *European Yearbook of International Economic Law. Special Issue: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement.* Berlin: Springer, 2020, pp. 17–18, et passim.

105 But see REINISCH, A. Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration. *Journal of International Economic Law,* 2016, Vol. 19, no. 4, pp. 766–767.

106 Actually, whether intra-EU arbitration and the CETA differ to each other concerning applicable law is one of the most important questions in the recent discussion on the reform of investment arbitration. However, the full analysis of the issue is beyond the scope of this article.

107 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 46–69.

108 Ibid., para. 136.

109 Ibid., para. 122.

CJEU supported this view by the argument concerning the envisaged Patent Court. Thus, the Patent Court would have to apply EU law frequently, whereas no such need would exist in the decision-making of CETA tribunals.[110]

Similarly, CJEU stated in *Achmea* that the *"tribunal* […] *would be called upon to give rulings on disputes that might concern the interpretation or application of EU law"*.[111] Thus, the same "problem" arose with the arbitral tribunal in *Achmea* as with the Patent Court. *Per argumentum e contrario*, CETA tribunals cannot encounter the issue of interpretation and application of EU law in the future application of CETA.

Subsequently, CJEU elucidated that the principle of mutual trust, lying at the heart of the EU judicial system, does not apply to international agreements between the EU and a non-Member State.[112] Thus, no mutual trust equals no application of EU law.

CJEU also stated with no ambiguity that: *"The fact that there is no jurisdiction to interpret the rules of EU law other than the provisions of the CETA is also reflected in Article 8.21 of that agreement, which confers not on the CETA Tribunal, but on the Union, the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the Union, whether the dispute is, in the light of the rules on the division of powers between the Union and its Member States, to be brought against that Member State or against the Union …"*[113]

According to the CJEU, there is no room for EU law in the tribunals' decision-making. Accordingly, no claim arising from misapplication of EU law would be successful. In the following, however, the analysis will show that the issue is more complex than this.

9.2 Applicable Law Under CETA

The pertinent provision for our analysis is Art. 8.31, which reads as follows:

> *"1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention*

110 Ibid., para. 131.
111 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 56.
112 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 128–129.
113 Ibid., para. 132.

> *on the Law of Treaties, and other rules and principles of international law applicable between the Parties.*
>
> *2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."* [114]

CJEU has found in its Opinion 1/17 that the above provision: *"serve[s] no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal."* [115]

As a result, EU law as a part of domestic law may be treated by CETA tribunals at best a fact. Consequently, a misapplication of EU law being "breach of a fact" may not give rise to international responsibility for breach of the CETA.

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114 The first part of this CETA provision seems to be informed by Art. 26 para. 6 ECT. The second part then appears to have found inspiration in Decision of the *ad hoc* committee of the ICSID of 5 June 2007, Case ARB/02/7, on the application for annulment of Mr. Soufraki, para. 96.

115 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 131.

9.3 Critical Assessment of the Role of Domestic and EU Law Under CETA

In examining of Art. 8.31, the regard must be had not only to the interpretation provided by CJEU in its Opinion 1/17, but also to its (con)text.

The textual analysis shows that the tribunals ought to apply, first of all, the CETA, and then other sources of international law to fill the lacunae that may be left by the former. EU law is not expressly mentioned. So far the CETA follows the common solution found in international investment treaties (see above).

Contrary to the Opinion 1/17, it is submitted that the text of the Art. 8.31 offers no justification why the EU law could not form part of the domestic law. Had the CETA parties intended domestic law without EU legal rules, such important legal consequence would have been stipulated expressly.

However, Art. 8.31 is perhaps the first provision in an international treaty explicitly stating that domestic law is fact. CETA thereby endorses the standard approach of general international law (see also above), which resembles the well-known dictum in the Upper Silesia case: *"The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."*[116]

National courts or authorities are not bound by the CETA tribunals' decisions domestically. Interestingly, though, what if the interpretation of domestic law conflicts between executive and judicial branch of the state?

Moreover, it remains unclear "how prevailing" the interpretation should be and, last but not least, what the tribunal should do, if such "prevailing" interpretation does not exist.[117] Also, it may well be that the Member State's courts adopt a prevailing interpretation in accordance with

116 Judgment of the PCIJ of 25 May 1926, Case concerning certain German interests in Polish Upper Silesia (The Merits), p. 19; LEONELLI, G. C. CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test. *Legal Issues of Economic Integration,* 2020, Vol. 47, no. 1, p. 47.

117 KÁPOSZNYÁK, A. Reinterpretation of the Requirements to Preserve the Autonomy of the EU Legal Order in Opinion 1/17. *ELTE Law Journal,* 2019, no. 2, p. 98; GATTI, M. Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold? *European Papers,* 2019, Vol. 4, no. 1, p. 118.

an EU directive, which has not been duly implemented into their domestic law.[118] If this is the case, then the CETA tribunal cannot ignore such prevailing interpretation, including EU law rules underpinning it.

Along similar lines, no provision of domestic law may give an answer to the contested question before the CETA tribunal, but for an EU law provision being a part of domestic law, e.g., a concept contained in an EU directive. In such a scenario, the CETA tribunals will find themselves between Scylla and Charybdis. On the one hand, the tribunals will not be able to refuse deciding the issue submitted to it, for it would amount to denial of justice. On the other hand, as the CETA tribunals will not be entitled to ask the CJEU for preliminary ruling, there would be a lack of uniformity of interpretation of EU law and difficult foretelling of the CETA tribunals' decisions.[119]

Moreover, the concept of EU law as belonging to both domestic and international (treaty) law envisaged in *Achmea* does not seem to be overcome, as a matter of principle, even after the Opinion 1/17.[120] Not least because Opinion 1/17 is no more (and no less) binding on the CETA tribunals than the judgment in *Achmea*, which expressly states the nature of EU law *qua* law (see above).

It seems that EU law may not be considered as international law under CETA. Canada is not bound by EU law, which is thus not applicable "between the parties".[121] Nonetheless, it would be difficult to preclude the CETA tribunals from treating EU law as international law, in accordance with *Achmea* and *Electrabel*, and contrary to Opinion 1/17.[122]

Moreover, nothing deprives the Canadian investor from the possibility to invoke EU law against the Member State or EU before the CETA

118 Member States are obliged to interpret their domestic law in accordance with EU law. See SCHÜTZE, R. *An Introduction to European Law.* Cambridge: Cambridge University Press, 2012, pp. 128–132.

119 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 134.

120 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slowakische Republik (Slovak Republic) vs. Achmea BV*, Case C-284/16, para. 41.

121 But see PAPP, K. von. *EU Law and International Arbitration*. Oxford: Hart, 2021, pp. 81–82.

122 STOPPIONI, E. The Interactions between EU Law and International Investment Law. The Five Acts of Kabuki Play. *Hitotsubashi Journal of Law and Politics,* 2020, Vol. 48, p. 50.

tribunal. It would amount to an unjustified discrimination and non-reciprocal treatment, if Canada was internationally responsible for the breaches of Canadian law, hence standards of investment protection thereunder, towards EU investors, whereas Member States would not be responsible for breaches of EU law towards Canadian ones.[123]

In addition, if the CETA tribunal considers an EU law rule to be a factual finding, such a finding could not be overturned outside the system of tribunals under the CETA. Thus, it seems that Member States courts will not have the possibility to review the tribunal's factual finding concerning EU law, in case that the investor asks for recognition and enforcement of a CETA decision.[124] This is a clear disadvantage of treating EU law as a fact.

Also, Opinion 1/17 casts doubt on whether a claim "unfounded as a matter of law" pursuant to Art. 8.33 of the CETA includes also unfoundedness as a matter of EU law. Following the mechanical logic employed in Opinion 1/17, one would incline to conclude that the respondent, i.e., the Member State or the EU, cannot raise an objection based on the EU law against the Canadian investor's claim "as a matter of law" before CETA tribunals.

Finally, if the tribunal finds that the application of EU law is necessary to decide the case, then it cannot resign on its application. CETA tribunals will bear responsibility for the process, including interpretation and application of (EU) law. It is thus fully in their competence to decide whether they may apply EU law or not, reflecting the principle of *jura novit curia* and the need for avoidance of *non-liquet*.[125]

In summary, the problem with CJEU's approach to domestic/EU law seems to lie in that it is unconvincing that domestic law, hence EU law, should be treated as fact to the extent as the fact that was raining yesterday. A number

123 Opinion 1/17 of the CJEU (Full Court) of 30 April 2019, para. 117 ("reciprocal nature of international agreements").

124 It is common knowledge that courts cannot review arbitral awards with regard to the fact-finding by the tribunal. See, e.g., BLACKABY, N., C. PARTASIDES, A. REDFERN and A. HUNTER. *Redfern and Hunter on International Arbitration. Student version.* Oxford: Oxford University Press, 2015, p. 591.

125 As to the prohibition of *non-liquet*; Art. 42 para. 2 Convention on the Settlement of Investment Disputes between States and Nationals of other States; TANZI, A. M. On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings. *Leiden Journal of International Law,* 2020, Vol. 33, no. 1, p. 62.

of authors see this approach to EU law as a fact as more of a fiction than reality.[126] As a result, EU law would be treated in the very same way as "law". As a result, it is not excluded that misapplication of EU law may lead to international responsibility of the Member State under CETA.

9.4 Misapplication of EU Law and Substantive Standards in the CETA

CETA contains traditional standards of investment protection, in particular FET; FPS; prohibition of expropriation without compensation; national treatment; and most-favoured-nation treatment. Thus, in principle, misapplication of EU may fall within the scope of these standards (see the discussion above).

However, the novelty is the considerable qualifications of these standard and a high threshold for their breach.[127] Thus, for instance, the broad standard of FET is confined to specific categories of breaches, like the denial of justice. Along similar lines, arbitrariness must be "manifest" to amount to violation of the standard.[128]

One of the key limitations of the claims based on EU law is also the CETA's express endorsement of the Member State's right to regulate, without providing for compensation to investors.[129]

It would be thus difficult to successfully claim, for instance, that the Member State indirectly expropriated the investment by a mere transposition of an EU directive, as it may argue that the transposition constitutes a regulation in public interest. Although, it seems that international responsibility under CETA may arise with regard to the so-called gold plating,

126 GALLO, D. and F. G. NICOLA. The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication. *Fordham International Law Journal,* 2016, Vol. 39, no. 5, p. 1126; FLAVIER, H. L'avis 1/17 sur le CETA: de l'autonomie à l'hermétisme. *Journal d'Actualité des Droits Européens* [online]. 6. 9. 2019 [cit. 24. 7. 2021]. Available at: https://revue-jade.eu/article/view/2573 ("la distinction du fait et de droit est artificielle").

127 See, e.g., REINISCH, A. The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court. In: MESTRAL, A. de (ed.). *Second Thoughts: Investor-State Arbitration between Developed Democracies.* Waterloo (CA): Centre for International Governance Innovation, 2017, pp. 342–346.

128 See only 8.10 CETA.

129 Art 8.9 CETA, and specifically with regard to expropriation Annex 8-A3 CETA.

whereby the state exceeds the requirements of EU law in its implementation, without that being demanded by the EU legislative act in issue.[130]

In addition, breach of domestic law does not automatically amount to violation of standards under CETA (see also above).[131] Thus, if EU law is considered as domestic law for the purposes of CETA, then its misapplication does not trigger, in and of itself, international responsibility of the state for a breach of CETA.

However, regulation cannot be equated with misapplication. Therefore, it remains possible that the Member State will be liable for the breach of substantive standards under CETA by various forms of misapplication of EU law.

10 Findings

This paper has shown that EU law may not only be applied, but also the investor rights stemming from it may be enforced in international investment arbitration. Given that the EU judiciary has little to offer to investors, investment arbitration provides a better avenue for enforcement of EU rights.

It would be a false dichotomy, if EU law were reserved to the EU judiciary and investment law to arbitral tribunals. The very fact that investment tribunals assess whether the Member State complied with its EU law obligations does not seem to be something reprehensible.

Moreover, it has been demonstrated that EU law may have the status of a sub-system of international law or domestic law in investment disputes on the one hand or a mere fact on the other hand. Consequently, the most convincing interpretation seems to be that only a misapplication of EU law *qua* law may give rise to international responsibility for a violation of standards of investment protection under investment treaties.

Accordingly, the tribunal's approach in *Electrabel* perceiving EU law as a special regime of international law seems to be meaningful. However, two conditions must be met.

130 4th MEETING of the High Level Expert Group on Monitoring Simplification for Bene-ficiaries of ESI Funds: Gold-plating. *European Commission* [online]. [cit. 24. 7. 2021]. Available at: https://ec.europa.eu/futurium/en/system/files/ged/hlg_16_0008_00_conclusions_and_recomendations_on_goldplating_final.pdf

131 Art. 8.10.7 CETA.

First, the tribunal must have jurisdiction to decide over misapplications of EU law as a specific regime of international law. Thus, an investment tribunal may assume its jurisdiction to assess a misapplication of EU law, given that the wording of the dispute resolution clause in the investment treaty is broad enough to include misapplications of EU law related to the investment or refers to standards of investment protection, under which the misapplication of EU law may be subsumed. From the perspective of procedure, thus, an investment dispute may relate to a misapplication of EU law.

Second, there must be a legal basis for application of EU law in the investment treaty. Arbitrators would have to classify EU law, in all probability, as a specific treaty regime under international law. Albeit, it remains unclear how EU secondary legislative acts may be seen as belonging to a treaty law.[132] It seems possible that these rules may be put on equal footing with acts of international organization, which would nonetheless require that EU be deemed an international organization.

Furthermore, it has remained unclear whether a mere misapplication of EU law as part of domestic law, to which the investment treaty explicitly refers, might not lead to international responsibility of the state. While, as *Upper Silesia* has shown, breach of domestic law may give rise to international responsibility, as a matter of principle. However, in an analogy with domestic law, it seems that misapplication of EU law will not be tantamount to a violation of standards of investment protection in all situations. Thus, the aspect of subjective judgment as to whether a misapplication of EU law is fundamental or of a "technical" nature will play certain role in such assessment.

At any rate, misapplication of EU law may hardly be seen as a defence against state responsibility under investment treaties.

In addition, it is difficult to imagine that international responsibility arises when EU law is perceived as a fact, although the distinction between "law" and "fact" is debatable.

132 However, some recognized authors admit the use of the VCLT interpretation rules, intended for international treaties, for Security Council Resolutions. Thus, it seems conceivable that the rules applicable to the founding treaty may be applied also to the acts derived thereof, See WOOD, M. The Interpretation of Security Council Resolutions. *Max Planck Yearbook of United Nations Law* [online]. 1998, Vol. 2, pp. 88–95 [cit. 24. 7. 2021]. Available at: https://www.mpil.de/files/pdf2/mpunyb_wood_2.pdf

Opinion 1/17 has turned out to be problematic, for it excludes *a priori* that the tribunals established under CETA may interpret and apply EU law. Making of a watertight distinction between "fact" and "law" on the one hand and "appreciation" and "interpretation and application" of domestic law on the other hand seems to be highly artificial, in terms of a description of the decision-makers' intellectual process. Additionally, if a CETA investor or the Member State invoke EU law in an actual investment case, the principles of *jura novit curia* and avoidance of *non-liquet* would prevent the tribunal from turning a blind eye to the EU legal rules.

Thus, it has been submitted that international responsibility for misapplication of EU law under CETA is not totally excluded. Opinion 1/17 has done more harm than good by stating that CETA tribunals would not be able to request preliminary ruling by the CJEU for two reasons. First, tribunals may decide to treat EU law as a factual finding, thereby liming the possibility to overturn such finding by national courts in the stage of annulment or recognition and enforcement of the award, since this would amount to a *révision au fond*.[133] Second, CETA tribunals may want to render a decision based on a proper analysis of both law and facts. The fulfilment of this judicial role my require submitting of a request for preliminary ruling to the CJEU. It would be then interesting to see whether the CJEU would dismiss such request, notwithstanding the critical importance of its answer for the resolution of the dispute before the CETA tribunal.

At the end of the day, while Opinion 1/17 may be criticised for a somehow forced attempt to make a rigid distinction between "law" and "fact", *Achmea* is the real elephant in the room. On the one hand, the CJEU says that EU law may be applied in investment arbitration. On the other hand, it ousts investment arbitrators from the possibility to apply EU law. This tension between the substantive and procedural dimension of EU law established by the CJEU in *Achmea* is indeed one of the causes for exacerbating the unnecessary conflict between EU law and international investment protection.

133 The interference of EU law with final arbitral awards seems to be on the increase. See PENADES FONS, M. The Effectiveness of EU Law and Private Arbitration. *Common Market Law Review,* 2020, Vol. 57, no. 4, pp. 1105–1106.

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