BRILL | NIJHOFF

THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 23 (2024) 73–82

brill.com/lape

Symposium: Re-thinking the Role of Domestic Law in International Adjudication

Introduction

Stephan W. Schill | ORCID: 0000-0002-1458-0814
Faculty of Law, University of Amsterdam, Amsterdam, The Netherlands
Corresponding Author
s.w.b.schill@uva.nl

Michail Risvas | ORCID: 0009-0002-1588-7591
Law School, University of Southampton, Southampton, United Kingdom
m.risvas@soton.ac.uk

It is widely recognized that international law today is marked by judicialization.[1] Resulting from both the proliferation of international courts and tribunals and their increasing caseload, judicialization puts international adjudication at the center of the international legal system.[2] Great emphasis in this context has been put on how international courts and tribunals engage with – that

1 See e.g. Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014); Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (2014); Yuval Shany, *Assessing the Effectiveness of International Courts* (2014); Benedict Kingsbury, "International Courts: Uneven Judicialization in Global Order", in J. Crawford and M. Koskenniemi (eds.), *Cambridge Companion to International Law* (2012), 203; Andreas Follesdal and Geir Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (2018).

2 Viewing courts as the center of a legal system follows the legal theory of Niklas Luhmann, *Law as a Social System* (2004), at 297–337. For a different approach, albeit developed prior to the judicialization of international law, which puts States' argumentative practices at the center, see Martti Koskenniemi, *From Apology to Utopia* (2nd edition, 2006). For an approach emphasizing the centrality of sources, see Jean d'Aspremont and Samantha Besson, "The

Published with license by Koninklijke Brill BV | DOI:10.1163/15718034-BJA10111

is, interpret, apply and further develop – international law, both general and specific, such as human rights, foreign investment, or international trade law. Scholars have analysed this engagement from various theoretical and methodological angles. One conclusion they share is that international courts and tribunals do more than passively find and apply international law; they actively make and shape it.[3] Similar conclusions are reached in the scholarship dealing with how domestic courts engage with international law. Here, as well, domestic courts are analysed as not only passively finding and applying international law, but as contributing to its making, concretization, and further development.[4] Courts, in other words, whether international or domestic, are not Montesquieuian *bouches de la loi* who approach international law as if it had an independent ontological existence that one merely observes; instead, they appreciate international law in its normativity and realize that they play an active role in shaping its content.

By contrast, what is largely neglected is that international courts and tribunals regularly also engage with domestic law. Especially in international investment arbitration, tribunals are frequently confronted with domestic law in different contexts: from analysing claims for breach of investor-State contracts that are governed by domestic law, and assessing host State conduct under domestic investment legislations, to scrutinizing compliance of domestic law with the host State's investment treaty commitments.[5] In fact, the Convention on the Settlement of Investment Disputes between States and Nationals of

---

Sources of International Law: An Introduction", in J. d'Aspremont and S. Besson (eds.), *The Oxford Handbook of the Sources of International Law* (2017), 1.

3 See Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014). See also the contributions in Armin von Bogdandy and Ingo Venzke (eds.), *International Judicial Lawmaking* (2012).

4 See generally the contributions to the symposium issue on "Domestic Courts as Agents of Development of International Law", in 26 *Leiden Journal of International Law* (2013), 531–665; Andrea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", 60 *International & Comparative Law Quarterly* (2011), 57; André Nollkaemper, *National Courts and the International Rule of Law* (2011).

5 For an overview, see Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013); Andrea K. Bjorklund and Lukas Vanhonnaeker, "Applicable Law in International Investment Arbitration", in S. Kröll, A.K. Bjorklund and F. Ferrari (eds.), *Cambridge Compendium of International Commercial and Investment Arbitration*, Vol. 1 (2023), 512. For in-depth analyses of the role of domestic law in investment arbitration, see further Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International and Municipal Law* (2nd edition, 2017); Hege E. Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (2013); Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (2017).

Other States (ICSID Convention) provides that, in the absence of the parties' agreement regarding the applicable law, the law of the respondent State (complemented by international law) applies by default.[6] But also in other contexts, international courts and tribunals regularly apply domestic law. This can relate to the main claim that a State has breached its international obligations through, or based on, domestic legal action, an issue found in most cases across all international dispute settlement fora, or concern incidental questions, such as the determination of nationality or legal personality.[7]

International legal scholarship has hardly addressed the role domestic law plays in international adjudication in depth. The only notable exceptions are inquiries that consider how international courts and tribunals have recourse to domestic law as part of comparative legal reasoning or in the distillation of general principles of law.[8] The disinterest in domestic law beyond those contexts is striking. We suspect that it finds its rationale in public international law's long-time preoccupation with its autonomy *vis-à-vis* other (domestic) legal orders and its struggle about justifying that international law is really "law".[9] Domestic law, in that context, was relegated by international courts and

6 See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966), 575 *United Nations Treaty Series* (1968), 159, Art. 42(1).

7 For examples from the jurisprudence of the International Court of Justice, see *Nottebohm Case* (*Liechtenstein v. Guatemala*) (*second phase*), *I.C.J. Reports 1955*, p. 4, at 20 (concerning the determination of nationality); *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) (*second phase*), *I.C.J. Reports 1970*, p. 3, paras. 37–43; *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (*Preliminary Objections*), *I.C.J. Reports 2007*, p. 582, para. 61; *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*) (*Preliminary Objections*), *I.C.J. Reports 2019*, p. 7, paras. 87–88 (all concerning the determination of the existence of corporate legal personality).

8 For a few notable exceptions, see Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (2019); Daniel Costelloe, "The Role of Domestic Law in the Identification of General Principles of Law under Article 38(1)(c) of the Statute of the International Court of Justice", in M. Andenas et al. (eds.), *General Principles and the Coherence of International Law* (2019), 177–194.

9 For an extensive discussion, see Richard Collins, *The Institutional Problem in Modern International Law* (2016); David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (2020), at 8–128; Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2nd edition, 2020), Chapters 1–6. For individual voices in the debate, see e.g. Hersch Lauterpacht, *The Function of Law in the International Community* (2011, 1st edition 1933), at 407–446; James L. Brierly, *The Basis of Obligation in International Law and Other Papers* (1958), at 1–67; H.L.A. Hart, *The Concept of Law* (2nd edition, 1994), at 213–237; Anthony D'Amato, "The Neo-Positivist Concept of International Law", 59 *American Journal of International Law* (1965), 321–324; Anthony D'Amato, *International Law: Process and Prospect* (1987), at 1–26; Thomas M. Franck, "Legitimacy in the International

tribunals themselves to the realm of facts. In *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice (PCIJ) formulated this *locus classicus* as follows:

> [f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[10]

The conception of domestic law as facts not only had repercussions on how international courts and tribunals were to address issues of domestic law, namely by relying on and deferring to the State's interpretation of its own law, rather than themselves taking independent cognizance of domestic law.[11] This conception also was only a step away from denying, from the standpoint of international law, domestic law's normativity and nature as law. Against this background, it is unsurprising that domestic law did not catch the interest of international legal theory or doctrine, except in limited circumstances. Analysing how international courts and tribunals approach domestic law was a topic that was part of the law of fact-finding and no different from how international adjudication would deal with any other real-world fact.[12]

System", 82 *American Journal of International Law* (1988), 705–759; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (2005); Ronald Dworkin, "A New Philosophy for International Law", 41 *Philosophy and Public Affairs* (2013), 2.

10 *Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*) (*Merits*), *P.C.I.J. Series A, No. 7* (1926), at 19.

11 See *Serbian Loans* (*France v. Serbia*), *P.C.I.J. Series A, No. 20* (1929), at 46–47 (suggesting that the Court, in principle, should not undertake its own construction of municipal law as long as the highest national tribunals have done so); *Brazilian Loans* (*France v. Brazil*), *P.C.I.J. Series A, No. 21* (1929), at 124 (stating that municipal law should be applied by the Court as it would be in the country in question). Cf. also *The Panevezys-Saldutiskis Railway Case* (*Estonia v. Lithuania*), *P.C.I.J. Series A/B, No. 76* (1939), at 19–21 (concerning the issue of whether domestic law provided for means of redress and whether domestic remedies were indeed satisfied).

12 Rüdiger Wolfrum and Mirka Möldner, "International Courts and Tribunals, Evidence", in A. Peters and R. Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (2013), para. 22 (citing *Brazilian Loans* (n 11), at 124, where the Court stated: "Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken.").

The PCIJ's approach in *Certain German Interests* is still the point of departure for the view that international law doctrine has on the relevance of domestic law in international adjudication.[13] At the same time, with the increasing importance domestic law plays in international adjudication, and the more general unravelling of a strict dualist approach to the relationship between international and national law, the PCIJ's orthodox approach becomes increasingly unsatisfactory.[14] International adjudicators themselves realize that treating domestic law as fact fails to appreciate the normativity of domestic law, brushes over important differences between domestic law and other real-life facts, and does not do justice to how international courts and tribunals take cognizance of domestic law. The WTO Appellate Body, for example, explained:

> [a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law.[15]

Even the International Court of Justice (ICJ) started taking a slightly more open approach towards interpreting domestic law itself, rather than blindly relying on the interpretation put forward by the State itself. In *Diallo*, the ICJ, even though it continued grounding its approach in that of the PCIJ, explained:

> The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts. … Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining

13 See e.g. Malcolm N. Shaw, *International Law* (9th edition, 2021), 117–118.

14 See e.g. Peter Tomka, Jessica Howley and Vincent-Joël Proulx, "International and Municipal Law before the World Court: One or Two Legal Orders?", 35 *Polish Yearbook of International Law* (2015), 11, at 26 (showing that "domestic law and municipal court decisions cannot be excised altogether from international adjudication. On the contrary, they can play a role in appropriate cases – sometimes instrumental – in shedding light on a legal avenue available to the Court, and thus become an important tool in its decision-making."). Similarly, James Crawford, *Brownlie's Principles of Public International Law* (9th edition, 2019), at 49 (noting that "the general proposition that international tribunals take account of national laws only as facts 'is, at most … debatable'").

15 Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697, para. 200.

> an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.[16]

All of this calls for a re-assessment of the orthodox approach to viewing domestic law as fact. What is the value, if any, of viewing domestic law as fact? Does this approach still adequately capture the role played by domestic law in international adjudication? Or does it ignore important functions that domestic law plays as law in international courts and tribunals? These questions motivate the contributions to this *Symposium* and support the call to re-think the role of domestic law in international adjudication.

The first act of re-thinking is done by Saïda El Boudouhi in her article entitled "Taking the Fact/Law Distinction Not Too Seriously: The Status of Domestic Law within International Litigation".[17] In it, the author argues that the designation and treatment of domestic law as fact in international adjudication following the PCIJ's statement in *Certain German Interests* has led to misunderstandings. Treating domestic law as fact, El Boudouhi argues, neither denies the nature of domestic law as law, nor does it ignore that domestic law is subject to assessment and interpretation by the adjudicator, just as international law itself is. In terms of cognitive engagement, El Boudouhi explains, there is no real difference between how international adjudicators approach domestic law as compared to international law; the real difference is functional. On the one hand, from the perspective of international legal reasoning, "in most cases, domestic law is, by its logical status within the legal syllogism, a fact which the international adjudicator will have to characterize in order to determine whether it fits within a given legal category of international law."[18] On the other hand, international law itself attaches certain procedural consequences to the distinction between law and fact, for example in respect of circumscribing the scope of review exercised by some adjudicatory bodies. According to the Dispute Settlement Understanding, for example, review by the WTO Appellate Body is "limited to issues of law covered in the panel report

16 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (*Merits*), *I.C.J. Reports 2010*, p. 639, para. 70 (relying on *Serbian Loans* (n 11) and *Brazilian Loans* (n 11) for the proposition that in principle that Court cannot substitute its own interpretation of domestic law for that of a State's highest court).

17 Saïda El Boudouhi, "Taking the Fact/Law Distinction Not Too Seriously: the Status of Domestic Law within International Litigation", 23 *The Law and Practice of International Courts and Tribunals* (2024), 83.

18 *Ibid.*, pp. 88–89.

and legal interpretations developed by the panel."[19] This would exclude review on pure points of domestic law, as domestic law itself is not qualified as law in the sense of the underlying provision. Treating domestic law as fact, rather than law, El Boudouhi concludes, therefore concerns a functional difference between international and domestic law, not a categorical one: Domestic law may be fact for purposes of international legal reasoning, or some other issue of international adjudicatory procedure, but it remains law, both from a cognitive and a normative perspective.

In the second contribution to this *Symposium*, Jonathan Brosseau reviews, in an article entitled "The Jurisdiction of Investment Tribunals to Adjudicate Claims and Incidental Questions Grounded in Domestic Law", the different gateways through which domestic law can come under the jurisdiction of investment tribunals, as an example of international courts and tribunals more generally.[20] Rejecting, like El Boudouhi, the traditional understanding of domestic law as fact, Brosseau shows how, and in which circumstances, domestic law is interpreted and applied in investment arbitration. This encompasses situations in which domestic law is the basis for claims or counterclaims brought in investment arbitration proceedings, either because the jurisdictional clause or the applicable-law clause so provide. The same, Brosseau shows, applies in relation to incidental questions that are governed by domestic law. Investment tribunals have inherent jurisdiction over these questions of domestic law, even if the main claim is governed by international law and the tribunal's jurisdiction limited to entertain such claims, whenever the resolution of the domestic law question is necessary and ancillary to the main claim. In both cases, domestic law cannot be treated as fact, but is interpreted and applied as law in an international adjudicatory process. Certainly, Brosseau's analysis is anchored in international investment law, but the insights he develops on the various gateways international law provides for international courts and tribunals to exercise jurisdiction over matters that are governed by domestic law is equally relevant for the practice of other international courts and tribunals.

In the last contribution to this *Symposium*, Juan-Pablo Pérez-León-Acevedo examines "The International Criminal Court (ICC)'s Procedural Practice and

19 See Understanding on Rules and Procedures Governing the Settlement of Dispute (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 *United Nations Treaty Series* (1998), 401, Art. 17.6 (DSU).

20 Jonathan Brosseau, "The Jurisdiction of Investment Tribunals to Adjudicate Claims and Incidental Questions Grounded in Domestic Law", 23 *The Law and Practice of International Courts and Tribunals* (2024), 104.

Domestic Legal Sources: Focus on General Principles of Law Derived from National Laws (GPLDNL)".[21] His analysis zooms in on the functions domestic law fulfils in international adjudication, more specifically how the ICC makes use of domestic procedural law under the ICC Statute. Its Article 21(1)(c) provides that, on a subsidiary basis, the ICC shall apply "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."[22] In distilling general principles under this provision, Pérez-León-Acevedo argues, domestic law fulfils several important functions for international adjudication: i) filling gaps in the applicable law (*praeter legem*); ii) aiding the interpretation of the applicable law (*secundum legem*); and iii) correcting the applicable law (*contra legem*). With gap-filling and serving as an interpretative aid being the most prominent functions, Pérez-León-Acevedo argues, a sophisticated understanding of the ICC's practice under Article 21(1)(c) of the ICC Statute is incompatible with reducing domestic law to mere facts. On the contrary, domestic law, as exemplified in the ICC's practice, clearly functions as law and is treated as such by the Court. At the same time, Pérez-León-Acevedo also notes that, in taking cognizance of domestic law, the ICC is unlikely to interpret and apply domestic law in an identical manner to that of a domestic court. Instead, issues of bias and decontextualization in the operation of international adjudication, its specific legal culture, and differences in the expertise and socialization of international judges will impact how international courts and tribunals interpret and apply domestic law and what normative content they give it. This, as well, is a lesson that holds true not only for the ICC, but international adjudication more broadly.

All three articles, of course, focus on specific international courts and tribunals, and address different aspects of the role domestic law plays within the respective jurisdictions; but they also share important insights. They agree that the traditional approach to viewing domestic law as fact, as laid down in *Certain German Interests*, is hardly a tenable position today, and certainly not when it is understood as diminishing the nature of domestic law as law or suggesting that

21 Juan-Pablo Pérez-León-Acevedo, "The International Criminal Court (ICC)'s Procedural Practice and Domestic Legal Sources: Focus on General Principles of Law Derived from National Laws (GPLDNL)", 23 *The Law and Practice of International Courts and Tribunals* (2024), 138.

22 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 *United Nations Treaty Series* (2004), 3, Art. 21(1)(c).

the process by which international courts and tribunals engage with domestic law is categorically different from how those courts and tribunals interpret and apply international law. On the contrary, all three articles provide examples of the fact that international courts and tribunals today routinely apply domestic law as law and interpret it accordingly. Furthermore, the contributions to this *Symposium* illustrate the multiplicity of gateways through which domestic law comes under the jurisdiction of international courts and tribunals, including jurisdictional clauses, applicable-law clauses, or the inherent jurisdiction of international courts and tribunals over incidental questions. At the same time, all three articles agree that it is international law that determines how and to which extent domestic law becomes relevant in international adjudication. This notwithstanding, international courts and tribunals approach domestic law in its normativity and recognize that it has various normative functions for the operation of international adjudication, notably in filling gaps and in aiding the interpretation of international law. Finally, all contributions suggest that international courts and tribunals have an impact on how domestic law's normative content is understood in international adjudication due to the differences in the sociology and legal cultures of, as well as the procedures and legal doctrines applicable in, international courts and tribunals.

The contributions to this *Symposium* cannot be but a start for a broader process of re-thinking the role of domestic law from an international law perspective. For example, future analyses could consider to which extent the increasing importance of domestic law in international adjudication does not require a broader re-thinking of how the relationship between domestic and international law is represented, and whether the traditional theories of monism and dualism still adequately capture that relationship. Future research could also consider the extent to which the interpretation and application of domestic law by international courts and tribunals has impacts on domestic law itself, and whether there are situations in which the content of domestic law is shaped not only by domestic, but also by international courts and tribunals, for example when the latter are faced with cases of first impression that find no precedent in domestic courts. Finally, future research could look into the methods and approaches in international adjudication that are adequate to ensuring that international courts and tribunals stay true to domestic law and its normativity and reduce problems of bias and decontextualization in the interpretation and application of domestic law. All these avenues for future research, and arguably many more, are open once the orthodox approach that relegates the relevance of domestic law in international adjudication to the world of facts is overcome.

Acknowledgements

The contributions to this *Symposium* were first presented at a workshop held on "Engaging with Domestic Law in International Adjudication: Fact-finding or Transnational Law-Making?", which took place on 28 February and 1 March 2019 at the University of Amsterdam. Funding from the European Research Council (ERC Grant Agreement No. 313355), as part of the research project on "Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica" (LexMercPub), in the organization of the workshop and development of the ideas underlying the present *Symposium* is gratefully acknowledged.