DOMESTIC COURTS AND INTERNATIONAL INVESTMENT ARBITRAL TRIBUNALS: NURTURING A PROFITABLE AND SYMBIOTIC RELATIONSHIP

OBIANUJU CHIOMA EZEJIOFOR

SUBMITTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE UNIVERSITY OF LONDON FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAW

CENTRE FOR COMMERCIAL LAW STUDIES, QUEEN MARY AND WESTFIELD COLLEGE, UNIVERSITY OF LONDON

JUNE 2014
DECLARATION

The candidate confirms that the work presented in the thesis is her own and that the thesis is the one upon which she expects to be examined. Appropriate credit has been given where reference is made to the work of others.

Obianuju Ezejiofor
Centre for Commercial Law Studies
Queen Mary, University of London
ABSTRACT

This thesis proposes that conscious and increased co-operation and coordination of the relationship between investment tribunals and domestic courts can greatly improve the efficacy of the international investment arbitration system, and further the rule of law. The extent of the power both forums wield, the level of influence both systems have on each other and the critical roles both systems play in the resolution of investment disputes warrant a systematic approach to cooperation and coordination.

This study finds justification for this proposition by analyzing the policy implications of investment arbitration outcomes. It goes on to explore the relationship between domestic courts and investment tribunals by examining the roles they play and the areas of jurisdictional friction between the two systems. The core issues addressed include the jurisdiction and competence of international investment tribunals and domestic courts in the resolution of investment disputes; the support roles of domestic courts; anti-suit/anti-arbitration injunctions; pre-conditions to arbitration; the effects and implications of the review of investment tribunals’ decisions by domestic courts, and the review of the lawfulness of the conduct of domestic judicial systems by investment arbitration tribunals. In addressing these issues, the work examines the extent to which domestic courts and international arbitration tribunals should accord deference to each other with respect to their involvement in the resolution of investment disputes. Based on the analysis of the areas of intersection between the domestic and international investment dispute settlement systems, instances of ‘positive interactions’ are highlighted and encouraged. The study also proposes ways in which further cooperation and coordination can take place. In making these proposals, and acknowledging the differences that exist, this thesis considers the collaboration between other international adjudicatory bodies and domestic courts so as to distill lessons for the international investment arbitration system.
DEDICATION

Dedicated with love, tears and pride to the towering and inspiring memory of my father,

Prof. Gaius Ezejiofor.
ACKNOWLEDGEMENTS

The journey towards the completion of this thesis has been very challenging. However, a number of people made this journey worth the end result.

First and foremost, I thank the Lord Almighty for His grace.

I am indebted to my supervisor, Prof. Loukas Mistelis, for his support, patience and guidance. My gratitude also goes to Norah Gallagher, for her support in the early phases of this study. My thanks go to arbitration experts, who despite their busy schedules, offered critical comments, useful insights and provided me with useful documents used in this research. I also thank my colleagues at the IMF and World Bank for their encouragement.

My greatest debt is to my family and friends. I acknowledge their love and support throughout the process of writing this thesis. In more ways than they know, they provided the stability and encouragement I needed to complete this study. To my brothers, Chairman (CC), Ejike, and Nnanyelugo, your undying love and support saw me through, I thank you from the bottom of my heart. To my sister, Nneka, you have been a great pillar of strength and support, I can never thank you enough. To my brother-in-law, Ike Oraedu, I am forever grateful to you for opening your doors to me. To the rest of my family, Mama Cee, Uncle Nathan, Chinelo, Chydon, Ebele, I thank you for your prayers and support. Uncle Benson Okeke and Barrister Peter Eze, you have both been unflinching in your support and commitment to me, I thank you. To my reliable friend and colleague, Dr. Nkechi Amobi, I do not know what I would have done without you, thank you for your guidance. My sincere thanks go to my cousin, Nneka Ikelionwu for her steadfastness. To great friends, thank you for cheering me on.

Lastly, I wish to thank my husband and the best little girls in the world. Ike Obasi, thank you for love and patience, and for believing in me even in my lowest moments. Uso and Chisi, your sweet smiles and warm hugs made this journey all worth it, thank you!
Table of Contents

DECLARATION ....................................................................................................................... 2
ABSTRACT ............................................................................................................................... 3
DEDICATION ............................................................................................................................ 4
ACKNOWLEDGEMENTS ......................................................................................................... 5
LIST OF ABBREVIATIONS ..................................................................................................... 9
TABLE OF CASES .................................................................................................................. 17

ARBITRATION RULES- DOMESTIC AND INTERNATIONAL .................................................. 28
INTERNATIONAL CONVENTIONS .......................................................................................... 28

Chapter 1: Introduction ........................................................................................................ 30
  1.2. Objective of Thesis: ....................................................................................................... 32
  1.3. Literature Review: ....................................................................................................... 32
  1.4. Research Questions: .................................................................................................... 35
  1.5. Research Methodology: ............................................................................................. 36
  1.6. Outline Of Chapters: .................................................................................................. 38
  1.7. Limitations Of Study: .................................................................................................. 40

Chapter 2: Rationales For Cooperation and Coordination: Jurisdiction and Competence of
Domestic Courts And Investment Tribunals ........................................................................ 41
  2.1. Background: ................................................................................................................ 41
  2.2. Rationales Justifying Cooperation and Coordination Between Investment Arbitration And
Domestic Judicial Systems: ................................................................................................. 47
    2.2.1. Resolution Of Investment Disputes And The Development Objective: ......................... 47
    2.2.2. Adjudication Of Investment Disputes And The Rule of Law: ........................................ 50
  2.3. The Jurisdiction of Investment Arbitration Tribunals: .................................................. 56
    2.3.1. Jurisdiction and The Notion of Investment: ICSID Convention: .................................... 57
    2.3.2. Jurisdiction and ICSID Convention: Contracting State and National of Another Contracting
State: ..................................................................................................................................... 61
    2.3.3. Jurisdiction and The Notion of Investments: Investment Treaties: ................................. 63
    2.3.4. Arbitral Award as Investment for The Purposes of Jurisdiction: ................................. 64
    2.3.5. Stretching and Limiting the Boundaries of Jurisdiction: ............................................ 66
  2.4. The Competence Of Investment Arbitration Tribunals: ................................................. 67
  2.5. The Jurisdiction and Competence of Domestic Courts: ............................................... 69

Chapter 3: Domestic Courts And Investment Tribunals: Necessary Collaborators Or Festering
Partners .................................................................................................................................... 73
  3.1 Court Involvement In Aid Of Arbitration: ..................................................................... 74
    3.1.2 Interim Measures By Domestic Courts: ...................................................................... 74
    3.1.3 Enforcement Of Awards: ......................................................................................... 76
  3.2 Judicial And Arbitral Interferences: ................................................................................ 78
    3.2.1 Anti-Arbitration Injunctions: ..................................................................................... 79
    3.2.1.2 Domestic Court Support: Refusal to Issue Anti-arbitration Injunction: .................... 79
Chapter 4: Domestic Court Review Of Arbitral Awards

4.1. Review Standards: United States Courts: .................................................................125
4.1.2. BG Group v Argentina: .........................................................................................126
4.1.3. Chevron and Texaco v Ecuador: ........................................................................130
4.2. Review Standards: Canada: ..................................................................................132
4.2.1. The Standard Applied by the Court in Cargill and Other Courts: .........................134
4.3. Effectiveness of Domestic Court Review: ..............................................................135

Table 1: Summary Of Challenges To The Decisions Of Arbitral Tribunals Before Domestic Courts And Their Outcomes. .............................................................................................................................................140

Chapter 5: Arbitral Review of Domestic Judicial Acts

5.2. Standards Under Which States Can Be Held Accountable For Decisions And Actions Of The Judiciary: .........................................................................................................................148
5.2.1. Denial of Justice; .................................................................................................149
5.2.1.2. What is Denial of Justice?: ..............................................................................150
5.2.1.2. Case Law on Denial of Justice: ......................................................................152
5.2.1.3. Denial of Justice Through Legislative Acts: .......................................................... 155
5.2.2. Judicial Expropriation: ................................................................................................. 155
  5.2.2.1. Saipem v Bangladesh: .......................................................................................... 156
  5.2.2.2. GEA Group Aktiegesellschaft and Romak: ......................................................... 158
  5.2.2.3. Reluctance to Categorically Classify Awards as Investments: ....................... 161
5.2.3. Effective Means Standard- Effective means of Asserting Claims: ....................... 161
  5.2.3.1 Chevron and White: ............................................................................................. 162
  5.2.3.2. Violation of Effective Means Standard: Executive Interference: .................... 164
5.2.4. Other Standards: Bosh and Vanessa: .......................................................................... 164
5.3. Standard Of Review And Deference: Theoretical Impacts and Perspectives: ........ 166
  5.3.1. The Notion of Deference and Sovereignty: ............................................................... 166
  5.3.2. Lack of Judicial Restraint v. Too Much Deference: ............................................... 170
  5.3.3. Distilling Standards of Review I: ............................................................................ 172
  5.3.4. Distilling Standards of Review II: International Adjudicative Bodies and Domestic
        Administrative Law Systems: ................................................................................. 174
5.4. Possible Remand Authority? ........................................................................................ 178

Chapter 6: Conclusion........................................................................................................ 181

6.1. General Findings On The Interaction Between Domestic Courts And Investment Tribunals
  ........................................................................................................................................ 182
6.2. Basis For Co-operation: ............................................................................................... 183
6.3. Existing Relationship: .................................................................................................. 184
6.4. Supervisory/Review Powers: ...................................................................................... 186
   6.4.1. Courts: .................................................................................................................. 187
   6.4.2. Tribunals: ............................................................................................................. 188
6.5. Positive Interactions And Positive Cross-Influences: Lessons for Investment Arbitration?:
  ........................................................................................................................................ 191
   6.5.1: Judicial Reform To Aid Effective Channeling of Influences: ......................... 195
6.6. A Vision of A “Global Community of Courts”: ......................................................... 197
6.7. Laudable Advancements: ........................................................................................... 198
6.8. Final Thoughts: ........................................................................................................... 199
6.9. Areas For Future Research: ......................................................................................... 200

BIBLIOGRAPHY: .............................................................................................................. 202
## LIST OF ABBREVIATIONS

### General

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
</tr>
<tr>
<td>AC</td>
<td>Appeal Cases Law Reports (United Kingdom)</td>
</tr>
<tr>
<td>ACHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>AF</td>
<td>Additional Facility Rules</td>
</tr>
<tr>
<td>ALI</td>
<td>American Law Institute</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Countries</td>
</tr>
<tr>
<td>AUSFTA</td>
<td>Australia- United States Free Trade Agreement</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaties</td>
</tr>
<tr>
<td>CERDS</td>
<td>Charter of Economic Rights and Duties of States</td>
</tr>
<tr>
<td>D.C. Cir.</td>
<td>United States District Court for the District of Columbia</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ECT</td>
<td>Energy Charter Treaty</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
</tr>
<tr>
<td>GA</td>
<td>General Assembly</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>IBA</td>
<td>International Bar Association</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCA</td>
<td>International Commercial Arbitration Act (British Columbia)</td>
</tr>
<tr>
<td>ICCA</td>
<td>Yearbook of Commercial Arbitration</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court Of Justice</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Center for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>IISD</td>
<td>International Institute for Sustainable Development</td>
</tr>
<tr>
<td>IIT</td>
<td>International Investment Treaties</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labor Organization</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>ITA</td>
<td>Investment Treaty Arbitration</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
</tr>
<tr>
<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
</tr>
<tr>
<td>MFN</td>
<td>Most Favored Nation Treatment</td>
</tr>
<tr>
<td>MNEs</td>
<td>Multinational Enterprises</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-governmental Organization</td>
</tr>
<tr>
<td>NZLR</td>
<td>New Zealand Law Report</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court Of International Justice</td>
</tr>
<tr>
<td>SC</td>
<td>United States Supreme Court</td>
</tr>
<tr>
<td>SCC</td>
<td>Stockholm Chamber Of Commerce</td>
</tr>
<tr>
<td>SDNY</td>
<td>Southern District of New York</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Trade Related Intellectual Property Rights</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Commission on Trade and Development</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>----------</td>
<td>---------------------------------------------------------------</td>
</tr>
<tr>
<td>UNCTC</td>
<td>United Nations Code of Conduct on Transnational Corporations</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>USFTA</td>
<td>US Free Trade Agreements</td>
</tr>
<tr>
<td>USTR</td>
<td>United States Trade Representative</td>
</tr>
<tr>
<td>VAT</td>
<td>Value Added Tax</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>

**Journals, Reports and Treaty Series**

<table>
<thead>
<tr>
<th>Journal/Report</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>Am. J. Comp. L.</td>
<td>American Journal of Comparative Law</td>
</tr>
<tr>
<td>APP.L.R.</td>
<td>Arbitration Practice and Procedure Law Report</td>
</tr>
<tr>
<td>Arb Int.</td>
<td>Arbitration International</td>
</tr>
<tr>
<td>BCLR</td>
<td>British Columbia Law Reports</td>
</tr>
<tr>
<td>Berkeley J. Int’l L.</td>
<td>Berkeley Journal of International Law</td>
</tr>
<tr>
<td>BLR</td>
<td>Business Law Report</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Title</td>
</tr>
<tr>
<td>--------------</td>
<td>------------</td>
</tr>
<tr>
<td>BYBIL/ BYIL</td>
<td>British Year Book of International Law</td>
</tr>
<tr>
<td>CEPMLP</td>
<td>Centre for Energy, Petroleum and Mineral Law and Policy</td>
</tr>
<tr>
<td>Ch.</td>
<td>Chancery</td>
</tr>
<tr>
<td>CMLR</td>
<td>Common Market Law Report</td>
</tr>
<tr>
<td>Col. L. Rev.</td>
<td>Columbia Law Review</td>
</tr>
<tr>
<td>Colum. J. Transnat'l L.</td>
<td>Columbia Journal of Transnational Law</td>
</tr>
<tr>
<td>Duke L. J.</td>
<td>Duke Law Journal</td>
</tr>
<tr>
<td>ECR</td>
<td>European Court Report</td>
</tr>
<tr>
<td>EJIL</td>
<td>European Journal of International Law</td>
</tr>
<tr>
<td>EPIL</td>
<td>Encyclopedia of Public International Law</td>
</tr>
<tr>
<td>EWHC</td>
<td>High Court of England and Wales</td>
</tr>
<tr>
<td>F. Supp.</td>
<td>Federal Supplement</td>
</tr>
<tr>
<td>FC</td>
<td>Federal Court Reports</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Title</td>
</tr>
<tr>
<td>--------------</td>
<td>------------</td>
</tr>
<tr>
<td>FILJ</td>
<td>Foreign Investment Law Journal</td>
</tr>
<tr>
<td>Fla. St. U. L. Rev.</td>
<td>Florida State University Law Review</td>
</tr>
<tr>
<td>Fordham Int’l L.J.</td>
<td>Fordham International Law Journal</td>
</tr>
<tr>
<td>Fordham L. Rev.</td>
<td>Fordham Law Review</td>
</tr>
<tr>
<td>Geo. Mason L. Rev.</td>
<td>George Mason Law Review</td>
</tr>
<tr>
<td>Harvard ILJ</td>
<td>Harvard International Law Journal</td>
</tr>
<tr>
<td>ICLQ</td>
<td>International &amp; Comparative Law Quarterly</td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>ILR</td>
<td>International Law Reports</td>
</tr>
<tr>
<td>ILSA</td>
<td>International Law Students Association</td>
</tr>
<tr>
<td>Ind. L.J.</td>
<td>Indiana Law Journal</td>
</tr>
<tr>
<td>Int'l Org.</td>
<td>International Organization</td>
</tr>
<tr>
<td>Int'l Rev. L. &amp; Econ.</td>
<td>International Review of Law and Economics</td>
</tr>
<tr>
<td>Iran USCTR</td>
<td>Iran-US Claims Tribunal Reports</td>
</tr>
<tr>
<td>ITL Rep</td>
<td>International Tax Law Reports</td>
</tr>
<tr>
<td>J. Int’l Econ. L.</td>
<td>Journal of International Economic Law</td>
</tr>
<tr>
<td>J. Int'l Arb.</td>
<td>Journal of International Arbitration</td>
</tr>
</tbody>
</table>
J. Islamic & Comp. L. Journal of Islamic and Comparative Law
J. World Inv. & Trade Journal of World Investment and Trade
Michigan JIL Michigan Journal of International Law
Minn. J. Int'l L. Minnesota Journal of International Law
NYLJ New York Law Journal
O.J.L.S. Oxford Journal of Legal Studies
Okla. L. Rev. Oklahoma Law Review
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>R.C.A.D.I.</td>
<td>Recueil des Cours de l'Academie de Droit International</td>
</tr>
<tr>
<td>RC</td>
<td>Recueil des Cours</td>
</tr>
<tr>
<td>S.C.R.</td>
<td>Supreme Court Report Canada</td>
</tr>
<tr>
<td>San Diego Int’l L. J.</td>
<td>San Diego International Law Journal</td>
</tr>
<tr>
<td>Tul. L. Rev.</td>
<td>Tulane Law Review</td>
</tr>
<tr>
<td>U. Miami Inter-Am. L. Rev</td>
<td>University of Miami Inter-American Law Review</td>
</tr>
<tr>
<td>U. Rich. L. Rev</td>
<td>University of Richmond Law Review</td>
</tr>
<tr>
<td>U.C. Davis Int’l L. &amp; Pol’y</td>
<td>UC Davis Journal of International Law and Policy</td>
</tr>
<tr>
<td>Va. JIL</td>
<td>Virginia Journal of International Law</td>
</tr>
<tr>
<td>Vand. J. Transnat'l L.</td>
<td>Vanderbilt Journal of Transnational Law</td>
</tr>
<tr>
<td>Y.B. Comm. Arb</td>
<td>Yearbook of Commercial Arbitration</td>
</tr>
<tr>
<td>Y.B. International Law Comm.</td>
<td>Yearbook of International Law Commission</td>
</tr>
</tbody>
</table>
TABLE OF CASES

**Investment Arbitration Awards**

Abaclat and others v. Argentina, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/07/5

ADC Affiliate Ltd. v. Republic of Hungary, Award, ICSID Case No. ARB/03/16

AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary, ICSID Case No ARB/07/22

Alex Genin, Eastern Credit Ltd Inc and AS Baltoil v. Republic of Estonia (Award) 6 ICSID Rep 236 (2001)

Ambiente Ufficio SPA v Argentina, ICSID Case No. ARB/08/9

Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. The Republic of Indonesia, ICSID Case No. ARB/81/1

AMTO LLC v. Ukraine (SCC Case No. 080/2005, Award (March 26, 2008)

Apetex v United States, ICSID Case No. ARB(AF)/12/1

Archer Daniels Midland Co & Tate & Lyle Ingredients Americas, Inc v Mexico, ICSID Case ARB(AF)/04/05, Award

ATA Construction, Industrial & Trading Co. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award

Atlantic Triton Company Limited V People’s Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1

Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2

Azurix v. Argentina, ICSID Case No. ARB/01/12, Decision on Jurisdiction

Bayindir v Pakistan, ICSID Case No. ARB/03/29

BG Group v. Argentina (UNCITRAL Final Award December 24 2007)
Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22

Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11

Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay, ICSID Case No ARB/07/9

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No ARB/08/5, Procedural Order No. 1, June 29, 2009

Camuzzi Int’l S.A. v. Argentine Republic, ICSID Case No. ARB/03/7, Decision on Jurisdiction

Cargill v Mexico (Award), ICSID Case No. ARB(AF)/05/2

CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15

Ceskoslovenska Obchodni Bank, A.S. (CSOB) v. The Slovak Republic, ICSID Case No. ARB/97/4

Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9

Chevron Corp and Texaco Pet Co. v Republic of Ecuador Counter Memorial on the Merits of Ecuador

Chevron Corp and Texaco Pet Co. v Republic of Ecuador Fourth Interim Award of February 7, 2013

Chevron Corp and Texaco Pet Co. v Republic of Ecuador Order for Interim Measures, February 9, 2011, as modified by Interim Award of January 25, 2012

Chevron Corp and Texaco Pet Co. v Republic of Ecuador Order of May 14, 2010 and Order of January 28, 2011

Chevron Corp and Texaco Pet Co. v Republic of Ecuador, UNCITRAL Arb., PCA Case No. 2009-23

Chevron Corp. v. Republic of Ecuador UNICTRAL Arb., PCA Case No. 2009-23, Opinion of Jan Paulsson, 16
Chevron Corp. v. Republic of Ecuador, UNCITRAL Arb., PCA Case No. 34877, Partial Award on the Merits

Chevron v Ecuador (No 2), Award, 27 February 2012

CME Czech Republic B.V. (The Netherlands) vs. The Czech Republic, UNCITRAL Award

CMS Gas Transmission Co. v. Argentine Republic (Jurisdiction), ICSID Case No. ARB/01/8

Compañíá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award

Consortium Groupement LESI-DIPENTA v. Algeria, ICSID Case No. ARB/03/8, Award of 10 January 2005


Corn Products International, Inc v Mexico, ICSID Case ARB(AF)/04/01, Decision on Responsibility

Daimler Financial Services v Argentine Republic, ICSID Case No. ARB/05/1

Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador, ICSID Case No. ARB/04/19

El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15


EnCana v Ecuador, Award 3 February 2006, 12 ICSID Rep 427

Enron Corp. and Ponderosa Assets, L.P. v. Argentina, Decision on Jurisdiction

Eudoro A. Olguin v. Republic of Paraguay, Decision on Jurisdiction, 8 August 2000, 6 ICSID Rep 156


Fedax N.V. v. Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction
Fraport A.G Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25

Frontier Petroleum Services Limited v. Czech Republic PCA UNCITRAL Award

GAMI v Mexico, Award of 15 November 2004

Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction

GEA Group Aktiengesellschaft v Ukraine ,ICSID Case No. ARB/08/16

Generation Ukraine, Inc. v Ukraine, ICSID Case No. ARB/00/9, 10 ICSID Rep 240

Glamis Gold v United States, UNCITRAL Award

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24

Helnan v. Egypt, Decision of the Tribunal on Objection to Jurisdiction

Himpurna California Energy Ltd. v. Republic of Indonesia, (2000) 25 Yearbook of Commercial Arbitration, 109 (Interim Award, 26 September 1999); Final Award of 16 October 1999

Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31

Holiday Inns S.A and others v. Morocco, ICSID Case No ARB/72/1

Hulley v Russia (Award, 30 November 2009)

ICS Inspection and Control Services Ltd v Argentine Republic, UNCITRAL, PCA Case No. 2010-9

Impregilo S.p.A v. Argentine Republic, ICSID Case No. 07/17

Inceysa Vallisolehana S.L. v. Republic of El Salvador ICSID Case No. ARB/03/26

International Thunderbird v. United Mexican States, Award (NAFTA) January 26, 2006

Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13

Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award, 6 August 2004
Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v Turkmenistan, ICSID Case No. ARB/10/1

Klockner v. Cameroon, Award, ICSID Case No. ARB/81/2 (1983)

Lanco v. Argentina, Decision on Jurisdiction, 8 December 1998

Lemire v Ukraine, ICSID Case No ARB/06/18

LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/16

Liman Caspian Oil B.V and NCL Dutch Investment B.V v. Kazakhstan, ICSID Case No. ARB/07/14

Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3

Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7

Malaysian Historical Salvors, ICSID Case No./05/10

MCI v Ecuador (Award, 31 July 2007)

Middle East Cement Shipping v. Egypt, ICSID Case No. ARB/99/6, Final Award


Mondev International Ltd. V. United States (ICSID Case No. ARB (AF)/99/2)


National Grid plc v. Argentina, UNCITRAL, Decision on Jurisdiction, 20 June 2006

Nobel Ventures v. Romania, ICSID Case No. ARB/01/11

Occidental v. Ecuador, ICSID Case No. ARB/06/11

Ömer Dede and Serdar Elhüseyni v. Romania, ICSID Case No. ARB/10/22
Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic, ICSID Case No. ARB/03/13

Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21

Parkerings v Lithuania Award of 11 September 2007

Patrick Mitchell v. Democratic Republic of Congo, Case No. ARB/99/7, Decision on the Application for Annulment of the Award

Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petro Ecuador), ICSID Case No ARB/08/16


Philip Morris Brands Sárl & Ors. v. Uruguay, ICSID Case No ARB/10/7

Phoenix Action Ltd. v The Czech Republic, ICSID Case No. ARB/06/5, Award

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24

PSEG Global Inc. & Konya Ilgin Elektrik Uretim ve Ticaret Ltd. Sriket v. Turkey, ICSID Case No. ARB/02/5

Romak S.A. (Switzerland) v. The Republic of Uzbekistan (2009) Award, PCA Case No. AA280

Ronald S. Lauder v. The Czech Republic, UNCITRAL Award


RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14

Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16

S.D. Myers v Canada, UNCITRAL Award

Saba Fakes v. Republic of Turkey (ICSID Case No. ARB/07/20), Award

Saipem S.p.A v. The Peoples Republic of Bangladesh, ICSID Case No. ARB/05/07


Salini v Jordan (Award of 9 November 2004)

Saluka Investments BV (The Netherlands) v Czech Republic, UNCITRAL, Partial Award

Sapiem v Bangladesh, ICSID Case No. ARB/05/07

Sedelmayer v. Russian Federation, Ad hoc Arbitration under Stockholm Chamber of Commerce Arbitration Rules, Award of 7 July 1998

Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6

SGS V. Pakistan, ICSID Case No. ARB/01/13

Siag and Vecchi v. The Arab Republic of Egypt (ICSID Case No ARB/05/15).

Siemens AG v Argentine Republic ICSID Case No.ARB/02/8

Soufraki v. The United Arab Emirates, ICSID Case No ARB/02/07

Sudapet Company Limited v. South Sudan, ICSID Case No. ARB/12/26

Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic/AWG Group Ltd. v. Argentine Republic, ICSID Case No. ARB/03/19

Teinver SA and others v Argentine Republic, ICSID Case No. ARB/09/1

Telefonica SA v Argentine Republic, ICSID Case No. ARB/03/2
Tethyan Copper Co. Pty Ltd v Pakistan, ICSID Case No. ARB/12/1
Tokios Tokeles v Ukraine, ICSID Case No. ARB/02/18
Toto Construzioni Generali S.P.A. v The Republic of Lebanon, ICSID Case No. ARB/07/12
Tradex Hellas S.A v. Albania, ICSID Case No. ARB/94/2
TSA Spectrum de Argentina .S. v. Argentine Republic, ICSID Case No ARB/05/5
Tza Yap Shum v Republic of Peru, ICSID Case No. ARB/07/6
U.P.S v Canada, UNCITRAL (NAFTA)
Unglaube v Republic of Costa Rica, ICSID Case No ARB/08/1 and ARB/09/20, Award
Urbaser SA and others v Argentine Republic, ICSID Case No. ARB/07/26
Vacuum Salt Products Limited v. Republic of Ghana ICSID Case No. ARB/92/1) Award
Vannessa Ventures v Venezuela, ICSID CASE NO. ARB(AF)/04/6
Veteran Petroleum v Russia (Award, 30 November 2009)
Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2
Waste Management Inc. v United Mexican States, ICSID Case No. ARB (AF)/00/3, Award
Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No ARB/98/4
White Industries Australia Limited v The Republic of India, UNCITRAL Award
Wintershall Aktiengesellschaft v Argentine Republic ICSID Case No.ARB/04/14
World Duty Free Company Ltd. v. The Republic of Kenya, ICSID Case No. ARB/00/7
Yukos v Russia (Award, 30 November 2009)
Domestic Court Cases

AT&T Technologies v Communications Worker, 475 U.S. 643 (1986)


BG Group v. Argentina Plc 665 F.3d 1363 1370-71 (D.C Cir. 2012)

BG Group v. Argentina Plc, 572 US (2014) [Brief for the United States Council for International Business as Amicus Curiae in support of the Petitioner; Brief for United States as Amicus Curiae 25; Brief of Amici Curiae Practitioners and Professors of International Arbitration Law in Support of Respondent]


Canada v SD Myers (FC)


Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan, 3 November 2010, [2010] UKSC 46

Decision of the Swiss Supreme Court (4A_232/2013 of 30 September 2013)


Elektrim SA v Vivendi Universal SA [2007] EWHC 571 (Comm)


First Options of Chicago Inc. v Kaplan, 514 U.S.


Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991)

KBC v Pertamina, 364 F 3d 274 (5th Cir, 2004)


Mexico v Cargill (Ont CA), 2011 ONCA 622. 10


Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L’Industrie Du Papier (RATKA), 508 F.2d 969, 977 (2d Cir. 1974)

Quintette Coal Ltd. V. Nippon Steel Corp., 1. WW.R. 219, 229N(BCCA 1991)

Republic of Argentina v. BG Group PLC, 665 F.3d 1363 (D.C. Cir. 2012)


Republic of Ecuador and Occidental Exploration and Production Co [2006] (High Ct of J Queens Bench Div Comm Ct), EWHC 345 (Comm); 8 ITL Rep 948 (2006)

Republic of Ecuador v Chevron Corp 638 F.3d 384 (2d Cir. 2011)


Schneider v. Kingdom of Thailand, 688 F.3d 68, 74 (2d Cir. 2012)


Teamsters Local Union No. 61 v. United Parcel Serv., Inc., 272 F.3d 600, 604 (D.C. Cir. 2001)

The Czech Republic v. European Media Ventures SA, 2007 EWHC 2851 (Comm)

The Hub Power Co. v. Pak. WAPDA & Federation of Pakistan

The United Mexican States v. Metallclad Corporation (2001), 89 BCLR (3d) 359; 14 BLR (3d) 285

The United Mexican States v. Metallclad Corporation Supplementary Reasons: [2001 BCJ No. 2268; 2001] BCSC 1529)
United Mexican States v Cargill Incorporated, 2010, ONSC 4656

United Mexican States v. Metalclad Corp. (2001), 89 B.C.L.R. (3d) 359 (S.C.)

Wal-Mart Stores, Inc. v. PT Multipolar Corp., No. 98-16952, 1999 WL 1079625, (9th Cir. Nov. 30, 1999)

Werner Schneider v The Kingdom of Thailand, 688 F 3d (2d Cir 2012)

**PCIJ, ICJ and PCA Cases**

Ambatielos Claim (Greece v. UK) 6 March 1956, International Law Reports 306

Barcelona Traction case (Barcelona v. Spain, ICJ 1970), ICJ Reports

Elettronica Sicula SpA (ELSI) case (United States of America v. Italy), ICJ Reports, 1989


Interhandel Case (Switzerland v United States), 1959 I.C.J. 5

Island of Palmas case (Netherlands v USA) Award of 1928, 2 RIAA 829

Mavrommatis Palestine Concessions (Greece v. United Kingdom), (1924) P.C.I.J., ser. A, No. 2

Mexico v. United States (Case Concerning Avena and Other Mexican Nationals), 2004 I.C.J. 12, Judgment at 153 (Mar. 31, 2004)

Nottebohm Case (Liechtenstein v. Guatemala), Preliminary Objections, Judgment of November 18, 1953, I.C.J. Reports 1953

Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.) (The Brazil Loans Case), (1929) P.C.I.J. Ser. A No. 21 (July 12)

The Case of the SS ‘Wimbledon’ (1923) (PCIJ Series A No 1, 25)

**Iran-US Claims Tribunal Cases**


Touche Ross & Co. v. The Islamic Republic of Iran, 9 Iran-U.S. Cl. Trib. Rep. 284 (Oct. 30, 1985) (Award No. 197-480-1)

Watkins-Johnson Co. v. The Islamic Republic of Iran, 22 Iran-U.S. Cl. Trib. Rep. 218 (July 28, 1989) (Award No. 429-370-1)
WTO Cases

Decision by the Arbitrator, US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 4.16-18, WT/DS285/ARB (Dec. 21, 2007)

Decision by the Arbitrators, EC—Regime for the Importation, Sale and Distribution of Bananas III, 52, WT/DS27/ARB/ECU (Mar. 24, 2000)


ARBITRATION RULES- DOMESTIC AND INTERNATIONAL

British Columbia International Commercial Arbitration Act (ICCA)

English Arbitration Act

The Federal Arbitration Act

ICC Rules of Arbitration

ICSID Additional Facility Rules

Swiss Arbitration Act

UNCITRAL Model Law

UNCITRAL Rules

INTERNATIONAL CONVENTIONS

Abs-Shawcross Draft Convention

American Convention on Human Rights

Convention for the Protection of Human Rights and Fundamental Freedoms

Convention on the Peaceful Resolution of International Disputes

European Convention on Human Rights
ICSI Convention

International Convention for the Mutual Protection of Private Property Rights in Foreign Countries

Law of the Sea Convention

Multilateral Agreement on Investment (MAI)

OECD Draft Convention on the Protection of Foreign Property

The Havana Charter

United Nations Charter

Vienna Convention on the Law of Treaties
Chapter 1: Introduction

International investment arbitration is a dispute resolution system that deals with state responsibility and to some extent, challenges the scope and limits of state power and sovereignty. Under this system, dispute resolution between states and foreign investors is taken away from the purview of domestic courts and foreign investors have a direct cause of action against states before international investment tribunals. The attractiveness of the international investment arbitration mechanism include the fact that the parties are given the opportunity to select the arbitral tribunal to preside over their dispute, the expertise and neutrality of the members of the tribunal and the neutral location separate from the host state or the home country of the investor. It is also often argued that investment arbitration “depoliticizes” disputes involving states. Importantly, an arbitral award is final and binding on the parties, and it is different from a court judgment because it is not subject to appeals and they are directly enforceable by courts.

In a number of instances, domestic courts are involved in the resolution of investment disputes. In non-ICSID arbitration, court intervention is dependent on factors such as the connection the case has with that particular country, the types of measures requested, the place of arbitration, the nationality of the parties, the law governing the arbitration and domicile. For example, courts can review the existence of a valid arbitration agreement, protect the jurisdiction of an arbitration tribunal or prevent a tribunal from assuming jurisdiction, make interim reliefs such as the preservation of evidence or the rights of a party. The challenge of awards by domestic courts is

3 Section 24 (2) of the English Arbitration Act 1996 allows the court to remove an arbitrator where a party has exhausted any available recourse to the arbitral institution.
4 Model Law, Article 18; Charles Brower & Michael Tupman (1986) ‘Court Ordered provisional measures under the NY Convention’, American Journal of International Law, Vol. 80, 24
based on very narrow grounds such as an excess of jurisdiction of an arbitral tribunal. In ICSID arbitration, court involvement is greatly curtailed as the major recognition that ICSID ascribes to domestic courts is in their intervention, when necessary, with the implementation of awards. The role of domestic courts in this instance is “one of judicial assistance intended to promote the effectiveness of such awards.”

Aside from the roles specifically assigned to domestic courts, domestic courts have the power to issue injunctions enjoining arbitration. The exercise of this power is often a source of friction between the power of courts and the jurisdiction of investment tribunals. There are also issues relating to the competence and jurisdiction of domestic courts and investment tribunals that arise in the arbitration of investment disputes. These issues include the fork-in-the-road clause, preconditions to arbitration and exhaustion of local remedies. Others are treaty claims v. contract claims, forum selection clauses and umbrella clauses. As evidenced by arbitral practice and rulings, the majority trend is for BITs containing these clauses to be construed to permit parties to assert claims directly through arbitration and avoid any form of resort to domestic courts. The role and practice of domestic courts in the post award stages with regards to the review, challenge and enforcement of awards also raise important issues. On the other hand, arbitral power over domestic courts is telling on the relationship between investment tribunals and domestic courts. Arbitral jurisprudence indicates that tribunals are not only able to enjoin or order parties to avoid or stop judicial proceedings, but they also may also examine or review the lawfulness of the acts and decisions of domestic courts.

---

5 See Model Law, Article 34 for review of an arbitration award; See Section 69 of the English Arbitration Act; See BG Group Plc v Argentine Republic, UNCITRAL; Impregilo SpA v Argentina, ICSID Case No. ARB/07/17
6 See Articles 54-55 of the ICSID Convention.
8 The delineation of the jurisdiction of domestic courts and that of arbitral tribunals due to the characterization of claims by arbitral tribunals and due also, to the interpretation of certain substantive and procedural provisions contained in investment treaties presents interesting issues. See the SGS V. Pakistan, ICSID Case No. ARB/01/13 and the SGS v. Philippines, ICSID No. ARB/02/6, and the cases following them.
9 BG v Argentina, UNCITRAL; Cargill v Mexico, ICSID Case No. ARB(AF)/05/2
1.2. Objective of Thesis:

The underlying problem which this thesis addresses is the disconnect between the proper role of domestic courts and investment tribunals, and the relationship between domestic judicial systems and the investment arbitration system. This study touches on the major ways in which acts and decisions of investment arbitration tribunals and domestic courts affect each other and the overall process of investment dispute resolution. In line with the thesis of this work, other international tribunals and their interactions with domestic courts are examined for comparative purposes. Importantly, this thesis addresses the lack of conscious coordination between the roles of investment tribunals and domestic courts and proffers ways in which such cooperation and coordination can be achieved so as to sustain a credible and effective system of investment dispute resolution.

1.3. Literature Review:

A great deal has been written on the role of domestic court decisions as a source of international law and evidence of the practice of forum states,\(^{10}\) and the role of domestic courts in the enforcement of international law.\(^{11}\) Specifically, there have been pertinent comments about the role of domestic courts in the resolution of investment disputes and the competing and conflicting jurisdictions of both domestic courts and international investment arbitration tribunals. A good number of these works either vilify the investment arbitration system as stunting the growth of domestic courts\(^{12}\) or refuse to fully acknowledge the importance of the role and power of domestic courts in the resolution of investment disputes.

---


\(^{12}\) International investment arbitration is viewed in some quarters as an alternative to domestic courts. The system has been criticized as not incorporating public law values and not always transparent in nature. See ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration (Discussion Paper 22 Oct. 2004),
With regards to the resultant effect of investment treaties on the jurisdiction of domestic courts, Tom Ginsburg notes that the decision to bypass domestic courts may reduce courts’ incentives to improve performance by depriving key actors from a need to invest in institutional improvement.\(^{13}\) In the same vein, he notes that the effect of investment treaties on the judicial systems of host states impacts human development and governance in that developing countries can find themselves in a trap of low quality institutions wherein no political coalition can form to support institutional improvement. Indeed, the presence of international alternatives to adjudicatory or regulatory bodies may reduce local institutional quality under certain conditions.\(^{14}\) There are similar suggestions to the effect that investment treaties retard the move to better domestic institutions, shields them from external influence, subverts the evolution of solid rule of law institutions and discredits the normative legitimacy of the BIT as a rule of law demonstration project.\(^{15}\) Mark Halle & Luke Eric Peterson note that investment treaties remove significant disputes between foreign investors and [g]overnment agencies from the purview of local courts and tribunals . . . [while relegating] locals—including domestic businesses, who may be the lifeblood of domestic investment—to the mercies of these inadequate institutions.\(^{16}\)

On the other hand, those in support of the limited role of domestic courts in the settlement of investment disputes cite the following reasons: the possibility of bias of host state domestic

---


\(^{14}\) Id, T Ginsburg (2005), p. 123

\(^{15}\) See Ronald Daniel (2004), Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World, available at http://www3.unisi.it/lawandeconomics/stile2004/daniels.pdf, last visited April 2014; The ICSID review mechanism has also been criticized as falling short of an appeal. This is because the grounds for review are limited and thereby not as far-reaching as an appeal from a lower domestic court to a higher domestic court. Art 75 of the ICSID Convention specifies limited procedural grounds under which the ICSID Annulment Committee can modify or nullify an ICSID award.

courts, intervention by the executive arm of government\textsuperscript{17}, the application of domestic laws which may contradict international laws and principles providing protection for foreign investors\textsuperscript{18}, and the fact that domestic courts may lack the expertise to deal with claims arising from foreign investment disputes. Other reasons include the possibility of corrupt judiciaries, lack of expediency, the lack of expertise on the part of members of the domestic judiciary to grapple with complex issues of international law and international commerce, the cost of litigating within domestic jurisdictions. In practice, some tribunals have interpreted certain investment treaty clauses to limit the role of domestic courts in the resolution of investment disputes. For example, tribunals interpreting the fork in the road clause have rarely come to the conclusion that a prior choice of domestic court is a bar to adjudication before an international arbitration tribunal.\textsuperscript{19} Even where the conditions required for this provision to apply are met or where there is doubt as to an investor’s choice under the clause, Schreuer is of the view that a more plausible choice would be a determination that the investor has made a choice of international arbitration rather than litigation before the domestic courts of the host state. This, according to him, is because the investor may encounter injustices, delays and other real or perceived setbacks associated with resolving disputes between foreign investors and host states in the domestic courts of the host state.\textsuperscript{20}

Susan Frank suggests that litigation of investment disputes in domestic courts instead of before an international arbitration tribunal might build the capacity of local courts by:

1. providing domestic courts with an opportunity to articulate relevant principles of domestic law;

\textsuperscript{17} The executive may not comply with the decisions of the judiciary. See Siag v. Egypt, Award, ICSID Case No. ARB/05/15, 1 June 2009, paras. 33-87, 436, 448, 454-455.
\textsuperscript{20} Christoph Schreuer (2004) ‘Travelling The BIT Route: Of Waiting Periods, Umbrella Clauses And Forks In The Road’, 5 Journal of World Investment & Trade, pp. 241, 249; See also Christoph Schreuer (2008), ‘Consent to Arbitration’ in Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds.) The Oxford Handbook of International Investment Law, Chapter 21, pp. 848-849.
2. increasing the transparency of the system; and
3. giving notice to future investors of the relevant domestic legal standards and their application.\textsuperscript{21}

She has the view that in promoting the rule of law, a symbiotic relationship exists between investment treaty arbitration and domestic courts.\textsuperscript{22} She refers to an analysis carried out in a World Bank research paper where the author concludes that BITs are a complement rather than a substitute for domestic institutions and that countries with already strong domestic institutions are likely to gain more from ratifying a treaty.\textsuperscript{23}

However, there has been no extensive study investigating the possible co-existence of both systems and postulating ways to consciously and systematically nurture the relationship between the two forums in the direction of this work. The study also differs from other works because it goes into detail about the development and policy issues related to the interaction between the two forums.

1.4. Research Questions:

The core of this work examines and analyzes areas where domestic judicial systems and international investment arbitration system interface, i.e. cooperate, interact and conflict. The three main research questions touch on the jurisdiction and competence of investment tribunals and domestic courts, and the review powers of domestic courts and investment tribunals.

1. Can international investment arbitration tribunals and domestic courts share competencies in the adjudication of investment disputes?
2. Can international investment arbitration tribunals review the lawfulness of the conduct of domestic courts under international law?

\textsuperscript{22} Id, pp. 365-370
3. In terms of reliability, accuracy and objectivity, is it convenient for domestic courts to review the decisions of investment tribunals?

1.5. Research Methodology:

As is consistent with qualitative research, this work proceeds without a statistically tested hypothesis. Rather, it builds theory and doctrine, basing its findings on existing literature and cases examined.

A theoretical approach has been adopted for this research. It builds on current literature and ultimately offers a different perspective to the existing issue of competence sharing and questions of jurisdiction between domestic courts and investment arbitration tribunals in the adjudication of investment disputes. The study also offers its own view regarding the powers both forums wield over each other. It goes further to examine and point out the policy implications of the interaction between domestic courts and investment arbitration tribunals.

This research analyzes trends relevant to the main subject of this thesis and looks at cases and awards that shape these trends. This lead to noting the relevant questions that arise from these topical areas and developing a plan for addressing these questions. This research was largely library based and my emphasis was not only on the collation of literature already available, but also on the systematic analysis of existing literature and case law. I went further to identify areas relevant to this thesis that have not been explored. The research identifies gaps in existing literature and proffers avenues in which the relationship between these two legal systems can be coordinated so as to promote the fairness of the arbitration process, coherence in law and public accountability. On the basis of my research and findings, I made my case, formulated ideas and drew conclusions.

This work proceeds from the overarching premise that while international investment arbitration is an innovative and highly beneficial system for the settlement of investment disputes, domestic legal systems are equally beneficial to this process because courts not only support the investment arbitration system, they lend credibility and legitimacy to the process through coordinated shared competencies. It is argued in this work that the efficacy of investment
arbitration system and that of domestic legal systems can be improved through increased cooperation and the coordination of the floundering symbiotic relationship which may already exist between both systems. Similarly, the effective use of both domestic and international resources can buttress the investment arbitration system, salvage the system from a possible legitimacy crisis and develop domestic systems of dispute resolution in the process.

As has been suggested, investment arbitration serves as a “useful tool of good governance to create longer-term interests in the stewardship of economic, human and natural resources.” 24 The central theme of this work has both legal and policy undertones as the coordination between courts and the international investment arbitration system requires not only legal changes and initiatives in both systems but also domestic and international policy choices due to the influence both systems have on each other. It is also possible that coordination can trigger reforms in the processes of domestic courts (generally and more specifically, in aid of the resolution of investment disputes)25 and investment arbitration tribunals. An equally important issue covered is the rule of law agenda of international investment arbitration. I went on to examine if and how international investment arbitration furthers the rule of law. It is found that there was an intention for investment arbitration to contribute to the rule of law as part of its efforts towards development cooperation.26 The suggestions for cooperation build on this issue. Throughout the thesis, the ‘positive interactions’ between domestic courts and investment tribunals have been highlighted to buttress the argument that the two systems can coordinate to resolve investment disputes effectively. The thesis also discusses and analyzes the areas of conflict between domestic court jurisdiction and that of investment arbitration tribunals. This is with the view to

25 Id, 6:459–466, Walde wrote “Investment arbitration is about setting up external and independently enforceable disciplines to anchor economic reform policies associated with economic development towards prosperity and civilisation in an institutional setting outside the grasp of protectionist domestic politics, usually by narrow-interest groups capturing and colluding with politicians and bureaucrats. It is therefore a policy instrument that is rather in the instrument of good-governance and effective economic reform and, naturally, one element among others in enhancing the quality of the investment conditions than merely an instrument of investor protection. Weakly and badly governed countries do not develop; their authoritarian regimes have most difficulty in accepting the external accountability which investment arbitration provides. It is not surprising that the system of externally anchored and enforced disciplines is at the very core of the economic and political success of the European Union over the last 46 years”,
understanding why these conflicts exist and offering suggestions on how they can be minimized or better still avoided.

The investment arbitration rules considered in this work are mostly International Centre for Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) Rules because of the wide usage of these rules in investment dispute resolution. In making a critical analysis of this subject matter and drawing conclusions, sources such as treatises, law journals and legal encyclopedias were consulted. International investment treaties, international laws and principles, case law (international and domestic) and the decisions of international arbitration tribunals and other international adjudicatory bodies were also examined.

This work adds to a field of knowledge that has yet to be thoroughly examined. It also opens up areas for further research and opens up new thinking in the area of the dynamics for cooperation and coordination of the roles of domestic courts and investment arbitration tribunals in the settlement of investment disputes; the ways in which the coordination of these roles can increase the functioning and legitimacy of both domestic and international judicial systems. Additionally, this work raises consciousness on the influence both systems can have on each other.

1.6. Outline Of Chapters:

This chapter introduced the study and research background. It identified the problem, discussed the research objectives and lays out questions to be addressed in the study as well as the significance of the research. Different perceptions of the role of domestic courts and investment tribunals were addressed so as to understand the relationship and the interaction between these two forums. The chapter discusses the methodological approach adopted for this study.

Chapter Two gives some background on the development of investment arbitration and identifies the rationales justifying increased coordination and cooperation between domestic courts and investment arbitration tribunals by exploring the development and policy implications of domestic court and arbitration tribunal involvement in the settlement of investment disputes. This chapter also looks at the competence and jurisdiction of investment tribunals and domestic
courts to deal with investment disputes in other to give a theoretical perspective to the whole study.

Chapter Three identifies key instances of interaction between domestic systems and the international investment system by examining the support role of domestic courts, the power of domestic courts and investment tribunals to issue injunctions and the possible consequences of this exercise of power. Other issues which may cause conflict and friction such as preconditions to arbitration, the exhaustion of local remedies, fork-in-the-road clause, and the distinction between treaty and contract claims are addressed.

Chapter Four deals with the review by domestic courts of international investment tribunal decisions. Here, the role and practice of domestic courts in the post-award stages is examined. The focus in this chapter is on challenges and review of non-ICSID awards. The domestic courts, which their decisions are examined here, are selected mainly from the United States and Canada so as to consider whether the practice across courts is consistent or not. This chapter considers the issue of how much deference must be accorded to arbitral decisions, and finally, the effectiveness and appropriateness of domestic court review of decisions of investment tribunals.

Chapter Five analyzes the role and practice of an investment arbitration tribunal called on to review the lawfulness (under international law) of the conduct of domestic judicial organs. In this vein, I examine the issue of whether and when intervention by domestic courts amount to denial of justice, judicial expropriation, a breach of the effective means standard, fair and equitable treatment standard and the full protection and security standard. This chapter examines the standard of review adopted by tribunals in the review of domestic acts, and the amount of deference accorded to acts of domestic judiciaries. The chapter also considers the possibility for the distillation of standards of review for investment arbitration by looking at standards adopted by other international adjudication bodies and domestic courts in the review of administrative acts. In conclusion, this chapter evaluates the possibility of a remand system for the investment arbitration process.

Chapter Six, the concluding chapter summarizes the findings of the study and suggests ways in which the roles of courts and investment tribunals can be synchronized and coordinated. Bearing
in mind the structural and institutional differences that exist, this chapter looks at the interaction and cooperation between other international adjudicatory systems and domestic courts in order to possibly distill positive lessons for investment arbitration. This chapter also notes areas for further research.

1.7. Limitations Of Study:

This work has its limitations. While ICSID cases are largely publicized, investor-state arbitration under the UNCITRAL Rules are not as readily available due to various publicity requirements and the fact that different institutions administer cases under the UNCITRAL Rules. The result of this is that the interaction between some those tribunals and domestic courts is not captured in this study. Perhaps, useful models of interaction would have been distilled, supposing they exist. Possible further extension of this work may include a collation of dissenting arbitrators’ opinion arguing for greater roles for domestic courts and amicus submissions on role of courts in order to test the credibility of their opinions and as a tool for shaping the cooperation between courts and tribunals. This study is also by no means exhaustive of the topics and possible issues that relate to the relationship of domestic courts and international investment arbitration tribunals. Decisions issued and materials published after March 2014 have largely not been analyzed in this study.
Chapter 2: Rationales For Cooperation and Coordination: Jurisdiction and Competence of Domestic Courts And Investment Tribunals

Investment tribunals and domestic courts, to an extent, play vital roles in the adjudication of investment disputes. This chapter sets the background by addressing the evolution of arbitration as a mechanism for the settlement of investment disputes. This chapter then identifies the rationales justifying increased coordination and conscious cooperation between domestic courts and investment arbitration tribunals by exploring the development and policy implications of domestic court and arbitration tribunal involvement in the settlement of investment disputes. This thesis is aligned with the view that dispute resolution mechanisms ought to promote public law values such as the rule of law, and that more so, cooperation between investment arbitration and domestic judicial systems ought to evidence a greater contribution to the rule of law. In other to give a theoretical perspective to the entirety of this study, the jurisdiction (power) of investment tribunals and domestic courts to deal with investment disputes, and the competence of both forums to determine their jurisdiction are addressed in this chapter. This exploration is conducted so as to determine the possibility of sharing of competencies between domestic courts and investment tribunals.

2.1. Background:

Traditionally, in the absence of an agreement to the contrary, any person wishing to assert foreign investment claims against a host state had to rely on domestic courts of the host state to adjudicate the dispute. The choice of the domestic court of the host state is mostly based on the fact that under conflict of law rules, the host state is likely to be the place with the closest connection to the dispute, that is the forum of natural jurisdiction for the adjudication of all matters relating to the state.

The adjudication of investment disputes before host state domestic courts is by no means a preferred choice for foreign investors due to a number of reasons. The reasons include the real or perceived partiality and bias of host state domestic courts, the application of domestic laws which contradict international laws and principles providing protection for foreign investors (a
natural bias for the application of domestic law over international law), and the fact that domestic courts may lack the expertise to deal with claims arising from foreign investment disputes. Other often cited reasons include the possibility of corrupt judiciaries, lack of expediency, the lack of expertise on the part of members of the domestic judiciary to grapple with complex issues of international law and international commerce, the cost of litigating within domestic jurisdictions.

Adjudication of foreign investment claims before domestic courts of investors’ home country or third states is also associated with its difficulties. They include the fact that under conflict of law rules, the jurisdiction of these courts would be hard to establish. Additionally, it is almost inconceivable that host states would agree to adjudicate these disputes in another state. Most importantly, the domestic courts of home states would normally be plagued with issues of sovereign immunity and the act of state doctrine.

Another means by which foreign investment claims was dealt with was by the home state of the investor pursuing claims on behalf of the investor. One of the ways in which the home states espoused the claims of its citizens was through the use of force. Such force was either implied or actual, and this process of settlement was referred to as ‘gunboat diplomacy’. The use of force is very problematic: the purpose of this cause of action, which was mostly full compensation, was rarely achieved and besides, the use of force by one state against another state as a means to settle differences has been outlawed.

---

28 Loan contracts are often subject to the jurisdiction and governing of international financial centers.
30 Influential individuals or corporations would convince their government to send a small contingent of warships to moor off the coast of the offending state until reparation was forthcoming, see Miriam Hood (1975), *Gunboat Diplomacy 1895-1905*, London: George Allen & Unwin, pp. 187-8; Christopher Dalrymple (1996), ‘Politics and Foreign Investment: The Multilateral Investment Guarantee and the Calvo Clause’, 29 Cornell International Law Review 161, pp. 164, 165
The use of force gave way to intervention by the home state of the injured private party on his behalf through diplomatic action (diplomatic protection). The Convention on the Peaceful Resolution of International Disputes which was signed at the International Peace Conference of The Hague in 1907 provided for the claims of nationals of one state party to be settled between two state parties (the host state and home state) before an independent arbitral tribunal. In this case, the home state of the injured private party was the sole claimant and the host state was the defendant. The home state only exercised diplomatic protection after the injured private party had tried and failed to obtain relief through ‘ordinary channels’. Ordinary channels included making claims in the domestic courts of the state responsible for the injury clearly recognized the host state courts as the natural forum for the resolution of disputes.

The foreign investor benefitted from the assistance of its home state, a more powerful ally, espousing its claims. As much as diplomatic protection had its benefits, the process also had its disadvantages. Among them include the fact the foreign investor had no right to this process. The investor would have to be shown to be a national and maintain continuous nationality of the espousing home state. The home state exercised the discretion whether to bring a claim or not.

---


34 Mavrommatis Palestine Concessions (Greece v. United Kingdom), (1924) P.C.I.J., ser. A, No. 2, at 11-12, The Permanent Court of International Justice (PCIJ) stated that the right of the state to protect its citizens against injures incurred by the acts of another state was “an elementary principle of international law”.

35 Diplomatic protection comes into play after the injured private party has exhausted local remedies through domestic courts. The exhaustion of local remedies has also been established as a rule of customary international law. See Interhandel Case (Switzerland v United States), 1959 I.C.J. 5, 27; The Ambatielos arbitration, 12 RIAA, p. 83 (1956); See Elettronica Sicula SpA (ELSI) case (United States of America v. Italy), ICJ Reports, 1989, p.15; Article 44 of the International Law Commission Articles on State Responsibility, ILC Commentary 2001; See Malcolm Shaw (2003), International Law, pp. 723, 728; See the Barcelona Traction case (Barcelona v. Spain, ICJ 1970), where the court noted that the traditional rule gave the right of diplomatic protection of a corporation to the state under the laws of which it is incorporated and in whose territory it has its registered office, ICJ Reports (1970), pp. 3, 42; 46 ILR, pp. 178, 216.

36 See Won-Mog Choi (2007), ‘Present and Future of the Investor- State Dispute Settlement Paradigm’, Journal of International Economic Law, p. 3, “It is generally accepted that the institution of diplomatic protection has brought a remarkable stability to international relations. In a rapidly changing and sometimes volatile international setting, diplomatic protection grants a natural or legal person engaged in international business or similar activities, the opportunity to rely on assistance from the strongest possible institutional supporter of these activities, i.e. his or her home state. …At a minimum, the right of states to protect their nationals can serve as a warning signal to states inclined to ignore treaty or customary law obligations”.

as the claim must not have any adverse effects on the home state’s national policy. The home state also decided the extent of the claim to bring and the extent of the protection to be granted.38

There was no guarantee of compensation even if the host states’ actions were found to be illegal. These types of intercourse between states on behalf of its citizens proved to be often a politically costly friction.39 The equation of the “interests of powerful individuals with the interests of an entire country has been described as the greatest threat to peace in the modern world”. 40 Developing and less developed countries have also resisted this process as being a process tainted with the uneven exercise of sovereign power.

The International Court of Justice (ICJ) could deal with claims of foreign investors but again, their claims have to be directed through their home states. 41 The ICJ has proved not to be a very popular forum for the resolution of disputes arising from the conduct of states in international business transactions. 42 One of the main reasons appears to be the dissatisfaction of states with the inability of the ICJ to enforce judgments. The Statute of the ICJ states that the judgments of the ICJ are final and not subject to appeal but does not contain any provision for the enforcement of its judgments.43 Rather, the United Nations, through the Security Council, is by implication, granted the authority to enforce judgments of the ICJ.44 The UN Security Council is to use discretion in reviewing enforcement cases brought before it and it may make recommendations for the implementation of the ICJ judgment. In this implied enforcement capacity, the UN

---


40 Won Mog Choi (2007), p. 3

41 See Article 34 of the ICJ Statute which states that only states may be parties before the court; See the Serbian and Brazilian Loans Case: See also Hersch Lauterpacht (1947), ‘The Subjects of the Law of Nations’, 63 Law Quarterly Review, pp. 453-448; Philip C. Jessup, ‘Responsibility of States for Injuries to Individuals’, 46 Columbia Law Review (1946) 903 at 910

42 Sean D. Murphy (1991), ‘The ELSI Case: An Investment Dispute at the International Court of Justice’, 16 Yale J. Int’l L. 391, 444-48,where Murphy argued that the ICJ is not an inappropriate forum for the resolution of investment disputes.

43 Article 60 of the ICJ Statute.

44 Article 94(1) of the UN Charter states that “each member undertakes to comply with the decision of the International Court in any case to which it is a party.”
Security Council is not an appellate body. In addition it may well avoid enforcement decisions avoiding any allegations of political interference.

The need for a process and forum that would protect both the host states’ sovereignty and the investments of the foreign investor, balance the competing interests of developed and developing states, and most importantly, grant foreign investors direct access to neutral dispute resolution forums with definite enforcement mechanisms culminated in the development of international investment treaties (IITs). IITs include dispute resolution clauses that allow private parties to bring direct claims against host states before neutral international arbitration forums. In most cases, these treaties take the settlement of investment claims away from the purview of domestic courts. The search for a neutral process also led to the conclusion of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The Convention provides a neutral depoliticized arbitral forum for the resolution of investment disputes between investors and the states- the Centre for Settlement of Investment Disputes between States and Nationals of Other States (ICSID). The ICSID system of

46 Following the Friendship, Commerce and Navigation Treaties, which were signed between developed countries, multilateral attempts at the negotiation of treaties balancing the interests of the host states and foreign investors include, the 1948 Havana Charter, the 1957 International Convention for the Mutual Protection of Private Property Rights in Foreign Countries, and the 1959 Abs-Shawcross Draft Convention. Other multilateral attempts are the OECD Draft Convention on the Protection of Foreign Property (The OECD Council accepted this draft by a Resolution passed on October 12, 1967), the United Nations Code of Conduct on Transnational Corporations (See United Nations Code of Conduct on Transnational Corporations, UNCTC Current Studies: Series A, No. 4, (ST/CTC/SER.A/4), p.1, United Nations, NY, September 1986) and the Multilateral Agreement on Investment (MAI). The mandate for the negotiations stated that the MAI was to “provide a broad multilateral framework for international investments with high standards for the liberalization of investment regimes and investment protection and effective dispute settlement procedures..” For literature on the analysis of the MAI, see William Witherell (1995), ‘The OECD Multilateral Agreement on Investment’, Transnational Corporations, 4, pp. 1-14; Peter Muchlinski (1999), ‘What Went Wrong with the MAI? Lessons For The Future’, Paper Presented at The MAI Coalition Conference on ‘An International Architecture for Investment Rules’; Peter Muchlinski (1999), ‘The Rise and Fall of Multilateral Agreement on Investment: Where Now’, 34 International Law, 1033
47 A number of international tribunals have allowed individual claims against states. They include the Alabama Claims Arbitration which was established after the American Civil War, the Mixed Tribunals and the Claims Commission after World War 1, the Iran-United States Claims Commission, the United Nations Compensation Commission established after the Gulf War 1990-1991. These tribunals did not deal with future disputes but with disputes arising from set periods, out of a defined series of events or subject matter which already occurred. See also John Collier and Vaughan Lowe (1999), ‘The Settlement of Disputes in International Law, Oxford University Press, Chapters 1 and 3. Other forums include the European Court of Justice (ECJ), the European Court for Human Rights (ECHR) and the Inter-American Court of Human Rights (ACHR).
international arbitration contains rules which Contracting State parties agree to comply with.\textsuperscript{48} ICSID, which is not involved in the resolution of disputes, provides institutional support, facilitates, coordinates and provides administrative support to impartial international tribunals chosen by parties in the proceedings relating to the settlement of investment disputes.\textsuperscript{49} ICSID eliminates the risk of the proceedings being subjected to the procedural laws of a host state.\textsuperscript{50} As of May 2014, 159 States are signatory to the ICSID Convention. 150 States have also deposited their instruments of ratification, acceptance or approval of the Convention and have become ICSID Contracting States.\textsuperscript{51}

International arbitration is a mechanism for the final and binding resolution of disputes concerning contractual or other relationships with an international element by neutral and independent arbitrators in accordance with standards and procedures chosen directly or indirectly by the parties.\textsuperscript{52} This form of settlement is removed from the sphere of the national judiciary\textsuperscript{53} because national judges are usually not considered to be equipped to handle disputes arising out of international business transactions or between parties of different nationalities\textsuperscript{54}, and due to the perceived and/or actual bias of domestic courts in favor of the host state. This mechanism also dispenses with the need to wait on home state of the investor to espouse its claim, like in diplomatic protection.\textsuperscript{55}

International arbitration is also claimed to be preferred to domestic litigation because of the flexibility of arbitral procedures, the neutrality and independence of the tribunal and the arbitral process, the confidentiality of the process, the finality and binding nature of the awards rendered

\textsuperscript{49} Moshe Hirsch (1993), The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes, AD Dordrecht: Martinus Nijhoff, p. 28
\textsuperscript{50} Mariel Dimsey (2008), The Resolution of International Investment Disputes, Eleven International Publishing, p. 10; ICSID proceedings are regulated by the ICSID Procedure for Arbitration Proceedings.
\textsuperscript{51} http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home, last visited May 2014
\textsuperscript{54} Julian Lew, Loukas Mistelis and Stefan Kröll (2003), p. 5
\textsuperscript{55} Consent to ICSID arbitration excludes the ‘harassment’ potential of diplomatic protection exercised by the home state of investors against weaker host states, see August Reinisch and Loretta Malintoppi (2008), ‘Methods of Dispute Resolution’, in Peter Muchlinski, Federico Ortino, and Christoph Schreuer. (eds), The Oxford Handbook of International Investment Law (The Oxford Handbook) 691, p. 701
by the tribunals, the cost of the process and the fact that the process is governed by rules chosen
by the parties. Arbitrators chosen by the parties oftentimes possess skills relevant to the dispute
being arbitrated. Additionally, this process ensures the enforcement of decisions of the tribunals
thereby avoiding problems which may arise in the enforcement of decisions of domestic courts.56

2.2. Rationales Justifying Cooperation and Coordination Between Investment Arbitration
And Domestic Judicial Systems:

A Nigerian proverb of cooperation says that when the right hand washes the left hand
and the left hand washes the right hand, both hands become clean.

This part sets forth a perspective from which to examine the interaction between investment
arbitration and domestic judicial systems, and identifies the bases that justify an increased
cooperation and coordination. This work proceeds on the premise that effective cooperation
between the investment arbitration system and domestic judicial systems will not only foster
greater rule of law but will also confer greater legitimacy to both systems in the resolution of
investment disputes between host states and foreign investors. Already, traces of a symbiotic
relationship exist between the domestic and international systems of investment dispute
resolution. What is needed is better coordination and cooperation between these two systems so
as to achieve greater legitimacy for both systems and improve the efficiency of the international
investment dispute resolution process. In cooperating and coordinating their roles, both systems
contribute to the growth of consistent and effective doctrines and principles in the field of
investor-state dispute resolution.

2.2.1. Resolution Of Investment Disputes And The Development Objective:

For the purposes of this thesis, the contribution of international investment arbitration to
development is not in the context of creating economic growth but in the sense that it furthers the
social goals of the host state. Economic development has to do with human development and

London: Sweet & Maxwell, pp. 22-3; Many countries are signatories to the Convention on the Recognition and
Enforcement of Foreign Arbitral Awards of 1959 known as the New York Convention.
encompasses the social and economic goals of nations.\textsuperscript{57} One of such goals is the creation and maintenance of an effective judicial system capable of interacting and coordinating with the investment arbitration system for the effective resolution of investment disputes.

A few key assumptions have been made that: foreign investments foster economic development\textsuperscript{58}, investment treaties increase foreign investments;\textsuperscript{59} investment treaties not only

\textsuperscript{57} Defined by the World Bank, economic development is "sustainable increase in living standards that encompass material consumption, education, health, and environmental protection. Development is “understood to include other important and related attributes as well, notably more equality of opportunity, and political freedom and civil liberties. The overall goal of development is therefore to increase the economic, political, and civil rights of all people across gender, ethnic groups, religions, races, regions, and countries.” World Bank Development Report 1991; See also the definition of economic development as “qualitative change and restructuring in a country's economy in connection with technological and social progress. The main indicator of economic development is increasing GNP per capita (or GDP per capita), reflecting an increase in the economic productivity and average material wellbeing of a country's population. Economic development is closely linked with economic growth”. http://www.worldbank.org/depweb/english/beyond/global/glossary.html, last visited April 2014


\textsuperscript{59} It has been suggested that the actual contribution of investment treaties to the development policy of nations is questionable because it provides little room and incentives for governments to take important policy decisions required for developing and regulating the economy without breaching the unclear provisions of the treaties, http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf, last visited April 2014; There are several calls to create a more development-focused investment policy which takes public law concerns into account and focuses on economic development rather than dispute settlement. See Baetens Freya (2009), \textit{The Review of the Oxford Handbook of International Law}, European Journal of International Law, Vol. 20 (3) 939-942, “There is mixed empirical evidence as to its actual success in securing foreign investment”; Susan Franck (2007), ‘Integrating Investment Treaty Conflict and Dispute Systems Design’, 92 Minnesota Law Review 161, 171; see also Susan Franck (2007), ‘Foreign Direct Investment, Investment Treaty arbitration and the Rule of Law’ (FDI, ITA and the Rule of Law), 19 Pacific McGeorge Global Business and Development Law Journal, 337, pp. 348–53 (on the topic of how investment treaties affect foreign investment); According to Ronald Daniels, these treaties are also capable of limiting a host state’s capacity to “respond to legitimate public policy concerns through the creation of credible, transparent and participatory regulatory institutions”, see Ronald J. Daniels, \textit{Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World}, available at http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf, last visited April 2014, at 31; See also Jennifer Tobin and Susan Rose-Ackerman (2005), \textit{Foreign Direct Investment and the Business Environment in
protect foreign investors, but they are also tools for economic development. This is because the purpose of treaties is to promote economic development while utilizing “investor protection as a means to an end.”\textsuperscript{60} Investment arbitration, therefore, which is the mechanism employed by most investment treaties for the resolution of investment disputes, can be said to be relevant for development of the global economic system.\textsuperscript{61} Thomas Walde suggests that investment arbitration is a ‘useful tool of good governance to create longer-term interests in the stewardship of economic, human and natural resources’.\textsuperscript{62} The reason for the ICSID mechanism being part of the World Bank Group is to promote investments towards the overall aim of contributing to economic development. The preamble of the ICSID Convention reads “Considering the need for international cooperation for economic development, and the role of private international investment therein…..” This signifies that the underlying principle of ICSID is the settlement of investment disputes between host states and foreign investors, the facilitation of foreign investment and economic development.\textsuperscript{63}

\begin{footnotesize}
\begin{itemize}
    \item There are however opposing views with regards to the contribution of investment arbitration to development. “While arbitration is an important means of fostering the rule of law and increasing investor confidence, it can also have significant drawbacks, particularly for developing countries, in terms of high costs, long duration, and the damage that such proceedings may cause to the investor-State relationship. In other words, arbitration is not very development-friendly”. In an UNCTAD paper suggesting alternative methods of dispute resolution in future IIAs. See http://www.unctad.org/en/docs/iteiit20073_en.pdf_last visited April 2014
    \item Thomas Walde (2006), ‘Investment arbitration and sustainable development: good intentions—or effective results?’, in response to the paper by James Chalker, ‘Making the investment provisions of the Energy Charter Treaty sustainable development friendly’, International Environmental Agreements 6:459–466, wrote “Investment arbitration is about setting up external and independently enforceable disciplines to anchor economic reform policies associated with economic development towards prosperity and civilisation in an institutional setting outside the grasp of protectionist domestic politics, usually by narrow-interest groups capturing and colluding with politicians and bureaucrats. It is therefore a policy instrument that is rather in the instrument of good-governance and effective economic reform and, naturally, one element among others in enhancing the quality of the investment conditions than merely an instrument of investor protection. Weakly and badly governed countries do not develop; their authoritarian regimes have most difficulty in accepting the external accountability which investment arbitration provides. It is not surprising that the system of externally anchored and enforced disciplines is at the very core of the economic and political success of the European Union over the last 46 years”; see Thomas W. Wälde (2004), ‘Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues based on Litigation Experience’, in Nobert Horn and Stefan Kroll (eds.), Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Aspects, Kluwer Law International
    \item “[In submitting the … Convention …] the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development”, see the Report of the Executive Directors, para.9. In Schreuer’s opinion, the Convention’s primary aim is the promotion of economic development, which depends on private international investment, see C. Schreuer (2001), The ICSID Convention, p. 5; It has been suggested that apart from the preamble language, many international investment instruments mainly pursue the development goal indirectly through the protection of foreign investment in the host country. See http://www.unctad.org/en/docs/iteiit20073_en.pdf_last visited April 2014
\end{itemize}
\end{footnotesize}
Sound domestic courts guarantee protection of investments, the protection of economic interests, ensures enforcement of the rules under which these interests operate and fosters growth which is essential to economic development. Judicial systems therefore have considerable impact on economic growth and economic development. A sound judicial system enforces and guards property rights thereby promoting economic development. Only solid, stable and effective judicial systems can engage with the investment arbitration system, cooperate effectively with the international arbitration mechanism to resolve investment disputes and thereby strengthen the general process of the settlement of investment disputes. The decisions of a deficient judicial system on the other hand may stunt the growth of the economy and innovation, create negative impacts on market expansion, and disrupt the resolution of investment disputes.

2.2.2. Adjudication Of Investment Disputes And The Rule of Law:

In sum, a viable and solid domestic judicial system and an effective investment arbitration system are important for the enforcement of the rule of law, which is a principle of economic development. Key components of the rule of law include judicial impartiality, independence,

---

competence, and accountability. Alvaro Santos notes that different conceptions of the rule of law are deployed for a variety of purposes and used to suit different objectives. Hence, for the purposes of this work, the definition of rule of law adopted is the adherence to legal standards and norms, and the adjudication of those legal standards in a consistent, reliable independent and impartial manner. An effective domestic legal system is one which is predictable and transparent. An independent and consistent application of justice by domestic courts is instrumental to the development of the rule of law, private business activity, development and economic growth. Part of domestic court contribution to the rule of law is the effective, transparent and consistent control over the exercise of public powers that conflict with domestic and international laws.

While it may not be a direct objective of the ICSID Convention, Van Den Berg notes that the Convention was intended to establish a balanced “rule of law” in foreign investments. In this

68 See Lon L. Fuller (1969), The Morality of Law, Revised Edition, Yale University Press; Norman L. Greene (2008), ‘Perspectives from the Rule of Law and International Economic Development: Are there Lessons for the Reform of Judicial Selection in the United States?’, 86 Denv. U.L. Rev. 53, “The principle of the rule of law is inextricably mixed with the principle of independence of the judiciary. The latter principle means, in effect, that judges shall enjoy immunity from interference by the government and [be free] to decide issues before them only in accordance with the law without fear of adverse repercussions. This is secured in modern constitutions, by provisions laying down well defined procedures for appointments to the higher judicial offices, charging judicial salaries on the consolidated fund thus giving them fixed salaries and excluding these from parliamentary debates and by the procedure for their removal from office”; see also Sam Rugege (2007), ‘Judicial Independence in Rwanda’, 19 Pac. McGeorge Global Bus. & Dev. L.J. 411, 411, 415, where he notes that “judicial independence is a universally recognized principle in democratic societies. It is a prerequisite for a society to operate on the basis of the rule of law”, and that an independent judicial system is important for the rule of law and the rule of law in turn, is important for the efficient operation of an open economy.


71 There is a negative correlation between corruption, investment and economic growth, see Per Bergling (2006), Rule of Law on The International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-operation, Antwerp – Oxford, Intersensia, (2006), p. 96

72 Id, p. 88

73 Mohamed Ibrahim Mostafa Aboul-Enein (2005), ‘Arbitration of Foreign Investment Disputes Responses to the New Challenges and Changing Circumstances’, in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, Kluwer Law International, p. 187. In this sense, investment arbitration can be said to be a mechanism for the implementation of the rule of law. See Aron Broches at the Consultative Meetings of Legal Experts (Addis Ababa, December 1963) where he notes “The fact that the World Bank had taken the initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity was due to the fact that the Bank was not merely a financing mechanism but, above all, a development institution………To that end, sound technical and administrative foundations were essential, but no less indispensable was the firm establishment of the Rule of Law.” He was giving reasons for the establishment and support of the ICSID agreement.
regard, the practice of international investment arbitration tribunals may indicate that the system can operate as a vanguard in the fight for corruption and bad governance practices of some host states. Furthermore, where international arbitration tribunals follow due and transparent procedure and render fair, reliable, consistent and neutral decisions, they contribute to the rule of law and provide a useful model for national decision makers and domestic courts, and thus promote the adherence to the rule of law. Helping states develop strong judicial institutions is a central part of the strategy for promoting the rule of law. Similarly, even though the promotion of rule of law may not be the direct objective of IITs, rule of law principles are bound up in standards contained in these treaties. For example, the requirement that states act in a predictable and non-arbitrary manner with regards to investment is contained in the fair and equitable standards.

This work also proceeds on the premise that investment arbitration should, in the adjudication of investment disputes, apply certain, fair and predictable standards leading to non-arbitrary and impartial results. In this way, the investment arbitration system can be said to contribute to the rule of law. For every arbitral decision, “the rule of law will be realized, and thus strengthened for the future.” Professor Crawford aptly notes,

74 See World Duty Free v. Republic of Kenya, ICSID Case No. ARB/00/7, p. 49-62, where the Tribunal held the main contract unenforceable for corruption under English law and the law of the host state Kenya.
77 One of the ways in which the United Nations promotes the rule of law domestically is through the design and building of solid and effective judicial systems. See Report to the General Assembly and the Security Council, ‘Uniting Our Strengths: Enhancing United Nations Support For The Rule of Law.; 14 December 2006, para. 41-42, p. 13; See also Resolution of the UN General Assembly of 24 October 2005, UN Doc. A/res/60/1; The International Criminal Tribunal for Yugoslavia encourages the development of domestic courts, see William Burke-White (2008), ‘The Domestic Influence Of International Criminal Tribunals: The International Criminal Tribunal For The Former Yugoslavia And The Creation Of The State Court Of Bosnia &Herzegovina’, Columbia Journal of Transnational Law, Vol. 46, p. 279
78 Kenneth Vandevelde (2010), Bilateral Investment Treaties: History, Policy and Interpretation, Oxford University Press, pp. 2-3
79 José Alvarez notes that the rules governing foreign investments are “becoming increasingly precise over time, not only as a result of ever more detailed provisions in treaty and national law, but also thanks to the ever more elaborate interpretations of relevant law rendered by international arbitrators sitting in investor-state disputes”. Jose Alvarez (2011), Public International Law Regime Governing International Investment, AIL – Pocket Books, 25.
“in an investment protection dispute, if the applicable law is international law, the criterion of liability is a set of standards more or less indistinguishable from the standards of the rule of law—absence of arbitrary conduct, judicial independence, non-retrospectivity.”

Similarly, Kingsbury and Schill note that investment tribunals help define

“the world standards of good governance and of the rule of law that are enforceable against states by foreign investors”.

This is an assumption in a perfect world where similar legal norms will be applied to similar cases to produce similar results. However arbitral practice so far has not been mostly uniform. International arbitration system in promoting the rule of law must consider a workable uniformity of awards arising out of similar instances and the promotion of accountability by the review of the substance of arbitral awards.

With regards to the resultant effect of investment treaties on the jurisdiction of domestic courts, there have been suggestions that the removal of cases from the domestic legal domain

84 In the CMS line of cases, the Tribunals found that Argentina could not successfully rely on this defense while in LG&E, the Tribunal excused Argentina’s actions based on this defense. Despite the CMS annulment decision where the Annulment Committee held that the Tribunal erred in failing to assess whether Argentina could have invoked a separate treaty based defense of necessity, the Committee could not reconsider the issue due to the limited grounds for review in ICSID annulment proceedings. A few days after the CMS annulment decision, the Tribunal in Sempra found Argentina had no defense of necessity under the BIT or under customary international law (the Sempra Tribunal included two members of the CMS Tribunal); CMS v Argentina, ICSID Case No. ARB/01/8; LG&E v. Argentina, ICSID Case No. ARB/02/1; Sempra Energy v. Argentina, ICSID Case No. ARB/02/16; Czech Republic cases- the CME and the Lauder cases where two different tribunals arrived at two different decisions over basically the same dispute; CME Czech Republic B.V. (The Netherlands) vs. The Czech Republic, UNCITRAL Award; Ronald S. Lauder v. The Czech Republic, UNCITRAL Award; SGS Cases, SGS v Pakistan, ICSID Case No. ARB/01/13 and SGS v Philippines, ICSID Case No. ARB/02/6; A more apparent instance is where there are two opposing awards emanating from the same BIT in Siemens AG v Argentine Republic ICSID Case No.ARB/02/8, Decision on Jurisdiction and Wintershall Aktiengesellschaft v Argentine Republic ICSID Case No.ARB/04/14, Decision on Jurisdiction.
undermines incentives for states to develop and establish a sustainable rule of law. Tom Ginsburg avers that the “decision to bypass domestic courts may reduce courts’ incentives to improve performance by depriving key actors from a need to invest in institutional improvement.”

In the same vein, he posits that the effect of investment treaties on the judicial systems of host states impacts human development and governance in that “developing countries can find themselves in a trap of low quality institutions wherein no political coalition can form to support institutional improvement. Indeed, the presence of international alternatives to adjudicatory or regulatory bodies may reduce local institutional quality under certain conditions.”

There are similar suggestions to the effect that investment treaties retard the move to better domestic institutions, shields them from external influence, subverts the evolution of solid rule of law institutions and discredits the “normative legitimacy of the BIT as a rule of law demonstration project”.

This thesis does not completely agree with the analysis that investment arbitration subverts the rule of law, but rather, that the coordination of the roles of the two systems of investment dispute settlement can further the rule of law by operating non-arbitrarily, consistently and reliably through their practice and decisions.

Susan Frank notes that in promoting the rule of law, a symbiotic relationship exists between investment treaty arbitration and domestic courts. Frank also suggests that litigation of

---

87 Id, p. 123

54
investment disputes in domestic courts instead of before an international arbitration tribunal might

“build the capacity of local courts by the following: (1) providing domestic courts with an opportunity to articulate relevant principles of domestic law; (2) increasing the transparency of the system; and (3) giving notice to future investors of the relevant domestic legal standards and their application.”

She refers to an analysis carried out in a World Bank research paper where the author concludes that BITs are a complement rather than a substitute for domestic institutions and that countries with already strong domestic institutions are likely to gain more from ratifying a treaty.

The involvement of domestic courts in the settlement of investment disputes would help build the capacity in the judicial sector of, especially, developing countries hosting foreign investments. It is therefore imperative that there is some sort of coordination of the roles of the dispute resolution systems (both domestic and international) involved in the investment arbitration process. Commenting on the role of international systems in national development and the role of national courts in the international arbitration system, Michael Reisman stated that

“international investment arbitration tribunals should not play politics but should apply the law in a rigorous fashion and national courts, performing the functions assigned to them in the international arbitral system, should enforce the resulting awards so that the infrastructure of international law can sustain a robust global economy. When the politics of exceptions and special claims infects the conduct of international investment tribunals, it is international economic development and all those who hope to benefit from it - all of the international community - who will suffer. And in an interdependent global

---

89 Susan Franck (2007), FDI, ITA and the Rule of Law, pp. 365-370
community, economic development is the indispensable basis for meaningful human rights”.

2.3. The Jurisdiction of Investment Arbitration Tribunals:

Ordinarily, jurisdiction is the power of a forum to hear a case. Authority conferring jurisdiction on an investment arbitration tribunal manifests the consent of disputing parties and can be found in investment agreements/contracts between contracting parties, in investment law of host states and investment treaties. For example, where parties consent to ICSID arbitration, Article 25(1) of the ICSID Convention extends the jurisdiction of an arbitral tribunal to (1) any legal dispute ‘arising directly out of an investment’ (2) between Contracting host state (subdivision or agency) or national of another Contracting state and (3) the parties to the dispute must consent in writing to ICSID jurisdiction over their dispute. An arbitral tribunal in each case is empowered to interpret whether the activity concerned is an investment under the ICSID Convention. This Article has been interpreted as providing certain requirements which an investment must meet before an ICSID arbitral tribunal assumes jurisdiction.

For the purposes of ICSID jurisdiction, the expression ‘legal dispute’ has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation. The first draft of the Washington Convention defined ‘investment’ as ‘any contribution of money or other

---

93 Holiday Inns S.A and others v. Morocco, ICSID Case No ARB/72/1, Decision on Jurisdiction, 12 May 1974, World Duty Free v. Kenya, ICSID Case No ARB/00/7, Award, 4 October 2006; RSM Production v. Grenada, ICSID Case No ARB/05/14, Award, 13 March 2009
94 Amco Asia Corp and others v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983; Tradex Hellas S.A v. Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996; Sudapet Company Limited v. South Sudan, ICSID Case No. ARB/12/26
95 In treaties, the dispute resolution clause provides for arbitration and parties, in most cases, the investor takes advantage of this provision by initiating arbitration.
96 Christoph Schreuer (2001), The ICSID Convention, 149
assets of economic value for an indefinite period, or if the period is defined, for not less than five years.\textsuperscript{98} The oppositions to this definition ranged from the impreciseness of the definition, the choice of words and the time element. Alternative proposals were made and these put emphasis on aspects of money and profit, property rights and the state party’s interest in development. The ICSID Secretariat defined investment as the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial or agricultural, financial or service enterprise; (ii) participations or shares in any enterprise; or (iii) financial obligation of a public or private entity other than obligations arising out of short-term banking or credit facilities.\textsuperscript{99} All the proposals were rejected; however, a British proposal to omit the definition of investment was finally adopted by the Legal Committee. The Convention therefore left to the parties, the discretion of designating a transaction as an investment, and what constitutes an investment, to be determined by the subsequent practice of states. Basically, the motive behind not delimiting what may be termed foreign investment is to ensure that as many activities are included in the definition of investment and thereby extending the meaning of foreign investment to include intangible assets, contractual rights and administrative rights.\textsuperscript{100}

2.3.1. Jurisdiction and The Notion of Investment: ICSID Convention:

The first case dealing with the notion of investment was the \textit{Fedax N.V. v. Republic of Venezuela} award\textsuperscript{101}. In that case, the claimant alleged that Venezuela had failed to pay amounts due on promissory notes which were acquired by way of endorsement. Venezuela objected on the ground that the promissory notes held by the claimant did not constitute investments under the ICSID Convention and under the Netherlands-Venezuela BIT as they were not direct foreign investments or portfolio investments carried out through approved stock market transactions. Further, Venezuela stated that investments involved “the laying out of money or property in business ventures, so that it may produce a revenue or income” a quality the present transaction did not possess.\textsuperscript{102} The Tribunal in concluding that the promissory notes are evidence of a loan,
noted that the capital involved in the transaction was “relatively substantial”, was committed for a certain duration, entailed regular returns by way of interest payments, and the transaction involved an element of risk in that the payments on the notes were outstanding. A significant relationship between the transaction and the development of the host state was also identified by the Tribunal.

Following the *Fedax* award, in deciding whether an investment qualifies for ICSID arbitration, a number of tribunals have adopted the ‘*Salini* test’ which emerged from the jurisdiction decision in the *Salini v. Morocco* case. The ruling identified four elements of an ICSID investment and they include: 1) a contribution, 2) a certain duration of performance of the contract, 3) an element of risk, and 4) contribution to the economic development of the host state. Schreuer, in his commentary on the ICSID Convention, included a fifth category, which is that there must be a certain regularity of profit and return. This fifth category has been recognized by some tribunals as a category for an ICSID investment under the *Salini* test. Recently, Schreuer has questioned the fifth criteria, noting “that actually is debatable, and I am not sure if I would insist on this particular criterion, and I see that tribunals have actually dispensed with it so perhaps it should be discarded.”

---

103 Id., para. 43
104 There was a similar finding in *Ceskoslovenska Obchodni Bank, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999; See also *Consortium RFCC v. Kingdom of Morocco* (Award) 20 ICSID Rev FIJL 391 (2003); Following the decision in *Fedax*, the Tribunal in *Joy Mining v. Egypt* found that bank guarantees issued in support of a project did not meet the five elements an activity must have in order to qualify as an investment, *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, para. 53.
105 This award referred to the *Fedax* award above; *Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco*, 42 International Legal Materials 609 (2003). In order to determine whether sub-contracts for the provision of construction services could be considered an investment in accordance with the Italy-Morocco BIT, the Tribunal examined the BIT which stated that investments included rights to any contractual performance having economic value and any economic right conferred by law or contract. In its analysis, the Tribunal also looked at the Washington Convention and held that the construction agreement fell within the scope of the BIT and that for the purposes of the Washington Convention, the agreement satisfied the conditions of contribution, duration, risk and contribution to economic development of the host state; See *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, *Phoenix Action Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009.
106 See C Schreuer (2001), *ICSID Convention* on the criteria or characteristics of an ICSID investment, p.140, para. 122. They include (1). Extended duration (2). Profit and return (3). Assumption of risk (4). Substantial commitment (5). Significance to Host state’s development; He notes that “these features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”
107 See *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22
108 See Christoph Schreuer at a 2007 Panel discussion on ICSID Investments, ‘Are ICSID Rules Governing Nationality and Investments Working?’ in Todd Weiler (ed.), International Treaty Arbitration and International Law, Cameron May, Chapter 6, Vol. 1, 2008; This criterion has not been an essential characteristic in many ICSID cases.
There have been inconsistencies in the jurisprudence of arbitral tribunals on the importance of other elements of an ICSID investment. While noting that the promotion of economic development is an important feature of an investment under the ICSID Convention, the Tribunal in *Malaysian Historical Salvors v. Malaysia* declined jurisdiction over the claimant’s investment in a marine salvage operation stating that the contract did not make any significant contribution to the economic development of Malaysia to qualify as an “investment” for the purposes of Article 25(1) of the ICSID Convention or under the Malaysia-UK BIT. The Tribunal in *Victor Pey Casado and Presidente Allende Foundation v. Republic of Chile* reached a different conclusion when it stated that the effect of a finding that investments do not contribute to a host state’s development was not a denial of the protections of the relevant BIT or the ICSID Convention. Regarding the other elements of the *Salini* test, the Tribunal found that Respondent’s shares in a Chilean company were investments protected by the Spain-Chile BIT because they were expressly included in its definition of investment. In another ICSID decision, the Tribunal noted that the term “contribution to development” was impossible to ascertain. The Tribunal advocated for the application of a less ambitious approach and stated that contribution of the investment to the economy of the host state is sufficient and is normally inherent in the mere concept of investment as shaped by the elements of contribution, duration and risk.

---

109 *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, para. 143; See also *Patrick Mitchell v. Democratic Republic of Congo*, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006 where the Tribunal held that the feature is essential but that the contribution must not be sizable or successful. A law-firm operating in the host State did not constitute an investment within the meaning of the ICSID Convention; *Ceskoslovenska Obchodni Banka v. Slovak Republic* (1999) 14 ICSID Rev 251; But see the decision of the Annulment Committee in *Malaysian Historical Salvors*, ICSID Case No./05/10, Decision on the Application for Annulment where the majority of the Committee denounced the jurisdictional award.


111* Phoenix Act. Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05

112 Id., para. 85. The tribunal stated the Salini test was incomplete and proposed six elements: contribution in money or other assets, a certain duration, an element of risk, an operation made in order to develop an economic activity in the host state and assets involved bona fide, para 114; See *Sedelmayer v. Russian Federation*, Ad hoc Arbitration under Stockholm Chamber of Commerce Arbitration Rules, Award of 7 July 1998, para. 224.
The above highlights the confused state of interpretation of some of the criteria to be met before an activity is considered an investment under the ICSID Convention.\(^{113}\) The *Salini* test is criticized because it is deemed to ignore and contradict BITs in that a transaction or activity that qualifies as investment under a BIT may not qualify as an investment under ICSID. Hence, it is used by tribunals to overlook the definition of investments contained in relevant BITs. This treatment of BITs in the interpretation of ICSID investments is due to the “outer limits” theory.\(^{114}\) This theory states that the ICSID Convention defines the ‘outer limits’ of ICSID jurisdiction and that this cannot be deviated from even by the agreement of the parties. In other words, the Convention precedes parties’ agreement under an investment treaty so that not every investment protected by a BIT is protected by ICSID. The Annullment Committee in the *Malaysian Historical Salvors* case criticized the jurisdictional award in that case for relying on the “outer limits” theory. The Committee held that investment treaties are the engine of ICSID’s effective jurisdiction and to ignore the BIT was to “depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term “investment” as found in Article 25(1) of the Convention, risks crippling the institution”.\(^{115}\) The jurisdictional award was also criticized for elevating elements of ICSID investments to jurisdictional conditions.\(^{116}\)

The strict application of the *Salini* test would risk excluding certain transactions from the scope of the ICSID Convection. Adopting an approach that considers the *Salini* test alongside the relevant instrument giving consent to ICSID in the first place, mainly investment treaties, is preferred.\(^{117}\) This approach is in line with the view that parties can explicitly or impliedly agree to

\(^{113}\) Rudolf Dolzer (2005), *‘The Notion of Investment in Recent Practice’*, in Steve Charnovitz, Debra Steger & Peter Van den Bossche (eds.), Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano, 261–275

\(^{114}\) Christoph Schreuer (2001), *The ICSID Convention*, p. 91; See also Aaron Broches (1972–II), *‘The Convention on the Settlement of Investment Disputes between States and Nationals of other States’*, 136 R.C.A.D.I. 331

\(^{115}\) *Malaysian Historical Salvors*, Annullment Decision, para.73; However, see the dissenting arbitrator’s opinion where he made a strong case for the inclusion of the element of contribution to economic development as an important factor for the assumption of ICSID jurisdiction. He also stated that the outer limits of an ICSID investment comprise a requirement for contribution to the economic development of the host state - Dissenting Opinion of Judge Mohamed Shahbuddeen - [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1031_En&caseId=C247](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1031_En&caseId=C247), last visited April 2014

\(^{116}\) Schreuer had stated that the features are not to be understood as “jurisdictional requirements but merely as typical characteristics of investments under the Convention, see *ICSID Commentary* (2001), p. 140; The arbitral Tribunal in the *Bivwater Award*, stated that the contents of the Salini test were not strict criteria and is not mandatory as a matter of law, *Bivwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, para 312

\(^{117}\) See Yulia Andreeva (2008), *‘Salvaging or Sinking the Investment? MHS v. Malaysia Revisited’*, The Law and Practice of International Courts and Tribunals, Volume 7, No. 2, p. 161, and Devavish Krishan (2008), *‘A Notion of*
characterize a transaction as an investment in an investment treaty giving consent to ICSID arbitration for the purposes of meeting the requirements under Article 25(1) of the ICSID Convention.\textsuperscript{118} It is noted that ICSID case law has developed in line with the present view and indicates that the main criteria to be used as the benchmarks for development should be contribution, risk and duration.\textsuperscript{119}

\subsection*{2.3.2. Jurisdiction and ICSID Convention: Contracting State and National of Another Contracting State:}

The second portion of the ICSID jurisdictional requirement is that the respondent state must be an ICSID member country. States also transact through their instrumentalities, which may sometimes have separate and autonomous legal personalities. These entities are by enabling legislation authorized to enter into agreements with foreign private parties. The term ‘constituent subdivision’ and ‘agencies’, it appears would cover these instrumentalities. The activities of state instrumentalities raise issues such as the extent to which the state is liable for the conduct of its instrumentalities and whether substantive protections contained in international investment treaties would apply also to instrumentalities of the state.\textsuperscript{120} These questions are also vexatious

\footnotesize{\textit{ICSID Investment’}, in T. Weiler (ed.), Investment Treaty Arbitration, Krishnan notes that the exclusion of transactions from the scope of the ICSID Convention “wastes the masonic opportunities of ICSID as an element of the legal and regulatory architecture of the international economy. For the institution of ICSID, it dilutes neutrality, the Convention’s reputation, by aligning with ideology.” pp. 2-3. See also Abaclat and others v. Argentina, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/07/5, para 364
\textsuperscript{118} See Kathiagamar Nathan (1995), ‘Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention’, 12(1) Journal of International Arbitration 27, 40; For the issue of whether costs relating to negotiating a contract qualifies as an investment, see Mihaly v. Sri Lanka, ICSID Case NO. ARB/00/2, 17 ICSID Rev-FILJ, 142 (2002); Generation Ukraine v Ukraine Award, 10 ICSID Reports 240, para. 18.9 (2006) and PSEG v Turkey, Decision on Jurisdiction, 4 June 2004, 11 ICSID Reports 434, paras 67-105.
\textsuperscript{119} Saba Fakes v. Republic of Turkey (ICSID Case No. ARB/07/20), Award, 14 July 2010; Consorzio Groupement L.E.S.I.-Dipenta v. People’s Democratic Republic of Algeria (ICSID Case No. ARB/03/08), Award, 10 January 2005; The Tribunal in RSM v. Grenada, ICSID Case No. ARB/05/14 noted that the Salini elements are ‘benchmarks or yardsticks to help a tribunal in assessing the existence of an investment’, and should be used with flexibility, paras 240-241
\textsuperscript{120} Some tribunals have held that the international rules of attribution do not apply to contract based claims, for example, see Compania de Aguas del Aconquija S.A and Vivendi Universal v. Argentine Republic, ICSID Case No ARB/97/3}
because international arbitration instruments like the ICSID Convention have provided no definition of the term “Contracting State”.121

National of another contracting state (investors) can either be private individuals or companies. The nationality test is necessary for finding that an investor is “foreign” in accordance with the ICSID Convention and under relevant investment treaties.122 The jurisdiction of an ICSID tribunal is limited to disputes between a Contracting State and “national” of another Contracting State. The investor must also not be a national of the host state (the respondent state).123 For natural persons, the nationality test is straightforward as long as the person can prove he is a national of a Contracting State and also not a national of the host state. The sticky area is the nationality test for corporate persons. The test used for corporations is the place of incorporation test, the main seat of business (siege social) or the nationality of the controlling shareholders.124

Article 25(2)(b) of the ICSID Convention also contains an exception which allows Contracting States to agree to treat select legal persons as nationals of another Contracting State. In line with this carve out, practice has established that locally incorporated subsidiaries of foreign companies are considered by host states as foreigners for the purposes of dispute settlement under ICSID.125 This exception deviates from the test of place of incorporation in favor of the test

123 Article 25 (2) (a) ICSID Convention; See Aaron Broches (1991), ‘Arbitration under the ICSID Convention’, News from ICSID, No 1 at 5; Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003; Soufraki v. The United Arab Emirates, ICSID Case No ARB/02/07
124 M Sornarajah (1986), ‘State Responsibility and Bilateral Investment Treaties’, 20 Journal of World Trade Law, 79 at 88 where he stated that there is “strong support for the view that, at least as far as arbitration of investment disputes are concerned, the test of corporate nationality is the nationality of the majority of the shareholders of the company”; Tribunals in the Pey Casado case (Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, 2008) and the Tokios case (Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 2004) refused to pierce the corporate veil and ruled that the nationality was the place of incorporation even though the citizens of the host state who owned majority of the shares of companies incorporated in other contracting states; However, see a different decision in TSA Spectrum de Argentina S. v. Argentine Republic, ICSID Case No ARB/05/5 where the Tribunal pierced the corporate veil in the jurisdictional decision.
125 See the Holiday Inns v. Morocco, Decision on Jurisdiction (1974); Klockner v. Cameroon, Award, ICSID Case No. ARB/81/2 (1983); Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. The Republic of Indonesia, ICSID Case No. ARB/81/1 (1984); See also Christoph Schreuer (1998), ‘Access to ICSID Dispute Settlement for Locally Incorporated Companies’, in Friedl Weiss, Erik Denters, Paul de Waart (eds.),
of foreign control. Finding that it lacked jurisdiction, the tribunal in *Vacuum Salt Products Limited v. Republic of Ghana* upheld the challenge by the state based on the second clause of Article 25(2) b and held that there were no “indications of foreign control of the Vacuum Salt so as to justify regarding it as a national of an ICSID Contracting State other than Ghana.” In *Tokios Tokelės v Ukraine*, Ukraine objected that Tokios Tokelės’ ‘true’ nationality, by reference to its predominant shareholders and managers, was Ukrainian rather than Lithuanian. Ukraine then asked the tribunal to pierce the investor’s corporate veil and disqualify it as a national of another country under Article 25 of the ICSID Convention. The tribunal concluded that there was no agreement between the parties to create an exception as provided under Article 25 (2) (b), as such, a nationality test based on the investor’s state of incorporation and the siege social applied in this case.

### 2.3.3. Jurisdiction and The Notion of Investments: Investment Treaties:

The notion of investments under most modern investment treaties is broader and more descriptive than under national investment legislations and under the ICSID Convention. Investments under these treaties are generally drafted to include “every kind of asset” or “any kind of asset”. This general description of investment is usually followed by a non-exhaustive and indicative list of rights. For example, Article 1(1) Germany - Philippines BIT defines investment as “any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State.” Article II of the 1987 Association of South East Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investments also provides that the “agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any

---

126 (ICSID Case No. ARB/92/1) Award, 16 February 1994
127 Id, para 54; 20 percent shareholding was found to be insufficient foreign control.
128 Decision on Jurisdiction, ICSID Case No. ARB/02/18, paras 42-52; See dissenting opinion of Prof. Weil, who was of the view that the majority of the shareholders were Ukrainian as such, the dispute did not qualify as a dispute between Ukraine and a foreign investor. See also *Wena Hotels Ltd v Arab Republic of Egypt*, Summary Minutes of the Session of the Tribunal held in Paris on May 25, 1999, ICSID Case No ARB/98/4, 41 I.L.M. 881, 886 (2002)
other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.”

An additional requirement found in many investment treaties is that to qualify as an investment, a transaction must be made in accordance with the laws of the host state and its regulations for the admission of investments. If a transaction is not made in accordance with the relevant laws or is not valid under the relevant domestic law, then it does not qualify as an investment. In the Plama award, even though the ECT did not state that investment must be made in accordance with any particular law, the Tribunal held that investment must not be contrary to domestic and international law. The good faith principle also plays an important part in the admission of a transaction as an investment under certain IITs. International and national law principles require parties to “deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage…” The Tribunal in Inceysa Vallisotetana S.L. v. Republic of El Salvador found that the concerned investment was not performed in good faith and could not benefit from protection of international rules provided for in the BIT.

2.3.4. Arbitral Award as Investment for The Purposes of Jurisdiction:

Recently, there have been discussions and rulings concerning whether an arbitral award qualifies as a protected investment subject to investment protections such as fair and equitable treatment and expropriation. The question here is whether the classification of an arbitration award as an investment is capable of triggering the jurisdiction of a tribunal.

---

130 See also Art XI of the Netherlands-Uganda BIT (1970); Art 2(1) of the Korea-Thailand BIT (1989).
131 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB 03/24, para. 138-139; See also World Duty Free Company Ltd. v. The Republic of Kenya, ICSID Case No. ARB/00/7, para. 188 and Fraport A.G Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, paras. 306-323 where investments were made contrary to host state laws.
133 ICSID Case No. ARB/03/26, Award of August 2, 2006
134 Id, paras. 230,243, 249; See also Plama Award, paras. 143-144; This good faith principle is noted to also govern legal rights and duties of persons wishing to seek international claims under a treaty, see Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, paras. 106-107. The investment was held not bonafide because the initiation and pursuit of arbitration was an abuse of the international investment protection regime under the BIT and under ICSID.
135 See Loukas Mistelis (2013), ‘Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement’, 28 (1) ICSID Review. In addition to the fact that an award is considered similar to a domestic court judgment, he notes that an international arbitration award is “de facto and dejure a judgment with transnational
In the *Saipem* case, the tribunal’s jurisdiction was conditioned upon the investor having made an investment within the meaning of the relevant BIT and ICSID. Bangladesh claimed that a dispute arising out of the ICC award is not a dispute arising directly from the original investment. The tribunal stated that the rights arising from ICC award arise “indirectly from the investment….the opposite view would mean that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, which the Tribunal is not prepared to accept”.\(^{136}\)

The tribunal while refusing to characterize an award as an investment, reasoned that the notion of investment under Article 25 (1) was all encompassing as to include all elements of the operation-the construction, Retention Money and the ICC award.\(^{137}\) As to whether the award was an investment under the BIT, the tribunal accepting that rights accruing from the award fall within the notion of ‘credit for sums of money’, concluded that the rights embodied in the award arise out of the contract. The award, according to the tribunal, “crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1 (1) (c) of the BIT”.\(^{138}\)

The finding and reasoning of the tribunal under ICSID and under the BIT was equivocal as it did not definitively or categorically state whether an award was an investment or whether it was not. The assumption of jurisdiction by the tribunal based on the reasons it offered evidences the wide discretion possessed by individual tribunals and the need for better-reasoned rulings by arbitral tribunals.\(^{139}\) The challenge with this decision is that it is likely to set precedents, even if not in a related matter, for other tribunals in taking on cases that should not be settled by arbitration. Ruling categorically that an award does not constitute an investment and challenging the ruling effect”. As to the ‘value’ of awards, he notes that awards embody economic and/or commercial value and may be “used as a basis for renegotiation of contracts or for the exercise of pressure to achieve legitimate commercial objectives”, pp. 7, 10

\(^{136}\) *Sapiem v Bangladesh*, ICSID Case No. ARB/05/07, para 113

\(^{137}\) id, para 114

\(^{138}\) id, para 127

\(^{139}\) See also *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan* sided with the *Saipem* reasoning on an award’s characterization as an investment, para 113; *White Industries Australia Limited v The Republic of India*, UNCITRAL Award, para 7.6.10, both decisions stating the award was a crystallization of the rights under the contract.
in *Saipem*, the tribunal in *GEA Group Aktiengesellschaft v Ukraine* held that an award is just a “legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement (neither of which was itself an “investment”). Chapter 5 of this work contains a discussion of this debate, especially with regards to the non-enforcement of arbitral awards, the interference by the courts with the enforcement proceedings of an award, and the review of these judicial acts by investment tribunals.

**2.3.5. Stretching and Limiting the Boundaries of Jurisdiction:**

Tribunals can ‘expand’ or ‘stretch’ the limits of their jurisdiction using various forms and standards such as- a breach of a contract violates a treaty, the umbrella clause, broad dispute resolution clauses and the most favored nation (MFN) clause. Regardless of the form or ‘technique’ used, there must still be a qualifying investment, a qualifying investor and a State party, even though a party may claim that a tribunal’s jurisdiction extends beyond the scope of disputes the parties agree to.

A limited number of investment treaties grant limited jurisdiction to arbitral tribunals and may provide for the jurisdiction of the host state court in the settlement of investments disputes. For example, a majority of Chinese investment treaties allow for ICSID arbitration only where a dispute involves “the amount of compensation for expropriation”. In the Chinese case, arbitration can also be used in all other cases as long as the parties to the dispute agree. In the absence of such agreements, the treaties direct the parties to the Chinese domestic courts.

---

140 ICSID Case No. ARB/08/16, para 163
141 Id., para 161
143 Zachary Douglas (2009), *The International Law of Investment Claims*, Cambridge University Press, p. 4
144 See the *Tza Yap Shum* Decision on Jurisdiction and Competence where the ICSID Tribunal determined that it was not limited to deciding only the amount due to an investor after an acknowledgement of expropriation, but that it could decide whether an expropriation occurred in the first place. By this decision, the Tribunal set a precedence with regards to Chinese BITs and such alike, that investors could directly seek relief in investment arbitration without first having recourse to domestic courts, *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, paras 150-157, 188; Article 8 (3) China-Peru BIT
145 Article 8(3) China-Peru BIT
Furthermore, under the Chinese investment treaty program, once an investor has commenced proceedings in the host state’s domestic courts, he is denied the right to international investment arbitration.146 Where the determination of the conduct of administrative agencies is in issue, recent Chinese BITs require that the parties exhaust an administrative review procedure.147

Still on the point of dispute resolution provisions of investment treaties, the investment chapter of the Australia-USA Free Trade Agreement (AUSFTA) excludes investment treaty arbitration and provides instead for state-state dispute resolution. The Australian government pointed to the fact that “both countries have robust and sophisticated domestic legal systems that provide adequate scope for investors, both domestic and foreign, to pursue concerns about government actions.”148 According to the United States, one of the reasons for not giving investors the right to direct claims against host states under investment arbitration was because of “their shared legal traditions, and the confidence of their investors in operating in each others’ markets…”149 However, the implementing legislations of the AUSFTA both in the United States and in Australia do not allow the domestic courts in both countries to hear claims under the AUSFTA.150 The result of this is that investors are drawn back to their governments to espouse their claims.151 Hence, the AUSFTA does not provide a good example of resolution of investment disputes by domestic courts.

2.4. The Competence Of Investment Arbitration Tribunals:

Competence is the authority of a tribunal to determine its own jurisdiction. The doctrine of Kompetenz-Kompetenz is the arbitral tribunal’s “power to be the ultimate arbiter of disputes

concerning the extent of those limited competences." Under ICSID arbitration, the Convention confers the authority on the tribunal to judge its own competence so as to determine whether it has jurisdiction over a specific dispute. Article 41 of the ICSID provides that (1) The Tribunal shall be the judge of his own competence (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to merits of the dispute. Article 23 (1) UNCITRAL contains a similar provision.

Professor Schreuer notes that the primary purpose of Article 41 ICSID

“is to prevent a frustration of the arbitration proceedings through a unilateral denial of the tribunal’s competence by one of the parties. This Article excludes the possibility for example of one State resorting to its domestic courts or to an Ad Hoc tribunal in order to deny an ICSID tribunal’s jurisdiction”. This is because the Article includes the tribunal’s power to interpret a party’s consent in the face of that party’s attempt to interpret it restrictively”. Viewed from another angle, since a tribunal decides its competence, tribunals have leeway to expand their jurisdiction in any given instance, if they choose.

This leeway was upturned by the decision of the D.C. Circuit Court in BG Group v. Argentina. On appeal by Argentina, the court concluded that the arbitration tribunal in this case exceeded its powers by permitting direct access to arbitration contrary to the parties expressed intention in providing for eighteen-month local litigation period. The court’s decision is a major deviation from the rulings of arbitral tribunals with respect to the eighteen-month local court

153 The Tribunal is authorized to declare its competence in interpreting the compromise, as well as the other Treaties which may be invoked, an in applying the principles of law.
155 BG Group v. Argentina Plc 665 F.3d 1363 1370-71 (D.C Cir. 2012)
A discussion of the Supreme Court decision follows where this work addresses the competence of courts to adjudicate international investment disputes. The D.C Circuit court’s decision highlights the fact that domestic courts possess a lot of power with regards to the review of non-ICSID award. This strengthens the call for judicial education, cooperation between the two systems on set standards of review so as to contribute to an emerging doctrine.

2.5. The Jurisdiction and Competence of Domestic Courts:

The authority of domestic courts to adjudicate international investment disputes may be found in different provisions of investment treaties such as the exhaustion of local remedies, the local litigation requirement, the fork-in-the-road clause, whereby a choice of one forum precludes the party from utilizing the other forum, and the dispute resolution clause. Chapter 3 of this thesis contains an analysis of these provisions with regards to the intersection between the authority of domestic courts and investment arbitration tribunals. The authority for domestic courts can also be found in investment contracts/agreements and in investment laws of host states. Additionally, domestic courts play support roles in international investment arbitration. In non-ICSID arbitrations, they have wider roles than under ICSID arbitration as courts can review awards. In ICSID arbitration, their role is limited the enforcement of arbitral awards.

The doctrine of Kompetenz-Kompetenz is applicable only to arbitral tribunals. A court may however, determine its own jurisdiction when a case is presented to it prior to the start of an arbitration. With regards the determination of the competence of a tribunal by a court, in the recent BG Group v. Argentina case, the question before the US Supreme court was “who—court or arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy? The Supreme Court, applying ordinary contract

---

156 In tribunal rulings with respect to the eighteen-month local court requirement, the tribunals in making their findings have relied on the BIT’s most-favored-nation clause (MFN) to import provisions that do not contain the eighteen-month requirement and proceed directly to arbitration. The BG Group tribunal however did not rely on the MFN clause. See Maffezi, ICSID Case No. ARB/97/7, 1 September 2000; Siemens v. Argentina, ICSID Case No. ARB/028, Decision on Jurisdiction, 3 August 2004; National Grid plc v. Argentina, UNCITRAL, Decision on Jurisdiction, 20 June 2006
159 572 U.S (2014)
principles, overruled the decision of the DC Circuit and held that under the Argentina–UK BIT,\textsuperscript{160} the tribunal, and not the court has competence to decide whether the preconditions to arbitration have been satisfied. The court reasoned that the local litigation clause in the BIT was a procedural prerequisite to commencing a particular arbitration and not a precondition to Argentina’s initial consent to arbitration.\textsuperscript{161} The BIT requires a claimant to bring arbitration claims arising under the treaty to Argentine courts before pursuing arbitration. When a dispute arose, BG Group, the claimant, disregarded this precondition and proceeded directly to arbitration to claim violations of the BIT resulting from measures taken by Argentina against its investments. The tribunal awarded BG Group $185 million in damages. Argentina challenged the award before the US District court on the basis that the arbitral tribunal exceed its powers by ignoring the provision which required litigation before Argentine courts. That challenge was unsuccessful. However, the US Court of Appeals for the DC Circuit reversed the finding of the tribunal, ruling that the court, and not the tribunal could decide whether a claimant can waive the local litigation requirement and proceed directly to arbitration. The case was appealed to the Supreme Court. The majority of the court concluded that the tribunal’s determination was entitled to deference and reinstated the award.

In his dissenting opinion, Roberts C.J, emphasized the weight to be given to an Argentine court’s authoritative construction of Argentine law, rendered in the same dispute. He went on the list the benefits of local litigation before the dispute reaches arbitration. They include—litigation before the courts could help to

“narrow the range of issues that remain in controversy by the time a dispute reaches arbitration. It might even induce the parties to settle along the way. And of course the investor might prevail, which could likewise obviate the need for arbitration”\textsuperscript{162}

\textsuperscript{160} The provision authorizes either party to submit a dispute “to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made,” i.e., a local court. Art. 8(1). And it provides for arbitration“(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal . . . , the said tribunal has not given its final decision; [or] “(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute.” Art. 8(2)(a).The Treaty also entitles the parties to agree to proceed directly to arbitration. Art. 8(2)(b).

\textsuperscript{161} Part of arbitral tribunal’s conclusions was that new laws enacted by Argentina hindered recourse to courts and excused failure of BG to comply with Article 8 of the BIT.

He interpreted the local litigation requirement as a condition on consent to arbitrate and as such, the court had authority decide de novo and not the arbitral tribunal. 163 The Solicitor General in his Brief for the United States as Amicus Curiae argued that the local litigation provision is a condition on the State’s consent to enter into an arbitration agreement. 164 He stated that the court ought to “review de novo the arbitral tribunal’s resolution of objections based on an investor’s non-compliance” with such a condition. 165 Finally, he recommended that the Supreme Court remand the case to the Court of Appeals to determine whether the court-exhaustion provision is such a condition. 166 To an extent, the Supreme Court’s decision is consistent with findings by arbitration tribunals interpreting the eighteen-month litigation period. 167 This decision shows the deference courts are willing to accord the investment arbitration tribunals and their interpretation of the litigation period as a precondition to arbitration instead of consent to arbitration. In that regard, it also allocates competences with respect to interpreting ‘preconditions’ contained in BITs. Again, it should be noted that these types of outcomes are only available to non-ICSID awards as ICSID awards are not subject to review by national courts but by the ICSID annulment procedure.

In conclusion, the wide usage of investment arbitration indicates to an extent, the intention of the parties to have little to do with domestic court systems. Yet, certain arbitration models, especially the non-ICSID system carve out a little more roles for domestic courts. Even investment treaties presumably support court roles in the adjudication of investment disputes. These and more create a basis for cooperation between the two forums for the settlement of investment disputes. Additionally, the basic and foundational system of investment arbitration point to the fact that the furthering of domestic systems, in this case, the development of courts and cooperation with courts, was intended. With regards to the jurisdiction and competence of domestic courts and investment tribunals, careful coordination of competencies is proposed so as to ensure the effective resolution of disputes. Domestic courts are pertinent for the functioning of

163 Id., p. 13. Because an arbitrator’s authority depends on the consent of the parties, the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented. Where the consent of the parties is in question, “reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.” Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), 83-84
164 BG Group Plc v Argentina, Brief For The United States As Amicus Curiae In Support Of Vacatur And Remand
165 Id, p. 25
166 Id, p. 31
investment arbitration. In the case where resort to domestic courts is required before going to investment arbitration, the aim may be to settle claims of a public nature before the courts of the host state under which the claims arose and give domestic courts an incentive to render independent and impartial decisions thus promoting the rule of law. The promotion of the rule of law also promotes investor and state confidence in the international investment arbitration resolution process because domestic courts are a necessary part of that process. The encouragement of the rule of law in domestic courts with regards to investment disputes also gives further credibility, legitimacy and integrity to the process.  

169 Id., p. 370
Chapter 3: Domestic Courts And Investment Tribunals: Necessary Collaborators Or Festering Partners

Investment arbitration was mainly conceived as a process to take the resolution of investment disputes beyond the realms of host state judicial processes. However, domestic courts continue to play pertinent roles in the adjudication of investment disputes, especially in non-ICSID and ICSID Additional Facility arbitration. In some cases, the roles played by courts are carved out for them in investment treaties, in arbitration clauses of concession contracts or in investment protection and promotion laws of a state. In some cases, the roles of courts are clear and actually aid the arbitration process. Often times, these ‘carve-outs’ are subject to various interpretations by arbitral tribunals and domestic courts and can be either a source of friction between the two forums, or signal cooperation between them. Other times, domestic courts and investment tribunals engage in jurisdictional clashes as to the proper forums for resolving investment disputes.

This chapter identifies key instances of interaction between domestic systems and the international investment system by examining the support roles actually or potentially played by courts. The interference by domestic courts in investment arbitration and enjoinder from domestic judicial proceedings by arbitral tribunals is examined in order to determine the effect of those measures on the investment arbitration process and states. Preconditions to investment arbitration are analyzed in this chapter with a view to determining which interpretation of the provisions containing such preconditions balances the concerns and interests of the investor, the state and the overall process of investment arbitration. Finally, the competition between investment arbitration tribunals and domestic courts is addressed also so as to determine ways in which healthy cooperation and coordination between domestic courts and investment tribunals can be furthered. Concrete examples of interaction are examined and those instances of positive interactions, increased cooperation and coordination between and among domestic and international systems are identified. The role played by domestic courts in investment arbitration is typically a function of interpretation and how courts view themselves in relation to the investment arbitration system. The acts of investment tribunals that affect domestic courts and arbitral responses to domestic court acts are also indicative of how tribunals characterize
domestic courts in the field of international investment arbitration. At the end of the day, the investment arbitration system needs both domestic courts and arbitration tribunals to thrive hence, careful coordination of competencies and relationship between the two systems is urged and promoted.

3.1 Court Involvement In Aid Of Arbitration:

“The great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself.”

Despite the major transfer of competences from domestic courts to international tribunals in the settlement of investment disputes, courts still have limited but significant support roles to play in the investment arbitration process especially as with regards issuing injunctions in aid of arbitration and the enforcement of awards.

3.1.2 Interim Measures By Domestic Courts:

Interim measures are grants of temporary relief intended to protect parties’ rights pending final resolution of a dispute. Interim, provisional or conservatory measures ordered by domestic courts are common in international arbitration. Article 26(9) of the UNCITRAL Arbitration Rules as revised in 2010 provides that

---

170 “In order to have an effective system of international arbitration, it is necessary to have an inter-linking system of national systems of law, so that- for example- the courts of Country A will enforce an arbitration agreement or an arbitral award made in Country B”, see Nigel Blackaby et al (2009), *Redfern & Hunter on International Arbitration, Oxford University Press*, p. 29; see also p. 439


172 A distinction is made between ICSID awards on one hand and ICSID Additional Facility (AF) awards and non-ICSID awards on the other hand. ICSID awards are not subject to domestic court review, while ICSID AF and non-ICSID awards are subject to the authority of domestic courts.


174 Id, p. 7; Article 26(2) of the 2010 UNCITRAL Rules defines an interim measure as any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement”.

Similarly, the ICSID Additional Facility Rule 46(4) states

“The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.”

Generally, these measures are support measures issued by domestic court in aid of international investment arbitration. Domestic courts can order interim reliefs or conservatory measures such as the preservation of evidence, maintaining status quo, or maintaining the rights of parties to arbitration.

Formerly, ICSID tribunals had exclusive jurisdiction to issue provisional measures. A revision to Arbitration Rule 39 settled the uncertainty surrounding whether tribunals had exclusive jurisdiction to issue provisional measures. The new Rule 39 provides that the parties may agree to request

“any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests.”

This provision extends the jurisdiction to issue provisional measures to domestic courts only when parties have agreed to them in the instrument recording their consent to arbitration.


176 See old Rule 39 ICSID Rules


178 Amendment of 26 September 1984 (para. 5 under the 1984 amendment), see I ICSID Reports 171; Renumbered para 6 in 2006.

179 See Christoph Schreuer (2009), pp. 372-376 for the role of domestic courts in international investment arbitration; see Lawrence Collins (1994), Essays in International Litigation and the Conflict of Laws, Oxford University Press, pp. 75-79; see also Lucy Reed et al. (2010), Guide to ICSID Arbitration, 2nd Edition, Kluwer Law International, pp. 22, 144-149; Note that the provisions of Article 26 do not apply to arbitrations under the Additional Facility Rules. Under the Additional Facility Rules 47 (4)
3.1.3 Enforcement Of Awards

This part is limited only to the identification of the support role of courts in enforcement of awards, and makes a distinction between enforcement of ICSID and non-ICSID awards. The execution of awards, which raises issues of sovereign immunity, is outside the scope of this work.

At the enforcement stage, domestic courts play a vital role. Under the ICSID system, Article 53 of the ICSID Convention provides that an ICSID award is final and not subject to review by domestic courts, and Article 54 of the ICSID Convention provides for recognition, enforcement and execution of awards. These two provisions when taken together, has been suggested as requiring a high level of deference by domestic courts to ICSID awards.

---

180 “It is essential to the efficient functioning of the arbitral process, and the realization of the parties’ objectives in agreeing to arbitrate, that national courts give effect to such agreements and provide support for the arbitral process”, see Gary Born (2009), *International Commercial Arbitration*, Kluwer Law International, p. 41

181 See Andrea Bjorklund (2011), ‘*State Immunity and the Enforcement of Investor-State Arbitral Awards*’, Christina Binder, Ursula Kriebaum, August Reinsch, Stephan Wittich (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press; Lucy Reed et al. (2011), pp. 185-190, where they distinguish between recognition and enforcement from execution of award. They note that the ICSID Convention offers no insulation from review when awards are executed against specific assets. The Convention does not obligate states to execute ICSID awards in circumstances where an equivalent final judgment of its own court cannot be executed. The national law on sovereign immunity from execution may be controlling in such cases. See Art. 54(3) and Art. 55 ICSID Convention which states that “nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any State from execution”; Stanimir Alexandrov (2009), ‘*Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*’, in Christina Binder, Ursula Kriebaum, August Reinsch, Stephan Wittich (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, p. 322

182 Article 54 ICSID Convention provides that “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territory as if it were a final judgment of a court in that State.”

The enforcement of non-ICSID awards issued in the territory of any state party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) benefits from the provisions of that Convention. Article III of the New York Convention provides for the recognition of arbitral awards as binding and for their enforcement in accordance with the rules of procedure of the territory where the award is relied upon. Article V of the New York Convention lists the grounds on which domestic courts can refuse to enforce awards. Domestic courts may also refuse recognition if the subject matter of the difference is not capable of settlement by arbitration under the law of the domestic court country, or if recognition and enforcement would be contrary to the public policy of that country. The language of the New York Convention is permissive and there is a presumption that the courts have the discretion to enforce an award even if one of the conditions listed in Article V exists. Domestic court enforcement of investment awards support arbitration tribunals because they give effect to awards issued by tribunals. This makes the role of domestic courts very fundamental to especially the non-ICSID investment arbitration process. Again, the discretion applied by courts and how courts interpret cases before them will turn on how the court views itself in relation to the investment arbitration system- as collaborator, partner or otherwise.

It has been shown that a majority of awards are complied with without problems. In a 2008 Survey on corporate attitudes towards recognition and enforcement of arbitral awards and settlement in international arbitration, it was found that non-prevailing parties complied with the

---

184 (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the awards was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where, the arbitration took place; or (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

award in approximately 90% of the cases.\textsuperscript{186} It would be interesting to see the results of the survey (Arbitral Award Enforcement Survey) carried out by Institute for Transnational Arbitration. The results will be presented in June 2014 (after the completion of this thesis).

With regards to the relevancy of domestic courts, Lew notes that

“….international arbitration can be envisaged as a giant squid which seeks nourishment from the murky oceanic world where the domain of international arbitration and national jurisdiction meet. One might therefore speak of the international arbitration process as stretching its tentacles down from the domain of international arbitration to the national legal systems to forage for legitimacy, support, recognition, and effectiveness.”\textsuperscript{187}

Further, he states that

“….if national courts refuse to provide the nourishment and sustenance sought at the right time and in the right place, the giant squid of international arbitration might be forced into shallower waters, where it will inevitably find itself in peril.”\textsuperscript{188}

In sum, the international investment arbitration system needs the support of domestic courts to successfully operate, therefore effective coordination and nurturing is advised.

3.2 Judicial And Arbitral Interferences:

Domestic courts and arbitral tribunals can exercise authority and powers over each other before a final judgment or award is made. Anti-arbitration and anti-suit injunctions can be issued by courts and tribunals respectively, in exercise of their power over each others jurisdiction.\textsuperscript{189} One purpose for anti-suit/anti-arbitration injunctions is to prevent parallel proceedings, that is, to

\textsuperscript{187} Julian Lew (2008-2009), p. 493
\textsuperscript{188} Id., p. 537 (noting that arbitrators and parties must accord due respect to national courts, as national courts ultimately hold the keys to recognition and enforcement)
prevent parties from simultaneously pursuing litigation or arbitration involving the same parties and the same claims in two different jurisdictions or forums. More importantly, these injunctions are issued where an action by another court or tribunal would occasion harm or prejudice the judicial or arbitral process.

3.2.1 Anti-Arbitration Injunctions:

When courts issue anti-arbitration injunctions, they enjoin parties from arbitration proceedings. Some of the reasons a court may issue anti-arbitration injunctions include a situation where a party initiates arbitral proceedings in the wrong place or with the wrong institution, if arbitration is begun in the absence of a valid arbitration agreement or where it is absolutely clear that the arbitration proceedings have been wrongly brought. Before the commencement of arbitration anti-arbitration injunctions can be used to prevent the tribunal from being established. After proceedings have begun, anti-arbitration injunctions can be issued to stop arbitration in its tracks. These injunctions can be directed against the parties alone, and in cases where the court has jurisdiction over arbitrators, injunctions can also be directed against them. The relevant questions in this portion are- whether courts have the power to issue anti-arbitration injunctions, the extent courts are willing to issue anti-arbitration injunctions and the possible repercussions to states for the issue of such orders by their state courts.

3.2.1.2 Domestic Court Support: Refusal to Issue Anti-arbitration Injunction:

Court support and respect for investment arbitration is evidenced by the refusal of some courts to issue anti-arbitration injunctions prohibiting parties from arbitration proceedings. In most cases,

---

190 It should be noted that the jurisdiction of arbitral tribunals do not specifically preclude the pursuit of related claims in national courts. In fact, because of the overlap between contract and treaty claims, tribunals have favored parallel claims by refusing to yield to contractually agreed dispute settlement provisions; see Gus Van Harten (2013), *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*, Oxford University Press

191 See Stacie Strong (2014), *Anti-Arbitration Injunctions in Cases Involving Investor-State Arbitration: British Caribbean Bank Ltd. v. Government of Belize*, 15 Journal of World Investment and Trade, Issue 1-2, 324, footnote 3; See also *Attorney-General v. Mobil Oil NZ Ltd.*, High Court, Wellington, 1 July 1987, 4 ICSID Reports 117, where a court in New Zealand stayed the court case pending a determination by the ICSID panel of its jurisdiction to hear the case. The court noted the exclusive jurisdiction of ICSID under the Convention and the authority of the arbitrators to rule on their own jurisdiction.


193 Id., p. 499
these courts have interpreted investment treaties and international investment agreements such as the New York Convention in favor of arbitration. International law doctrines such Kompetenz-Kompetenz have also been recognized by these courts as giving arbitrators the power to determine their jurisdiction rather than courts.

In 2013, the Caribbean Court of Justice vacated an injunction ordered by a Belizean court in the case of British Caribbean Bank Ltd. v. Belize.\(^{194}\) The case arose when the government of Belize took certain measures to compulsorily acquire foreign-owned interests in the telecommunications sector. Loan and mortgage debenture facilities held by British Caribbean Bank (BCB), a Turks and Caicos company that owned investments in Belize, were part of the government’s acquisition. At the time of the compulsory acquisition, payment of both principal and interest ceased and BCB received no other form of compensation. In 2011, the legislation authorizing the initial acquisition was held unconstitutional, but the Government of Belize enacted a constitutional amendment to reacquire the telecommunications properties in question. These measure prompted BCB to challenge the constitutionality of these measures in the Belize courts. BCB also commenced arbitration proceedings alleging a violation of the U.K-Belize BIT (applicable to it on the basis of an agreement to extend the BIT to the Turks and Caicos, a U.K. dependency) On the basis of the BIT, an UNCITRAL tribunal was constituted to hear the claims raised by BCB. The government of Belize did not participate in the arbitration rather it sought to enjoin the proceedings contending that it would be vexatious or oppressive to pursue those proceedings simultaneously with the domestic proceedings regarding the constitutionality of the acquisition legislation and compensation and the validity of the loan and mortgage facility. In 2010, it obtained an injunction from the Supreme Court of Belize restraining BCB from proceeding with the UNCITRAL arbitration. The court was of the view that “resolution of the disputes through the domestic courts was preferable” to investment arbitration.\(^{195}\) The court ordered that the injunction remain until the completion of the related domestic cases.

The Belizean Court of Appeal upheld the injunction, holding that although a right to arbitrate existed under the BIT, the UNCITRAL/BIT claims should not be allowed to proceed until the until the hearing and determination of the substantive claim or further order. In the view of the

\(^{194}\) [2013] CCJ 4 (AJ)

\(^{195}\) Id, para. 11
majority, the right to arbitrate needed to “ripen” by the completion of the proceedings in the domestic courts.\textsuperscript{196}

On appeal to the Caribbean Court of Justice (CCJ)\textsuperscript{197}, the main issue for the court to determine was - whether the BIT provided BCB with an unqualified or indefeasible right to proceed to international arbitration; whether there was any sufficient basis for the grant of the injunction to restrain the arbitration.\textsuperscript{198} The court stated that

“the right to commence the arbitral proceedings that BCB seeks to exercise arises from a legally binding agreement by the state of Belize to submit to arbitration….. It gives rise to an autonomous procedure through which BCB may vindicate rights under international law which are distinct and separate from rights vested as a matter of domestic law.”\textsuperscript{199}

Further, the court noted that

“…the courts of Belize do have and retain the jurisdiction to restrain international or foreign arbitral proceedings which are oppressive, vexatious, inequitable, or would constitute an abuse of the legal process….In this sense there is no unqualified or indefeasible right to arbitrate. Equally, however, there is no requirement to exhaust local remedies before exercising the right to arbitration. Under the doctrine of kompetenz-kompetenz\textsuperscript{200}, the arbitrators are competent to determine their jurisdiction although the effective exercise of that jurisdiction remains subject to the inherent competence of the court to decide, in relation to an injunction to restrain international arbitration, whether a particular dispute falls within the scope of the arbitration agreement.”\textsuperscript{201}

According to the court, the intrusion of the Belizean courts into the matter proceeded under an erroneous interpretation of the BIT and was inconsistent with the doctrine of Kompetenz-Kompetenz, under which arbitrators can make a determination of their jurisdiction. The CCJ cautioned on court interference with arbitration, especially as the parties have contracted to arbitrate their disputes\textsuperscript{202} and noted that “the approach to modern arbitration agreements

\textsuperscript{196} See para. 12.
\textsuperscript{197} CCJ has taken over the appellate function formerly exercised by the Privy Council with respect to certain member states of the Caribbean Community and Common Market (CARICOM).
\textsuperscript{198} CCJ judgment, para 13
\textsuperscript{199} Id., para 22
\textsuperscript{200} Used interchangeably with the term “competence-competence”
\textsuperscript{201} CCJ judgment, paras 23, 53
\textsuperscript{202} Id., para 37
contained in investment treaties is for the court to support, so far as possible, the bargain for international arbitration. Belizean cases have affirmed that it is “only with extreme hesitation” that the court will interfere with the process of arbitration”. Hence, on the basis of the principles set out in the Elektrim SA case\(^\text{203}\), the court held that the conduct of BCB in relation to this action did not support a conclusion of vexatious or oppressive conduct.\(^\text{204}\) It also noted that the issues in dispute in the BIT proceeding were qualitatively different from those in the local Belize courts.\(^\text{205}\) Accordingly, the anti-arbitration injunction was vacated, and the BIT arbitration resumed.

From the decision of the CCJ, it is evident that common law courts, when presented with the opportunity, will always either assert or affirm their power to issue anti-arbitration injunctions, albeit under very restrictive conditions.\(^\text{206}\) However, the interpretation of the BIT\(^\text{207}\) and the decision by the CCJ demonstrates the proper perception of a domestic court vis-a-vis its role in investment arbitration. The reasoning of the court and its understanding of international law concepts is such as to encourage the cooperation and coordination of the roles of courts and tribunals in the resolution of investment dispute. The tribunal’s recognition that arbitrators have the competence to determine their own jurisdiction under the doctrine of *Kompetenz-Kompetenz* and that arbitrators have the power to decide whether to stay arbitral proceedings pending the outcome of any related domestic actions is commended.\(^\text{208}\)

In the United States, a similar reaction was shown by the court in *Republic of Ecuador v Chevron Corp.*\(^\text{209}\) Even though the court declined to decide whether the Federal Arbitration Act (FAA) provides the authority to enjoin arbitration, the decision of the second circuit to decline the request to issue an anti-arbitration injunction is commendable. In that case, Ecuador sought to enjoin UNCITRAL arbitration seated in The Hague on the theory that Chevron had waived its

\(^{203}\) [2007] EWHC 571 (Comm). In *Elektrim SA v Vivendi Universal SA* and others the court held that there were only two bases on which an injunction to restrain an international arbitration could be granted: “First, if the proceedings are an infringement of a legal or equitable right of a party; secondly where those proceedings are vexatious, oppressive unconscionable. The first analysis is usually applied to cases where the parties have contractually agreed to submit disputes to a particular court or arbitration and one party has started proceedings in breach of that agreement. The second analysis applies where there is not such agreement but the court concluded that the ends of justice require an injunction to restrain foreign proceedings that are vexatious or oppressive.”

\(^{204}\) CCJ judgment, para 49

\(^{205}\) Id., paras 45, 46

\(^{206}\) Id., paras 23-28 and references to United Kingdom (UK) legislation and Canadian and UK case law. S. Strong (2014) cautions that this approach is somewhat unpredictable and potentially open to abuse.

\(^{207}\) Id., para 15, “…The bilateral investment treaty was developed to remedy the vulnerability of the foreign investor and ameliorate the conditions of their investments and the success of the treaty regime depends upon the acceptance and fulfillment by the host state of the legal obligations imposed by the treaty.” See also para 19 on incorporation of BIT into domestic law.

\(^{208}\) Id., para 23

\(^{209}\) 638 F.3d 384 (2d Cir. 2011)
right to arbitrate when it agreed to litigate in Ecuadorian courts. The second circuit noted the strong US policy favoring arbitration, in particular arbitration falling under the New York Convention. It ultimately concluded that a stay was unnecessary, but it declined to ‘resolve the question of whether federal courts have the power to stay arbitration under the FAA (or any other authority) in an appropriate case’. According to the court, it ‘is an open question in our Circuit’.210

3.2.1.3. Domestic Court Grants of Anti-Arbitration Injunctions211:

While many domestic legal systems favor arbitration and accord deference to parties’ intentions to arbitrate their disputes, a number of courts, especially in developing nations, are more disposed to issuing anti-arbitration injunctions as a means to either exert their authority or jurisdiction to resolve the disputes in question, or the assist the state party evade resolving its dispute before investment tribunals.

The tribunal in *Himpurna California Energy Ltd. v. Republic of Indonesia*212 rendered an award in favor of Himpurna California Energy against the Indonesian State-owned electricity company for failure to observe an obligation to purchase electricity from them. When the state company failed to satisfy the award, Himpurna initiated arbitral proceedings under UNCITRAL Rules with the seat of arbitration in Jakarta, Indonesia. The proceeding was against the Republic of Indonesia, on the basis that the Indonesian Minister of Finance had pledged to ensure the state-company’s performance. Indonesia sought annulment of the substantive awards before Indonesian courts, while Pertamina, an Indonesian state-owned-company, sought an injunction to suspend the pending arbitration. The District Court of Jakarta issued an anti-arbitration injunction ordering the suspension of the UNCITRAL proceedings.213 The order also included a fine of USD 1 million per day if the arbitration proceeded in breach of the injunction. The UNCITRAL tribunal moved the hearing to The Hague and proceeded with the arbitration.214 Indonesia, and not

---

210 Id., p. 391
211 See anti-arbitration injunction issued by Tanzanian court after the cut off date for this study. The injunction was issued to prevent compliance with an ICSID decision. *Standard Chartered Bank v Tanzania Electric Supply Company Limited*
212 *Himpurna California Energy Ltd. v. Republic of Indonesia. (2000) 25 Yearbook of Commercial Arbitration, 109 (Interim Award, 26 September 1999); Final Award of 16 October 1999*
214 Procedural Order of 7 September 1999, reproduced in the Interim Award, 73
Pertamina, then sought an injunction from the District Court of The Hague on the grounds that appearing in the arbitration would be a breach of the injunction issued by the Indonesian court, and thus would expose it to the penalty imposed by that court. The Dutch court refused to grant an injunction stating that Indonesia was entitled to appeal the Indonesian injunction.\(^{215}\) In its interim award, the UNCITRAL tribunal stated that the main issue in the case was not the consideration of the ‘relative allocation of authority between courts and arbitrators’, rather the main issue was whether by virtue of the anti-arbitration injunction, Indonesia could resist participation in the UNCITRAL proceedings.\(^{216}\) The tribunal found that the decision of the Jakarta court was imputable to Indonesia as a matter of state responsibility, as such Indonesia could not rely on it as a valid excuse for non-performance of its agreement to arbitrate.\(^{217}\) In its final award, the truncated tribunal\(^ {218}\) rendered an award in favor of Himpurna.

Following a dispute, which arose out of the breach of a water sewerage, and transmission contract, between Salini and Addis Ababa Water and Sewerage Authority (AAWSA), Salini instituted ICC arbitration\(^ {219}\). The seat of arbitration was in Ethiopia, but for convenience, the hearings were held in Paris. AAWSA challenged the tribunal before the ICC Court of Arbitration for holding meetings other than at the seat. That challenged failed as the Court found that the tribunal was acting in accordance with the Terms of Reference. AAWSA filed an appeal from the ICC Court to the Addis Ababa Court of Appeal. The Court of Appeal issued a temporary injunction suspending the arbitration pending the determination of the appeal. AAWSA also obtained an injunction from the Federal Court of First Instance in Ethiopia.\(^ {220}\) The ICC tribunal proceeded stating that it was not restrained by the injunctions.\(^ {221}\) By consenting to ICC arbitration, the parties had agreed that challenges to the arbitrators would be finally dealt with by

---


\(^{216}\) *Himpurna Interim Award*, paras. 105-107

\(^{217}\) Id., paras. 169-183

\(^{218}\) One of the arbitrators was Indonesian and did not participate in the hearing in The Hague. He later said that after his arrival to The Hague, he was prevented by Indonesian officials from participating in the hearing.


\(^{220}\) Frédéric Bachand (2005), ‘Must an ICC Tribunal Comply With an Anti-Suit Injunction Issued by the Courts of the Seat of Arbitration?’ 20 (3) MEALEY’S INT’L ARB. REP. 16, p. 47

\(^{221}\) Salini, footnote 219, para. 124
the ICC Court, and that under the Kompetenz-Kompetenz principle, the arbitrators had jurisdiction to rule on their jurisdiction.\textsuperscript{222}

Anti-arbitration injunctions have also been issued where the courts have a weak understanding of international law principles, thereby leading to faulty interpretation. In \textit{Hub Power Co. (HUBCO) v. Water & Power Development Authority of Pakistan (WAPDA)}\textsuperscript{223} a dispute arose out of a Power Purchase Agreement (PPA) concluded between HUBCO and WAPDA, a Pakistani state-owned company. HUBCO had obtained an injunction from the Sindh High Court restraining WAPDA from seeking to resolve the dispute through any other means except through ICC arbitration, WAPDA on the other hand, had appealed the Sindh High Court decision and the Division Bench issued an injunction restraining HUBCO from pursuing the arbitration. On appeal before the state Supreme Court, it stated that the question before it was whether the dispute was arbitrable as it involved matters of criminality.\textsuperscript{224} The court upheld the anti-arbitration injunction and held that matter was not arbitrable as it concerned matters of criminality.\textsuperscript{225} It therefore ordered that HUBCO desist from pursuing arbitration before the ICC and bring its claims before the Pakistani courts.\textsuperscript{226} The dissenting opinion concluded that the ICC arbitration should have been allowed to proceed stating that the courts finding breached the principle of separability of arbitration. This evidences perhaps a poor grasp of international investment law principles by domestic courts because under the doctrine of separability, the agreement to arbitrate contained in an arbitration clause is regarded as a separate agreement from the rest of the contract, regardless of the commission of corrupt practices by the parties in procuring amendments to their contract. Judicial education and awareness of the basic principles of international arbitration is pertinent because the enforcement of arbitration agreements is under the power of courts to and they must rightfully apply the concepts of separability and the arbitrability of disputes in order to determine the validity of an arbitration agreement.

\textsuperscript{222} Id, para 159-160
\textsuperscript{223} The Hub Power Co. v. Pak. WAPDA & Federation of Pakistan, 16 ARB. INT'L 439, 456-58 (2000)
\textsuperscript{224} Id, para 447
\textsuperscript{225} Id, para 456-458
\textsuperscript{226} Id, para 459; (Jehangiri J., dissenting, Rehman Khan J. concurring) (agreements); See also \textit{KBC v Pertamina}, 364 F 3d 274 (5th Cir, 2004), where anti-arbitration injunction was sought by a loosing party as a means of obstructing the enforcement of an award.
In another case involving a Pakistani court, an order was issued preventing the claimant from commencing, proceeding or taking any action in connection with ICSID arbitration. The ICSID tribunal proceeded with the arbitration notwithstanding the injunction. The SGS v Pakistan dispute arose out of a contract for the assessment of customs duties payable on goods imported into Pakistan. The contract contained an arbitration clause providing for arbitration in Islamabad under the Pakistani Arbitration Act. When the dispute arose, SGS first initiated court proceedings in Switzerland, claiming it could not rely on the arbitration clause in the contract because it feared it would not receive fair hearing in Pakistan. When the Swiss courts denied SGS’s request, it commenced ICSID proceedings on the basis of the Pakistan-Swiss BIT. The Supreme Court granted Pakistan’s request to proceed with the arbitration under the Arbitration Act pursuant to the contract on the ground that neither the ICSID Convention nor relevant BIT had been implemented into Pakistani law. The Government of Pakistan then sought an order from its courts to enjoin SGS from proceeding with the arbitration on the basis that the arbitration agreement contained in the underlying contract provided for local arbitration in Pakistan. The Supreme Court of Pakistan granted Pakistan’s request, finding that the BIT did not bind Pakistan. The ICSID Tribunal disregarded the effect of this order and ordered that Pakistan take all steps to inform the [Pakistani] Court of the current standing of the proceeding and of the fact that the Tribunal must discharge its duty to determine whether it has the jurisdiction to consider the international claim on the merits. It further recommended that the local arbitration initiated in Pakistan be stayed until such time as the Tribunal could determine in a final manner whether or not it had jurisdiction.

3.2.1.4. Potential Consequences of Issuing Anti-Arbitration Injunctions:

These injunctions restraining a party from proceeding with international arbitration have been termed ‘arbitral terrorism’ and also identified as ‘guerilla in nature’. The term ‘arbitration terrorism’
“[t]he contractual right of an alien to arbitration of disputes arising under a contract to which it is party is a valuable right, which often is of importance to the very conclusion of the contract." Therefore, any “[v]itiation of that right” through court interference “attracts the international responsibility of the State of which the issuing court is an organ.”

As for the potential consequences of issuing anti-arbitration injunctions, the Himpurna tribunal found that the court judgment was attributable to the state as legislation. The tribunal also called it a

denial of justice for a court of a state to prevent a foreign party from pursuing its remedies before a forum to the authority of which the state consented, and on the
availability of which the foreigner relied in making investments explicitly envisaged by that state.”

With the ingenuity of the lawyers structuring claims for investors and the flexibility of arbitration tribunals, where state parties employ anti-arbitration injunctions as a tactic to derail or delay arbitral proceedings, there is a possibility that such an action by the state could amount to a violation of a BIT obligation and could even result in a sanction. If the anti-arbitration injunction can be seen as a violation of treaty obligation or a breach of the arbitration agreement, tribunals could, perhaps in the future, sanction the state party for such delay by imposing damages. The 2012 White & Case/Queen Mary International Arbitration Survey indicates many respondents believe that improper conduct by a party or its counsel during the proceedings [improper conduct could include seeking anti-arbitration injunctions] should be taken into account by the tribunal when allocating costs. The Survey notes that “This sends a strong message to arbitrators that they are expected to penalize improper conduct when allocating costs.”

Additionally, assuming the ICC arbitration was stalled or the injunctions amounted to serious interferences, in the Salini case, there may be the possibility of the claimants bringing a claim before an ICSID tribunal, claiming that it was denied the effective means to resolve its dispute or perhaps an expropriation claim. The ICC tribunal in that case held that

“In effect, there is no difference between a state unilaterally repudiating an international arbitration agreement or changing its internal law in an attempt to free itself from such an agreement, on the one hand, and a state going before its own courts to have the arbitral proceedings suspended or terminated (whether on the basis of alleged nullity of the arbitration agreement, alleged bias on the part of the arbitral tribunal, or some other

---

235 Id, para. 184
236 See the Decision of the Swiss Supreme Court (4A_232/2013 of 30 September 2013) even though it was not an investment arbitration, the possibility that this could happen is high; See Lucy Reed (2013), ‘Sanctions Available for Arbitrators to Curtail Guerrilla Tactics’, in Gunther J. Horvath and Stephan Wilske (eds), Guerrilla Tactics in International Arbitration, International Law Library, Volume 28 (Kluwer Law International), Chapter 2, 93-102
237 White & Case, Queen Mary University of London School of International Arbitration, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 41
238 For example see Saipem SpA v Bangladesh, ICSID Case No. ARB/05/7; White Industries Australia Ltd.v India, UNCITRAL Award; Chevron-Texaco v Ecuador, UNCITRAL, PCA Case No. 2009-23
(ground), on the other hand. Both amount to the state reneging on its own agreement to submit to international arbitration”.  

Perhaps in the future, it would be found that such refusal to submit to arbitration amounts to a breach of an investment treaty. In *Saipem v Petrobangla*, interferences by way of injunctions issued by the Bangladeshi courts against ICC arbitration and failure of the courts to enforce the ICC award resulted in the institution of ICSID proceedings and a finding by the ICSID tribunal that Bangladesh, through its courts’ abusive exercise of their supervisory jurisdiction over the ICC arbitration, had expropriated Saipem’s investment in Bangladesh in breach of the treaty. The ICSID tribunal ordered Bangladesh to compensate Saipem. This also shows that anti-arbitration injunctions can be found to be a violation of obligations under an investment treaty.

That is not to say anti-arbitration injunctions are bad in themselves. As mentioned earlier, they can be issued when a party initiates arbitral proceedings in the wrong place or with the wrong institution, if arbitration is begun in the absence of a valid arbitration agreement or where it is absolutely clear that the arbitration proceedings have been wrongly brought. However, where the purpose of such order is to attack credible arbitration, delay and perhaps stop the arbitration for illegal reasons, then it is guerilla.

### 3.2.2 Anti-Suit Injunctions:

Tribunals have similarly enjoined parties from proceeding in domestic courts and from enforcing domestic court judgment while arbitration is pending. Arbitrators would usually be confronted with the question of whether to issue anti-suit injunctions when a party initiates court action in relation to a dispute covered by an arbitration agreement, the court decides it has jurisdiction to hear the claim and enjoins the other party from initiating arbitration proceedings or prohibit it from continuing with an ongoing proceeding. The term ‘anti-suit injunctions’ has been used in this portion of the thesis to refer to such orders issued by tribunals enjoining...

---

239 ICC Arbitration No. 10623/AER/ACS, para. 166
243 *SGS v Pakistan*, ICSID Case No. ARB/01/13; *Tokios Tokeles v Ukraine*, ICSID Case No. ARB/02/18 *Saipem v Bangladesh*, ICSID Case No. ARB/05/07
244 *Bayindir v Pakistan*, ICSID Case No. ARB/03/29.
domestic court proceedings or enforcement. Mostly ICSID cases have been analyzed in this section because they are more publicly available. Under Article 47 of the ICSID Convention, tribunals may as part of ordering provisional measures, issue anti-suit injunctions to protect or conserve the parties’ rights. Such measures must be aimed at preserving the rights of the parties and must be urgent and necessary to preserve the status quo. Additionally, these measures are appropriate to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might aggravate or extend the dispute or render its resolution more difficult.

The concept of anti-suit injunctions can be traced from the medieval English writs of prohibition. The features of the concept in public international law and investment arbitration are unique in that

“when such power is directed at a sovereign state, such an order imposes obligations not only on the executive acting as litigant, but, at least tacitly, on the state’s judiciary. In this respect, antisuit injunctions have gone full circle, and returned to their origins in medieval writs of prohibition. To the extent that they impose obligations directly on judges, an antisuit injunction in the investment setting may be thought of as an arbitral suspension of judicial proceedings.”

However, arbitrators must be cautious not to issue injunctions that would be tantamount to depriving parties of their substantive rights. This is because the jurisdiction of the tribunal does not preclude the pursuit of related claims in domestic courts. Also tribunals are conscious of the fact that they can determine only their jurisdiction and not that of another tribunal or

---

246 See also Article 46 ICSID Additional Facility Rules
250 Campbell McLachlan (2009), Lis Pendens in International Litigation, Martinus Nijhoff Publishers, p. 221, citing E-Systems v. Iran, para 521
court. Little wonder, most of the provisional measures ordered by ICSID panels were more in the nature of orders to preserve the status quo than orders to defend the tribunal’s jurisdiction. Only a few tribunals have relied on Article 26 of the ICSID Convention (exclusive jurisdiction clause) as providing justification for the granting of an anti-suit injunction in ICSID arbitrations.

3.2.2.1. Anti-Suit Order Pursuant to Article 26 ICSID Convention:

Relying on Article 26 to grant an anti-injunction, the tribunal in *Tokios Tokelés v. Ukraine*, decided that

“(a) Pending the resolution of the dispute now before the Tribunal, both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning Tokios Tokelés or its investment in Ukraine, namely Taki Spravy …which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute.”

The tribunal noted that Ukraine, in becoming a party to the Convention, had accepted the exclusivity of ICSID proceedings to the exclusion of domestic and administrative remedies.

Similarly, the tribunal in *CSOB v. Slovak Republic* confirmed that the parties have “the right to the exclusive remedy provided for in Article 26 of the Convention.” The tribunal then went on to grant an anti-suit injunction when the Regional Court failed to suspend its proceedings. In

---

251 L. Levy (2005) noted that “arbitrators should not take the risk of ordering a judge or other arbitrators how to behave. They are the arbitrators’ equals and have no orders to receive. Second, jurisdiction is something that is declared, not something that can be ordered. Hence, arbitrators should only decide on their own jurisdiction and may not order performance of an arbitration agreement in kind. Third, anti-suit injunctions are only appropriate where it appears necessary to protect the arbitral proceedings, namely where a party is fraudulently attempting to undermine the arbitral tribunal’s jurisdiction”, p. 128

252 According to study carried out by Rodrigo Gil, between 1972-2010, eleven or twelve panels have issued provisional measures to stop court proceedings, while about seven or eight of the requests have been denied. Rodrigo Gil, (2009), *ICSID Provisional Measures to Enjoin Parallel Domestic Litigation*, 3 World Arb. & Mediation Rev. 535, 553-64

253 Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.


255 Id, para 7

256 *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 3, November 5, 1998, 2; See also *MINE v. Guinea - MINE v Guinea*, tribunal recommended that Guinea terminate proceedings in connection with the dispute and any provisional measures pending with court and *Holiday Inn v. Morocco*, ICSID Case No. ARB/72/1

257 [T]he Tribunal: (1) Recommends that the above-mentioned bankruptcy proceedings be suspended to the extent that such proceedings might include determinations … contemplated in the Consolidation Agreement at issue in this
making an order on a request for provisional measures, and stay of concurrent arbitration proceedings in Pakistan, the tribunal in SGS v Pakistan found that SGS had a “prima facie right to seek access to international adjudication under the ICSID Convention.” \(^{258}\) The tribunal made a recommendation that Pakistan inform its state courts of the current standing of the ICSID arbitration and ensure that no action be taken to hold SGS in contempt of court. The Tribunal also recommended a stay of the local arbitration proceedings until tribunal determined its jurisdiction. \(^{259}\) A recommendation that the parties not resort to the courts of Ecuador to enforce or resist any claim which formed subject matter of the arbitration was made by the tribunal in Perenco. \(^{260}\) This recommendation was also made on the basis that legal process before domestic courts would violate Article 26 of the ICSID Convention.

3.2.2.1. Court Deference to Investment Arbitration on the Basis of Article 26 ICSID Convention:

Some domestic courts have been seen to defer to arbitral tribunals on the basis of the ‘exclusive jurisdiction’ provision of Article 26 of the ICSID Convention and thereby refusing to exercise their jurisdiction to issue interim measures. \(^{261}\) In MINE v. Guinea \(^{262}\), MINE sought to uphold a US district court’s decision to compel arbitration before the American Arbitration Association arbitration. (2) Calls on the parties to this arbitration to bring this Order to the attention of the appropriate judicial authorities of the Slovak Republic so that they may act accordingly, Procedural Order No. 4 of January 11, 1999, 2

\(^{258}\) SGS Procedural Order No 2, 16 October 2002, 18 ICSI Rev. – FILJ (2003), para 299

\(^{259}\) Id, p. 301

\(^{260}\) Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petro Ecuador), ICSID Case No ARB/08/16, Decision on Provisional Measures, May 8, 2009, para 61 and 62


(AAA) despite an ICSID arbitration clause.\textsuperscript{263} MINE then sought to enforce the AAA award before Belgian and Swiss courts while proceedings were pending before ICSID. The Court of First Instance of Antwerp and Court of First Instance of the Canton of Geneva noted the exclusive competence of ICSID and held that while an ICSID case is pending, a party to a case cannot bring the same issue before a national court.\textsuperscript{264} The ICSID Tribunal recommended that MINE withdraw and discontinue pending actions before national courts and desist from commencing any new actions.\textsuperscript{265} In the \textit{Attorney General v. Mobil Oil NZ Ltd}\textsuperscript{266}, after the case had been registered with ICSID, New Zealand sought interim injunctions before the New Zealand courts to restrain Mobil from continuing ICSID proceedings. Mobil on the other hand, applied for a stay of the injunction proceedings commenced by New Zealand based on Section 8 of the Arbitration (International Investment Disputes) Act of 1979 which serves the purpose of giving effect to the ICSID Convention in New Zealand.\textsuperscript{267} The New Zealand court found that the matter was a dispute that qualified for reference to ICSID. The court went ahead to stay all proceedings until the ICSID Tribunal had determined its jurisdiction.\textsuperscript{268}

While not directly questioning the courts’ reasoning in the foregoing cases, the reliance on Article 26 of the ICSID Convention raises the issue of how courts view themselves in relation to investment tribunals and the role they play in the resolution of investment disputes. In some

\textsuperscript{263} The U.S. Court of Appeals for the District of Columbia had denied that ICSID arbitration deprived the U.S. district court of jurisdiction; it therefore refused to stay proceedings and to refer parties to ICSID arbitration; The State Department noted that “agreements to arbitrate with ICSID do not contemplate the involvement of domestic courts, at least not before a final ICSID decision is to be enforced.”
\textsuperscript{265} Tribunal decided under Article 47 ICSID Convention and found that “MINE’s litigation to enforce the AAA award in European courts constituted ‘another remedy’ under Article 26 of the ICSID Convention…”; Article 47 ICSID Convention dealing with provisional measures by the arbitration tribunal. For general discussion of the legislative history of Article 47 ICSID Convention, see Arshad Massod (1972), \textit{‘Provisional Measures of Protection in Arbitration under the World Bank Convention’, 1 Delhi Law Review 138}; \textit{MINE v. Guinea}, Decision on Provisional Measures of 4 December 1985 (see the Decision on the Merits of 6 January 1988, 4 ICSID Reports 69); See also \textit{Holidays Inn v. Morocco}, the Tribunal ruled on provisional measures by a domestic court. The ICSID Tribunal affirmed its power under Article 47 to issue provisional measures and stated that “the parties are under an obligation to abstain from all measures likely to prevent definitely the execution of their obligations” in Pierre Lalive, \textit{‘The First World Bank Arbitration (Holidays Inn v. Morocco)- Some Legal Problems’}, 51 BYIL 123, at 136 (1980)
\textsuperscript{266} 4 ICSID Reports 117; (1987) 2 NZLR 649; 2 ICSID Review-FILJ 497 (1987)
\textsuperscript{267} In respect of matters concerning the Convention, Section 8 provides that a court may order a stay of domestic judicial proceedings where there is no sufficient reason why the matter should not be dealt with under the Convention.
\textsuperscript{268} A straightforward application of Article 26 of the ICSID Convention would have yielded the same result, rather the New Zealand court emphasized its discretion to stay proceedings on the basis of New Zealand’s legislation, see Christoph Schreuer (2009), Article 26 ICSID Convention, pp. 374-375.
cases, appropriate and related claims can be pursued in domestic courts alongside investment tribunals. Domestic courts must be well conditioned to determine such instances and not exaggerate their roles or underserve relevant parties.

3.2.3. Article 26 ICSID Convention: No Basis for Issuance of Anti-Suit Injunctions:

In contrast with the tribunals relying on Article 26 to issue injunctions, there are tribunals that did not consider it necessary to issue anti-suit injunctions to ‘preserve or protect its jurisdiction’. In the Atlantic Triton case, the tribunal was reluctant to affirm that pursuant to Article 26, the parties should refrain from preserving their rights by filing action in domestic courts.\(^\text{269}\) The Tribunal noted that while it had jurisdiction to recommend conservatory measures, such jurisdiction was not exclusive and does not prohibit any recourse to domestic courts, which are “traditionally and virtually universally recognized as having the sole jurisdiction to order such measures.”\(^\text{270}\) The French domestic court concerned with this case in line with the decision of the ICSID Tribunal, affirmed the power of domestic courts to issue interim measures in the course of an arbitration. The French Cour de cassation stated that Article 26 of the ICSID “was not intended to prohibit parties from applying to a national court to seek conservatory measures in order to guarantee the execution of an award which might subsequently be given.”\(^\text{271}\)

The tribunal in \textit{Plama} was also reluctant to recommend to a state that it orders its courts to deny third parties the right to pursue their judicial remedies. Moreover, it noted that it was not satisfied that even if it did, the respondent would have the power to impose its will on an independent judiciary.\(^\text{272}\)

In \textit{Tethyan Copper Co. Pty Ltd v Pakistan}, the tribunal noted that its prima facie jurisdiction was not affected by separate proceedings before the supreme court of Pakistan to decide related


\(^{270}\) Id., pp. 35-36.

\(^{271}\) See the Judgment of 18 November 1986, 3 ICSID Reports 10, pp. 11. The Court of Appeals of Rennes, France had earlier ruled that the arbitration Tribunal “has the general and exclusive power to rule not only on the merits of the dispute but also on all provisional measures…”

\(^{272}\) Plama Consortium Limited \textit{v. Republic of Bulgaria}, para 43
matters under Pakistani law and the application of relevant legislation as the subject matters were distinct and the parties were different.\textsuperscript{273}

While accepting the existence of a “right to exclusivity susceptible of protection by way of provisional measures”, the tribunal in \textit{Burlington v. Ecuador} found with regards to the continuation of the coactive process (administrative proceedings) that the claimants had not established a prima facie case for the breach of Article 26 of the Convention.\textsuperscript{274}

The reluctance of these tribunals may be based on the fact that tribunals can only determine their own jurisdiction, and not that of other courts or tribunals. Preserving jurisdiction of a tribunal through anti-suit injunctions may infringe upon the jurisdiction of courts and therefore must only be granted to prevent grossly abusive conduct.\textsuperscript{275} The determination of actions that are ‘grossly abusive conduct’ lies solely within the discretion of the tribunal and this may be problematic. This raises the question of how tribunals come to a finding of what is “abusive or unjust”.

\textbf{3.2.4. Interim Measures Issued as Interim Award:}

Where a tribunal issues interim measures or injunctions in the form of interim awards, it raises the possibility of the tribunal imposing damages on the state where the measures are violated.\textsuperscript{276} As evident in the case discussed below, the issuance of interim measures also has effects on the legal rights of litigants, and may encourage executive interference in domestic judicial processes.

\textsuperscript{273} \textit{Tethyan Copper Co. Pty Ltd v Pakistan}, ICSID Case No. ARB/12/1, para 130
\textsuperscript{274} \textit{Burlington Resources Inc. v. Republic of Ecuador}, ICSID Case No ARB/08/5, Procedural Order No. 1, June 29, 2009, para 58. See also in \textit{Cemex v Venezuela}, the tribunal held that the claimant made no prima facie case of breach of exclusive jurisdiction clause of ICSID. The tribunal dismissed the request for provisional measures, CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15.
The tribunal in *Chevron v Ecuador*\(^{277}\) issued interim measures to enjoin tangential proceedings, to which neither the state nor its entity was a party to, which was alleged to be unjust. In that case, Chevron\(^{278}\), after initiating UNCITRAL arbitration, requested the tribunal to

“(1) order Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable pending the outcome of this Arbitration; and/or (2) order Ecuador to use all measures necessary to enjoin enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation, including enjoining the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices, pending the outcome of this Arbitration; and/or (3) order Ecuador to make a written representation to any court in which the nominal plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive pending the outcome of this Arbitration; and/or (4) declare that any judgment against Chevron in the Lago Agrio Litigation is neither final, conclusive nor enforceable, pending the outcome of this Arbitration; and/or (5) Issue an interim award that the Tribunal deems just and reasonable, so as to protect and preserve the rights that Claimants assert in this Arbitration, pending its outcome; and/or (6) order Ecuador to refrain from taking any action that would aggravate, exacerbate or extend the dispute in question, threaten the integrity and jurisdiction of this arbitral proceedings or frustrate the effectiveness of any award from this Tribunal.”

The tribunal in that case issued a number of interim measures, the first set of measures ordered the parties to refrain from any conduct likely to impair or adversely affect the ability of the tribunal to address issues before it; not to exert any unlawful influence or pressure on the Ecuadorian court,\(^{279}\) then that Ecuador take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against chevron in the Lago Agrio Case. It also ordered Ecuador to inform the tribunal of all steps it

---

277 *Chevron Corp and Texaco Pet Co. v Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23
278 In breach of agreements between TexPet, an indirect subsidiary of Chevron, and Ecuador, releasing TexPet from liability for environmental impact in the former concession area, Ecuador colluded with a group of Ecuadorian plaintiffs who sued chevron in Ecuadorian courts seeking damages and other remedies for impacts that they alleged were caused by the Consortium’s operations. (TexPet was a minority member of a consortium with Ecuador and PetroEcuador, Ecuador’s state-owned company)
279 Order of May 14, 2010 and Order of January 28, 2011
takes to implement the order, pending further order or award. On February 16, 2012, the tribunal issued a second interim award this time, ordering Ecuador (whether by its judicial, legislative or executive branches) to “take all measures necessary” to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments by the Ecuadorian courts against chevron in the Ecuadorian legal proceedings known as “the Lago Agrio Case”

The Lago Agrio Judgment was made final, enforceable and subject to execution within Ecuador on August 3 2012, according to the tribunal, this finality was in violation of the interim awards under the Treaty, the UNCITRAL Rules and international law. The tribunal also declared that Ecuador was and remains legally obliged under international law to ensure its commitments under the Treaty and the UNCITRAL Rules are not rendered nugatory by the finalisation, enforcement or execution of the Lago Agrio Judgment in violation of the First and Second Interim Awards. The Ecuadorian court had considered whether it could give priority to the interim awards and concluded it could not, citing the provisions of the American Convention on Human Rights. The court held that it could not enforce the award over Ecuador’s prevailing human rights obligations. A final award is yet to be issued as at the time of writing this thesis.

As the parties await the final award, the Chevron case may be the first one where interim measures (injunctions) were issued in form of interim awards, which increases the likelihood of the tribunal imposing damages on Ecuador for violation of the interim measures. These measures were also directed to the Ecuadorian judiciary, which raises the question of the power of a tribunal to order a state and its judiciary to interfere with, and terminate legally constituted legal processes, of which the government is not even a party. Interestingly, the tribunal stated that

“from its perspective under international law, this Tribunal is the only tribunal with the power to restrain the Respondent generally from aggravating the Parties’ dispute and causing irreparable harm to the Claimants in regard to the enforcement and execution of the Lago Agrio Judgment. Such restraint has not been achieved by any state court

\[280\] Order for Interim Measures, February 9, 2011, as modified by Interim Award of January 25, 2012
\[281\] Fourth Interim Award of February 7, 2013
\[282\] Counter Memorial on the Merits of Ecuador, February 18, 2013, para 494, 495.
\[283\] Given that awards are enforceable.
(including courts in the USA); nor could it be in the circumstances of this most unusual case. The Tribunal therefore confirms and declares, as a matter of international law, that the Respondent has a continuing obligation to ensure that the commitments that it has given under the Treaty and the UNCITRAL Rules are not rendered nugatory by the finalisation, enforcement or execution of the Lago Agrio Judgment in violation of the First and Second Interim Awards.” 284

The interim measures would have the effect of affecting the legal rights of the litigants and would have the effect of promoting government interference in judicial proceedings, a measure which is contrary to the rule of law and certainly not the effect intended by international investment arbitration. This conclusion of the tribunal as to its power to restrain Ecuador and its courts and the implications of the injunctions are subject to different and difficult interpretations and opens up avenues for further study. 285

3.2.5. Anti-Suit Injunction Issued as Final Award:

In most cases, under investment arbitration, tribunals order the termination of judicial proceedings for the preservation of rights as interim/provisional measures or awards, and not as final awards. The ATA case marks the first adhoc investment case where a tribunal issued a dismissal of domestic judicial proceedings as a final award 286. Following a dispute between Arab Potash Company (APC), a Government of Jordan controlled company and ATA 287, APC commenced arbitration against ATA in Jordan under their contract, claiming over US$50 million in damages. ATA in turn submitted a counterclaim against APC. The commercial arbitration tribunal dismissed APC’s claim and upheld ATA’s counterclaim. APC challenged the award before the courts of Jordan which resulted in the Jordanian Court of Appeal annulling ATA’s arbitration award and was confirmed by Jordan’s Court of Cassation. The Jordanian courts also

284 Fourth Interim Award, para 82
285 Goldhaber notes that the states’s formal absence from the court litigation makes the chevron cases the purest example of an arbitral attempt to ‘suspend judicial action’, see Goldhaber (2013), p. 383
286 Iran-US Claims tribunals and the International Court of Justice have made such final orders. See Mexico v. United States (Case Concerning Avena and Other Mexican Nationals), 2004 I.C.J. 12, Judgment at 153 (Mar. 31, 2004); Watkins-Johnson Co. v. The Islamic Republic of Iran, 22 Iran-U.S. Cl. Trib. Rep. 218 (July 28, 1989) (Award No. 429-370-1); Touche Ross & Co. v. The Islamic Republic of Iran, 9 Iran-U.S. Cl. Trib. Rep. 284 (Oct. 30, 1985) (Award No. 197-480-1)
287 ATA Construction, Industrial & Trading Co. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010)
ruled that the arbitration agreement in the contract between ATA and APC was now extinguished by retroactive application of the Jordanian Arbitration Law of 2001. APC then brought its claims again before the Jordanian courts which was ongoing as at the time the final award of the ICSID tribunal was rendered. The tribunal ordered the Jordanian courts to cease “immediately and unconditionally” their long-standing interference with ATA’s rights. It ordered that: (i) the ongoing Jordanian court proceedings brought by APC be immediately and unconditionally terminated, with no possibility to conduct further judicial proceedings in Jordan or elsewhere on the substance of the dispute; and (ii) ATA is entitled, if it wishes to bring its claim once more against APC in accordance with the arbitration provisions in its 1998 contract with APC. Consistent with its findings, the tribunal gave no such right to Jordan or APC (which had funded Jordan’s representation in the ICSID proceeding) as against ATA.

The tribunal held that the Kingdom of Jordan, through its courts violated ATA’s basic rights to have its dispute with APC decided by way of arbitration. According to the tribunal, Jordan breached its obligations under Article II of the New York Convention to respect ATA’s right to arbitration. The importation of state adherence to other non-investment obligations is a trend likely to appeal to investors in the future. The tribunal also found that the Jordanian courts’ retroactive extinguishment of the arbitration agreement in the contract between ATA and APC constituted a clear violation of the Turkey-Jordan BIT. However, there was no clear indication from the ruling, which particular treaty provision had been breached.

3.2.6. Possible Implications of Anti-Suit Injunctions Issued by Arbitral Tribunals:

The issuance of anti-suit injunctions is established by arbitral practice. However, the extent to which a tribunal can control a state judiciary is doubtful. Claimants must be careful not to use investment arbitration as an avenue to get out of domestic litigation that is not favorable to them. As stated earlier, anti-suit injunctions must not be seen to interfere with the substantive rights of parties, and arbitrators must be cautious to issue interim injunctions in cases where it is necessary to ‘preserve a party’s rights’ or ‘conserve the goods forming the subject matter of the dispute’,

rather than in the tribunal’s power to protect its own jurisdiction.\textsuperscript{289} The overlap between contract and treaty disputes makes it challenging to issue anti-suit injunctions with the view to preserve jurisdiction because approximately two-thirds of investment treaty cases appear to involve a contract, presumably with its own dispute settlement clause, that related to the dispute brought before tribunals.\textsuperscript{290} This overlap complicates the delimitation of the jurisdictions of domestic courts and investment tribunals. This overlap is addressed later in this chapter.

3.3. Preconditions To Investment Arbitration:

Preconditions to arbitration are conditions that are to be satisfied before parties bring their claims to arbitration. Such preconditions may be contained in a BIT or the arbitration clause of a concession agreement or national investment protection and promotion laws. Under this heading, the exhaustion of local remedies rule and the local litigation requirement are addressed.

3.3.1. The Exhaustion Of Local Remedies Rule:

In international investment arbitration, the prior role of courts as contained in the exhaustion of local remedies rule is now presumed not to be a strict requirement for bringing claims before investment tribunals.\textsuperscript{291} This customary law rule of exhaustion of local remedies is established in other fields of international law where private foreign nationals seek to bring claims against a state for alleged violation of their rights. A majority of investment arbitration tribunals have ruled that the local remedies rule does not preclude an arbitration tribunal seized of a matter from

\textsuperscript{289} Goldhaber (2013), p. 382; See Amici Submission of November 5, 2010 urging the tribunal to dismiss the present arbitration on the basis of lack of jurisdiction and lack of justiciability.

\textsuperscript{290} Gus Van Harten (2013), 122-4

\textsuperscript{291} For the forms which the exhaustion of local remedies rule may take, see Christoph Schreuer (2005), ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’, The Law and Practice of International Courts and Tribunals, 1; Some of the reasons for removal or curtailing of this rule are that domestic courts of the host state may be biased and public proceedings in the domestic courts may intensify the dispute and affect the host state’s investment climate, see also Santiago Montt (2009), State Liability in Investment Treaty Arbitration (Oxford: Hart Publishing); Christoph Liebscher (2009), ‘Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues’ in C Binder et al (eds), International Investment Law for the 21st Century (Oxford: OUP), 117–18; Peter Muchlinski (2009) ‘The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution’, in Christina Binder and Ursula Kriebaum and August Reinisch, and Stephan Wittich (eds.), International Investment Law for the 21st Century Essays in Honour of Christoph Schreuer, Oxford: Oxford University Press, 345.
assuming jurisdiction. Where a host state intends to make this rule a condition of its consent to arbitration, such reservation to consent to arbitration must be expressly stated in the instrument in which such consent is expressed.

It must be noted that in some instances, tribunals have required an attempt to obtain local remedies as a substantive requirement and not as a matter going to jurisdiction or admissibility. The Tribunal in Generation Ukraine stated that even though there was no requirement to exhaust local remedies, the failure to obtain local remedy from the domestic system disqualified an international claim because it was doubtful an expropriation claim would succeed without reasonable effort by the claimants to redress the expropriatory acts.

Similarly, in Parkerings v Lithuania, the Tribunal required recourse to local remedies as a substantive requirement for fair and equitable claims. These examples of positive interaction favor the coordination of competencies of domestic courts and investment arbitration tribunals, and the utility of this seemingly harmless requirement is that it strengthens the role of domestic courts.

On local judicial processes, denial of justice claims and the need to exhaust all adequate, effective and available means of challenge within the domestic court system, the Tribunal in Loewen v. United States dismissed the claimant’s claim on the basis that it had not exhausted all available local remedies. Hence, that decision revived the exhaustion of local remedies law, but

---


295 Generation Ukraine v. Ukraine, Award of 16 September 2003, 10 ICSID Rep 240, para 20.30; See also EnCana v Ecuador, Award 3 February 2006, 12 ICSID Rep 427, para. 194 where the dissenting arbitrator claimed that the majority in effect adopted a duty to exhaust local remedies as a substantive requirement of expropriation. The majority however denied such incorporation.

296 Award of 11 September 2007, paras 316-320, 344, 360, 361, 449, 453, 454; See also GAMI where the tribunal denied claimant’s expropriation claim and noted that local remedies were available to the domestic company in which the claimant owned shares, GAMI v Mexico, Award of 15 November 2004, paras 132-133

only as to denial of justice claims. This interpretation suggests that the Loewen decision favors the development of domestic judicial and regulatory systems and the promotion of the ‘development of global administrative law by domestic regulatory bodies’. Perhaps, there is a possibility that appeals before domestic courts may get the right answers in the end.

3.3.2. Local Litigation Requirement:

One of these preconditions is the requirement to litigate claims before a domestic court for a given period of time before resort to arbitration. Out of the twenty-two (22) arbitral awards examined, eleven (11) tribunals have relied on the Most Favored Nation clause (MFN) to bypass the local litigation requirement. Four tribunals have interpreted the MFN clause as not being broad enough to eschew resort to domestic courts. For tribunals addressing the MFN clause, the debate has been whether and when an MFN clause can be used to import into a BIT, an arbitration clause from another BIT so as to override jurisdictional requirements of that BIT. From the analysis of cases considering this question, there appears to be no consensus on this issue. Six tribunals bypassed the requirement on other grounds (did not consider MFN analysis necessary) such as the futility of resort to domestic courts, frustration, by the state, of the claimant from effectively settling their claims or the satisfaction of the requirement. One tribunal refused to assume jurisdiction on the basis that the precondition was not satisfied by the claimant. In the latter case, the claimant did not rely on the MFN clause.

299 Paulsson (2005); Richard Stewart (2005), ‘The Global Regulatory Challenge to U.S. Administrative Law’, New York University Journal of International Law, and Politics, 37, pp. 752-753; But see Campbell McLachlan, Lawrence Shore and Matthew Weiniger (2007), International Investment Arbitration-Substantive Principles, Oxford University Press, pp. 231-233, commenting on the Loewen decision, noted that the intention, for states which are subject to the ICSID jurisdiction, was to substitute international arbitration for domestic remedies, unless the exhaustion of local remedies was expressly provided. They however pointed out that “many national systems possess highly developed remedies of judicial review”. Yet it would surely empty the development of investment arbitration of much of its force and effect, if, despite a clear intention of State parties not to require the pursuit of local remedies as a pre-condition to arbitration, such a requirement were to be read back as part of the substantive cause of action.”
300 Tables containing information relating to the twenty-two arbitral awards are attached as appendices at the end of this chapter.
3.3.2.1. Application of MFN Clause to Dispute Resolution Provisions:

The MFN standard is a relative and dynamic standard, which uses as a benchmark, the rights granted by the host state to foreign investors of other countries. The aim of the MFN standard is to ensure ‘uniformity and equality of the treatment granted by a host state and to balance competition in this country’s market.”

For the purposes of this thesis, this section concentrates on the application of the MFN treatment standard to foreign investment dispute settlement and analyzes the implication for the jurisdiction of domestic courts.

3.3.2.1.2. MFN Clause Considered Broad Enough to Avoid Resort to Domestic Courts:

The application of the MFN to dispute resolution provisions was first tested by the Maffezini v. Spain tribunal. The tribunal applied the MFN clause to uphold ICSID jurisdiction without observing the domestic court requirement imposed by the same BIT, thereby bypassing the Argentina-Spain BIT which required resort to host state domestic courts for 18 months before institution of arbitration which contained no such domestic court requirement. The Tribunal held that the claimant could rely on more favorable arrangements and had a right to submit their dispute to arbitration without first resorting to the domestic courts. The Tribunal referred to the Ambatielos case where it was acknowledged the MFN clause might cover the ‘administration of justice’ so long as the ejusdem generis principle was satisfied. Its application would depend on the text of the MFN clause and on the intention of the Contracting parties as determined from a reasonable interpretation of the treaty. The Tribunal noted that if a third party treaty regulated the same subject matter as the basic treaty, the MFN clause in the basic treaty would by inference, cover dispute settlement without breaching the ejusdem generis principle.

302 Decision on Jurisdiction, 25 January 2000, 5 ICSID Rep 396
303 The tribunal in Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/2 considered the Maffezini decision and stated that the requirement was ‘nonsensical from a practical point of view’, see Plama, para. 224
304 Ambatielos Claim (Greece v. UK) 6 March 1956, International Law Reports 306, Arbitration Commission. Greece brought an arbitration claim on behalf of its nationals against UK pursuant to the Declaration of 16 July 1926 accompanying the Treaty of Commerce and Navigation between Great Britain and Greece of 10 November 1886. Relying on the MFN treatment clause in the treaty, Greece contended that its national had not received the treatment which its nationals were entitled to and which was assured to nationals of other states. The MFN clause in the treaty was defined to include ‘all matters relating to commerce and navigation’. The Arbitration Committee held that the MFN clause could only attract matters belonging to the same category of subject as that to which the clause itself relates.
305 Maffezini, para 56; Stephen Fietta (2005), ‘MFN Treatment and Dispute Resolution under BIT: a Turning Point’, 8 International Arbitration Law Report 131, p.135
The Tribunal further noted that ‘dispute settlement arrangements are inextricably related to the protection of foreign investors as they are related to the protecting of rights of traders under treaties of commerce...’\textsuperscript{306} Some of these tribunals have noted that the requirement should go to admissibility and not to jurisdiction.\textsuperscript{307} The approach of the tribunals that have ruled in line with \textit{Maffezini} may be based on their broad interpretation of the relevant MFN clause so that it covers dispute clauses. Some of these tribunals have been over-reaching even when the language of the resolution MFN clause involved was not as wide as that of other MFN clauses.\textsuperscript{308} For the tribunals that have adopted other reasons, they considered the MFN argument moot as they considered that bringing claims before the domestic courts involved would have been futile because of frustrations from the state or that the claims could not have been reasonably resolved within 18 months.\textsuperscript{309} In other cases, the tribunals considered that the 18-month requirement was met by the claimants.\textsuperscript{310}

\textbf{3.3.2.1.3. MFN Clause Not Broad Enough to Avoid Resort to Domestic Courts:}

The statement of the tribunal in \textit{ICS Inspection} pretty much summarized the position adopted by the tribunals that have ruled that MFN clause is not broad enough to overthrow the choice of domestic courts and the strong dissents of especially Stern and Thomas.\textsuperscript{311} The ICS Inspection tribunal stated that for the MFN clause to do more than it was it intended to do, it ‘must constitute more than a mere prohibition of discrimination between investors based on their provenance: the MFN clause must also be in itself a manifestation of consent to the arbitration of

\textsuperscript{306} Maffezini, para 54; See Walid Ben Hamida (2008), ‘MFN Clause and Procedural Rights: Seeking Solutions from WTO Experiences’, in T. Weiler (ed.) Emerging Issues in International Investment Law, New York: Juris, where it has been suggested that the MFN clause applies to anything that is not expressly excluded and the application of MFN clause, under WTO jurisprudence, to procedural matters
\textsuperscript{307} Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction; Abaclat v Argentina, ICSID Case No. ARB/07/5; Impregilo S.p.A v. Argentine Republic, ICSID Case No. 07/17, Award; On the basis of admissibility, Prof Park in his dissenting opinion in the Kilic case said the proper approach would be for the tribunal to stay its proceedings until the local litigation requirement is satisfied, Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v Turkmenistan, ICSID Case No. ARB/10/1
\textsuperscript{308} For example, the MFN clause in Hochtief did not include “all matters” (Argentina-Spain BIT) but only referred to “activity in connection with investments”, Hochtief, paras 59-75; 125. The tribunal relied on a protocol to the BIT in considering that ‘activity’ included ‘the management, utilization, use and enjoyment of an investment’. Since recourse to dispute settlement was an aspect of the ‘management’ of the investment, dispute settlement was within the scope of the MFN clause.
\textsuperscript{309} BG Group Plc. v Argentina, UNCITRAL Award; Urbaser SA and others v Argentine Republic, ICSID Case No. ARB/07/26 and Ambiente Ufficio SPA v Argentina, (ICSID Case No. ARB/08/9)
\textsuperscript{310} Philip Morris Brands Särl & Ors. v. Uruguay, ICSID Case No ARB/10/7; TSA Spectrum v Argentina, ICSID Case No. ARB/05/5
\textsuperscript{311} J Christopher Thomas QC, Hochtief, Decision on Jurisdiction; Brigitte Stern, Impregilo SpA, Award
investment disputes according to the rules that the MFN provision might attract from other comparator treaties.\footnote{ICS Inspection \& Control Services Ltd. v Argentina, UNCITRAL, PCA Case No. 2010-9, para 278} Basically, these tribunals are of the view that treaty interpretation should take into account the principle of effectiveness by giving proper meaning to each provision in a treaty.\footnote{See the tribunal in Kiliç v. Turkmenistan, ICSID Case No. ARB/10/1}

Considering whether resort to the domestic courts of Argentina for 18 months was a precondition to arbitration or a condition to the consent of Argentina to arbitration, Professor Stern acknowledged that an MFN clause may be invoked to expand an investor’s rights under a BIT, but she noted that it could not alter the conditions for the enjoyment of such rights. In her opinion conditions qualifying a State’s consent are matters of jurisdiction and applying MFN clauses to alter dispute resolution provisions damaged the importance of State consent in international arbitration.\footnote{See Dissenting Opinion, Impregilo SpA, para 99 “Unless specifically stated to the contrary, the qualifying conditions put by the State in order to accept to be sued directly on the international level by foreign investors cannot be displaced by an MFN clause, and a conditional right to ICSID cannot magically be transformed into an unconditional right by the grace of the MFN clause. The access to the right as provided in the basic treaty cannot be modified through an MFN clause. Any other solution comports in my view great dangers. In his view, such employment could not generate a ‘perfected consent’ rather, it gave rise to a ‘counter-offer on different terms’, see Hochtief, Separate and Dissenting Opinion J Christopher Thomas, para 27.}

The tribunal in Daimler Financial noted that the 18-month requirement was more than a procedural directive. According to the tribunal, all dispute resolution provisions contained in investment treaties are “by their very nature jurisdictional. The mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators. They set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties’ consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts. That this is so is particularly evident in the case of the German-Argentine BIT, which describes its dispute resolution process in mandatory and necessarily sequential language.”\footnote{Daimler Financial Services v Argentine Republic, ICSID Case No. ARB/05/1, para 193, see also footnote 347; See also ICS Inspection where the tribunal declined jurisdiction on the basis that the language of the MFN clause itself did not sufficiently manifest Argentina’s ‘clear and unambiguous’ consent to investor–State arbitration, paras. 326-327} The tribunal goes on to cite the Wintershall tribunal: “That an investor could choose at will to omit the second step [the
18-month domestic courts requirement] is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina’s) the Host State’s ‘consent’ (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts.”

3.3.2.1.4. Domestic Court Interpretation of MFN Clause And Dispute Resolution Provisions:

Interestingly, the US courts reviewing the BG v Argentina award also touched on whether the local litigation requirement was a precondition to arbitration or a condition to consent to arbitration. The US Supreme Court grammatically interpreting the BIT noted that it did not state that the local litigation requirement was a condition of consent to arbitration and as such it did not need to consider the effect of “any such language”.317 For the dissenters, the treaty did not constitute an agreement to arbitrate. To create an agreement, in this case, an investor must submit his dispute to the courts of the host country. After 18 months, or an unsatisfactory decision, the investor may then request arbitration. Hence the local litigation requirement is a condition to the formation of an agreement to arbitrate as opposed to a condition precedent to performance of the contract as viewed by the majority of the court. On the benefits of the local litigation requirement, the dissenting opinion pointed out that courts’ authoritative construction of domestic law may be useful in tribunal analysis, it can also help to narrow the range of issues that remain in controversy by the time a dispute reaches arbitration. It may also act as an inducement for the parties to settle along the way and if the investor prevails, the need for arbitration would be obviated. Amicus briefs filed in support of BG and Argentina took divergent views. One of the briefs referred to NAFTA and notes that if NAFTA requirements, which do not have a local litigation requirement, are considered by all the member states as precluding their consent to arbitration where those requirements are not met, even more so should a BIT which expressly includes a provision requiring resort to domestic courts be interpreted as precluding Argentina’s consent to arbitration if those requirements are not met.318


318 Brief of Amici Curiae Practitioners and Professors of International Arbitration Law in Support of Respondent, page 8; See also the Solicitor General in his amicus brief argues that the local litigation provision may be “a
3.3.2.1.5. Balancing The Interests of Investors And States:

As it stands, there is no consensus on the issue of litigation in domestic courts before the commencement of arbitration proceedings. This study takes the view that when a state accedes to a treaty, there is a standing offer to arbitrate. Where that treaty contains a condition such as a local litigation requirement, such requirement is a condition to arbitration that must be satisfied before arbitration is commenced. The Urbaser tribunal’s analysis of the MFN clause offers a novel approach and appears to balance out the concerns of investors (the resolution of their disputes before neutral tribunals) and that of states (the respect for their sovereignty with regards giving their courts the opportunity to redress claims of claimants before submission to arbitration). The tribunal noted that the 18-month requirement is a necessary precondition for the right to submit the dispute to international arbitration. It further stated that the claimant must submit and the state had the obligation of allowing and conditioning its courts to operate in a manner that the opportunity to reach a suitable remedy is provided. From the tribunal’s analysis, the requirement raises dual obligations on the parties. If a state fails to provide effective domestic remedy under the given time, then an investor is not obliged to keep its own part of the bargain. This approach creates a balance between the harmonization of the dispute resolution measures of domestic courts and arbitral tribunals, and the functioning of courts in the settlement of investment disputes.

3.4. Competing Jurisdictions And Jurisdictional Overlap:

“It is that necessity of making a decision not between claims which are fully justified and claims which have no foundation at all but between claims which have varying degrees of legal merit –it is that necessity which, in common with the activity of legal tribunals generally, characterizes the work of the International Court”

Such necessity also characterizes the work of international investment tribunals and the power to exercise discretion falls on tribunals possibly because of the generality and vagueness of the condition on the State’s consent to enter into an arbitration agreement,” Brief for United States as Amicus Curiae 25; See also Brief for the United States Council for International Business as Amicus Curiae in support of the Petitioner.

319 Urbaser, para 111; See also Teinver SA and others v Argentine Republic, ICSID Case No. ARB/09/1
320 Urbaser, para 131
321 Hersch Lauterpacht. (1958), Development of International Law by the International Court (London: Stevens), 398
provisions to be applied. Andrés Rigo Sureda notes that investment treaties themselves are indeterminate to the extent that they provide standards of compliance, the content of which is left to be specified by arbitral tribunals thus discretion is more acutely relevant. In interpreting treaty provisions, tribunals usually apply or claim to apply Articles 31 and 32 of the Vienna Convention (VCLT). These articles lay out the basic rules of treaty interpretation. The most important and foundational rule is set out in Article 31, and it states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”. Other provisions of Article 31 provide a clear definition of “context” and other related guidance. Article 32 refers to travaux préparatoires (preparatory work of the treaty) and states that they are to be used to confirm the meaning suggested by an Article 31 interpretation or where the application of Article 31 leads to ambiguous or manifestly absurd results. There are different approaches with respect to reliance on the considerations laid out in those Articles. Some rely heavily on the words of a provision itself, as they are commonly understood (ordinary meaning), others seek to effectuate the purpose of a treaty, rather than slavishly follow the text. Additionally, they may attempt to divine the intent of the drafters (object and purpose). Their interpretation of a treaty is so as to give scope to the problem it was created to address. For others, the list is not one of precedence but must be taken as a whole.

This section examines provisions contained in investment treaties and contract agreements that appear to carve out roles for domestic courts and investment tribunals in the adjudication of investment disputes. Arbitral tribunal reactions, discretions and responses to these provisions are examined. In most instances, domestic court jurisdiction has been overridden by the interpretation given to these provisions by investment tribunals but in a limited number of cases, some tribunals have deferred to domestic courts as “equals” in the settlement of investment claims.

322 States may not have been able to agree on the definition of a term, they may have opted to provide for standards of conduct rather than clear-cut rules, they may have intentionally left a certain provision open for future development, or else the field in question may not be sufficiently developed in general, see, Andres Rigo Sureda (2012), Investment Treaty Arbitration: Judging Under Uncertainty, Cambridge University Press, p. 9
323 Sureda (2012), p. 9
3.4.1. Overlapping Jurisdiction:

The distinction between contract and treaty claims is subsumed in the interpretation of a number of treaty provisions which can be considered to create roles for domestic courts in the resolution of investment disputes. These provisions include the fork-in-the-road provision, the umbrella clause, dispute resolution clause and the contract forum selection clause. The interpretation given to these provisions are examined and the implication of such interpretations for the involvement of domestic courts in international investment dispute settlement is considered.

3.4.1.2. Fork-In-The-Road Provision:

This clause requires the claimant to make an election between litigation in the domestic courts or tribunals of the host state and international investment arbitration. Any election made by the claimant is final. The utility of this provision may be to avoid inconsistent judgments by domestic courts and investment tribunals, prevent forum shopping and promote judicial economy. According to a detailed research carried out by one critic of the investment arbitration process on arbitrator behavior and discretion in relation to the roles of other adjudicative forums, a majority of tribunals have allowed investors claim under the treaty to proceed even though it was subject to a fork-in-the-road clause that appeared not to have been satisfied by the claimant. For this provision to be applicable, arbitral practice so far has established that the following conditions must be met:

327 Lucy Reed et al (2011), Guide to ICSID Arbitration (2d ed.), at 100 define a fork-in-the-road provision as “a stipulation that if the investor chooses to submit a dispute to the host State courts or to any other agreed dispute resolution procedure (for example, to ICC arbitration under the dispute resolution clause in the relevant investment contract), the investor forever loses the right to submit the same claims to the international arbitration procedure in the BIT”; Jacomijn J. van Haersolte-van Hof and Anne K. Hoffman (2008), ‘The Relationship Between International Tribunals and Domestic Courts’; in Peter Muchlinksi et al. (eds.), The Oxford Handbook, at 962, 998 note that they “are clauses stipulating that the investor has to make a choice between the different procedural forums offered to him under the treaty, for example local courts, previously agreed dispute settlement mechanisms, or international arbitration proceedings . . . As soon as he, for example, selects the local courts of the host state and has initiated proceedings accordingly, he will not be able to submit the same claim to one of the other forums provided for in the treaty, including international arbitration.”

328 This provision is expressed by the Latin maxim, ‘una via electa non datur recursus ad alteram’ meaning, He who has chosen one way cannot have recourse to another; Example see Article VII of the Argentina-United States BIT.

329 See Gus Van Harten (2013), Sovereign Choices and Sovereign Constraints, p. 149. He lists the following awards (as at 2012), Genin v Estonia (Award, 25 June 2001), paras 322 and 330–3; Middle East Cement v Egypt (Award, 12 April 2002), paras 70–1; CMS v Argentina (Award, 17 July 2003), para 80; Azurix v Argentina (Award, 8 December2003), paras 23, 79–80, and 90; Enron v Argentina (Award, 14 January 2004), para 97; LG&E v
1. The juridical nature of the claims must be the same: The claims asserted by the investor before the local courts and international arbitration must be the same. If the claim asserted in the local court is contract based and not treaty based, the fork in the road provision will not apply, as the investor can bring a treaty-based claim before an international arbitral tribunal.\(^{330}\) If the claims asserted before the international tribunal are the same as those asserted before the local court, the fork in the road provision will apply and the investor will be held to its election.

2. The parties to the two claims must be the same: The parties to the domestic proceedings must be the same as the parties to the international arbitration proceedings. This means that the host state must be the respondent in both proceedings and the investor, the same in both proceedings.\(^{331}\)

Where these conditions are met, the fork in the road provision gives a res judicata “effect” to any claims brought earlier on.\(^{332}\) Where there is broad dispute resolution clause allowing tribunal to hear contractual claims, the fork in the road may also be triggered by proceedings before domestic courts for breach of contract.\(^{333}\)

---

\(^{330}\) See Alex Genin, Eastern Credit Ltd Inc and AS Baltoil v. Republic of Estonia (Award) 6 ICSID Rep 236 (2001), paras 331-333; CMS Gas Transmission Co. v. Argentine Republic (Jurisdiction) 7 ICSID Rep 492 (2003), 511; Azurix Corp. v Argentine Republic (Jurisdiction) 43 ILM 262, 280 (2004); See also Eudoro A. Olguin v. Republic of Paraguay, Decision on Jurisdiction, 8 August 2000, 6 ICSID Rep 156, para 30; Compania de Aguas del Aconquija SA & Compagnie Generale dea Eaux (Vivendi) v. Argentina, 21 November 2000, 5 ICSID Rep 296, paras 40, 42, 53, 55, 81; Petrobart Limited v. Kyrgyz Republic, ARB No. 126/2003, Arbitration Institution of the Stockholm Chamber of Commerce; Azurix v. Argentina, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003; Middle East Cement Shipping v. Egypt, ICSID Case No. ARB/99/6, Final Award, 12 April 2002

\(^{331}\) Genin (above); Enron Corp. and Ponderosa Assets, L.P. v. Argentina, Decision on Jurisdiction, 14 January 2004; CMS v. Argentina (id)

\(^{332}\) Christoph Schreuer (2004), ‘Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’, 5 Journal of World Investment and Trade, pp. 241, 249; See also Christoph Schreuer, ‘Consent to Arbitration’ in Peter Muchlinski et al. (eds.), The Oxford Handbook, Chapter 21, pp. 848-849. Even where the conditions are met or where there is doubt as to an investor’s choice under the clause, Schreuer is of the view that a more plausible choice is the determination that the investor has made a choice of international arbitration rather than litigation before the domestic courts of the host state. This, according to him, is because the investor may encounter injustices, delays and other real or perceived setbacks associated with resolving disputes between foreign investors and host states in the domestic courts of the host state.

\(^{333}\) See Vivendi v Argentina (Annulment), para. 55
3.4.1.2.1. Solitary Jurisprudence: *Pantechniki v Albania*:

So far, only one tribunal has deferred to domestic court proceedings initiated by claimants before resorting to arbitration. In *Pantechniki v. Albania*, the sole arbitrator in that case, accepting Article 10(2) of the Greece-Albania BIT (“... the investor or Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal ...”), as a fork in the road clause, held that the clause barred the claims of the claimant from the jurisdiction of the tribunal because of earlier court proceedings instituted by it.

Relying on the 1903 Woodruff case by the America-Venezuela Mixed Commission, the Tribunal noted that the test for determining whether claims before a court is the same as claim before a tribunal is

“whether or not “the fundamental basis of a claim sought to be brought before the international tribunal is autonomous of claims to be heard elsewhere”.

It also noted that

“claims have the same “essential basis” if they have the same factual predicates and request the same relief; it is not permissible merely to reformulate local contractual claims.”

The sole arbitrator then went on to find that the claimant’s grievance before ICSID arose out of the same entitlement it had invoked before the Albanian courts; hence the claims had the same fundamental basis. The Tribunal held that claimant could not adopt the same fundamental basis as the foundation of a treaty claim. It is important to note that the clause in question differs from other fork-in-the-road clauses found in other investment treaties in that it does not stipulate that the claimant must make a definitive election between the courts and the tribunal, and that that election is final. Even if that provision contained a finality requirement, it appears that the arbitrator would have still interpreted it the same way. Such an interpretation lowers the threshold set by the majority of the tribunals in that it essentially looks at the substance of the claims, and not the form, and notes that if they are founded on the same grounds and the reliefs

\[^{334}\textit{Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, 30 April 2009}\]

\[^{335}\textit{Id, para. 61}\]

\[^{336}\textit{Id, para. 67}; The Tribunal however reserved jurisdiction on the claims of denial of justice, see para. 68\]
sought are the same, then the fork-in-the-road clause is triggered. In essence, regardless of the juridical nature of the claim, the fork in the road clause ought to apply to preclude an investor from bringing a claim before an international tribunal where the same investor had already brought before the domestic courts of the host state, a claim which is “equivalent in substance” to that found under an investment treaty against the host state. This interpretation also gives the clause some practical effect. Because this is the only case so far offering this interpretation of the fork-in-the-road provision, it remains to be seen whether there will be a shift in the interpretation of this provision.

3.4.1.3. Fork-in-the-Road Provision: Balancing Domestic Court and Investment Tribunal Roles:

This provision raises the question of the role of courts in the adjudication of investment disputes and whether they competent to deal with cases when a party elects to have its dispute settled before it. Generally, there is no obligation under international treaty law, customary international law, or general principles of international law for a state to open its courts for invocation by individuals of treaty norms. Since domestic courts are deemed to be limited to matters of national law, where a claimant makes an election of domestic courts first, the domestic courts can deal with the contractual issues contained in the dispute. In that case, tribunals can wait and assume jurisdiction if the decision of the domestic court involved violates the relevant investment treaty or treaties. While accepting the fears associated with litigation in domestic courts, the waiver of an election of domestic court jurisdiction amounts to a disregard of domestic court systems, especially the ‘credible’ systems, which may be able to deal with similar issues and deliver the same outcomes as international tribunals. According deference to domestic

337 See Campbell McLachlan et al. (2007), p. 107
338 On the waiverability of this provision, the Tribunal in Maffezini v. Spain in identifying some “important limits” to the extension of an MFN clause noted that such arrangement may be a matter of public policy of the host state and therefore cannot be over ridden Emilio Augustin Maffezini v. Kingdom of Spain, Decision on Jurisdiction, 25 January 2000, 16 ICSID Rev.-FILJ203 (2001)
339 Sean Murphy (2009), ‘Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms that Protect or Benefit Person?’, in David Sloss (ed), The Role of Domestic Courts in Treaty Enforcement, Cambridge University Press
courts in such situations is premised on the fact that local jurisdictions may have the same remedies against the state as those found under treaties.\(^{342}\)

### 3.4.2. Dispute Resolution Clauses And Umbrella Clause:

Investment contracts between host states and foreign investors usually contain dispute resolution clauses which refer the parties to domestic dispute settlement forums. Difficulties usually arise where in addition to the domestic forum provided for in an investment contract, the applicable investment treaty refers the parties to submit to international arbitration for the settlement of their disputes. When faced with a treaty claim related to a contract which had its own dispute resolution clause, the rulings of majority of arbitral tribunals on this issue have basically been the same but the rationale for the rulings have been divided.\(^{343}\) The dominant position is that there is a distinction between contract claims arising out of a breach of an investment contract and treaty claims arising out of breach of an IIT, and an exclusive jurisdiction clause in a contract does not preclude a treaty claim thus following in the line of the *Vivendi* Annulment decision.\(^{344}\)

The earlier *Vivendi* tribunal had held that it had jurisdiction to entertain the treaty claims which were similar to the claims before the local courts. It however dismissed the claim on the merits stating that

\(^{342}\) Thomas Walde & Abba Kolo, ‘*Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law*’, 50 ICLQ 811, 826-835 (2001), where they compare the protections against regulatory taking under international law and under the US Constitution or the First Protocol of the European Convention on Human Rights. The protections under the systems were found to be similar.

\(^{343}\) Christopher Dugan et. al (2008), ‘*Investor-State Arbitration*’, Oxford University Press, p. 380; See also Emmanuel Gaillard (2005), ‘Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered’, in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May p. 328; See statistics prepared by Gus Van Harten (2013), *Sovereign Choices and Sovereign Constraints*, where he notes that majority of the tribunals faced with the specific issue of whether to decline jurisdiction or stay their proceedings where the investor’s treaty claim appeared to relate to a contract with a dispute settlement clause that was agreed previously by claimant or related party declined to show restraint, p.136

“the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract required, asserted their rights in proceedings before the contentious administrative courts of Tucuman and have been denied their rights, either procedurally or substantively.”

Here, the tribunal showed restraint and respect for the contractual choice of the parties. Van Harten notes that if this example of restraint had been followed by subsequent tribunals,

“then the decision would have constituted investment treaty arbitration largely as a supplement [and not an alternative] to contract-based adjudication.” (Emphasis added by the present writer).

3.4.2.1. The SGS Cases:

A few other tribunals deferred to the contract forum provided in the investment contract and declined jurisdiction to entertain the contractual claims, albeit for varying reasons. Of note are the SGS v Pakistan and the SGS v Philippines cases. These two cases have set the tone for tribunal decisions with regards to the interpretation of whether dispute resolution clauses in investment treaties are broad enough to allow the tribunal exercise jurisdiction over contract claims, and whether observance of undertakings clauses (umbrella clause) transform contract claims into treaty claims. Based on the SGS decisions, subsequent tribunals have ruled either that (1) contract claims cannot be elevated to treaty claims, (2) contract claims can be

345 Compania de Aguas del Aconquija S.A & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, para. 104
346 Gus Van Harten (2013), Sovereign Choices and Sovereign Constraints pp. 136-137
347 Others include Joy Mining v. Egypt (Award of 6 August 2004) where the tribunal declined jurisdiction on the basis that the investor’s claims related to a contract which provided for UNCITRAL arbitration; The tribunal in Salini v Jordan (Award of 9 November 2004) also declined jurisdiction over most of the claimant’s contract related claims on the basis of a provision in the treaty which provided that a contractual dispute settlement clause shall apply if it was agreed by the claimant, See Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay (ICSID Case No ARB/07/9)
348 These clauses contained in investment treaties provide that “any” or “all” disputes “with respect to”, “relating to” or “concerning” investments between a contracting State and an investor of another contracting State can be submitted to arbitration.
349 Sureda adds a fifth type of approach that involves taking into account the international obligation of the disputing State to the other State party of the BIT. He notes that none of the previous approaches considered whether a State party to an investment treaty breaches the commitments made to the other State party when it insists that an investor sign a forum clause which excludes the arbitration venue in that treaty. “Would it not be appropriate for a tribunal established under that investment treaty to uphold the promises of the disputing State party to the other State party in priority to the commitments made by the investor? As for existing contracts, would not the State parties to a treaty have offered an alternative forum by way of that very treaty?”, see Andrés Rigo Sureda (2012), p. 35
elevated to treaty claims without any regard to contract selection clauses.\(^\text{351}\) (3) Contract claims can be elevated to treaty claims but a tribunal will not assume jurisdiction where there is a valid contract forum selection clause.\(^\text{352}\) and (4) a fourth narrower approach suggests that the clause is only relevant to governmental interference as opposed to mere commercial breaches of contract.\(^\text{353}\)

With these in mind, this study examines the SGS cases and the reasoning behind the decisions made by the tribunals. Accepting that BIT claims differ from contract claims and that it had jurisdiction over the treaty claims\(^\text{355}\) despite the forum selection clause contained in the investment agreement, the tribunal in *SGS v. Pakistan*\(^\text{356}\) was then faced with the issue of whether it had jurisdiction to determine the claimant’s claims which were grounded on alleged breaches of a contract agreement. To resolve this issue, the tribunal examined the BIT dispute resolution clause and the observance of undertakings clause (umbrella clause) and declined jurisdiction over SGS’s claims which the tribunal characterized as arising solely out of the contract agreement. The Tribunal’s reasoning was based on the purported intention of the contracting Parties to the BIT and it found that the broad dispute resolution clause could not be read to supersede the contract forum selection clause and was also not sufficient reason for the tribunal to assume jurisdiction over the contract claims.\(^\text{357}\) According to the tribunal, investment treaties create international law substantive standards and there is an assumption that only violation of these standards are to be dealt with by the dispute resolution mechanisms provided under these treaties. The absence of specific indication in the treaty for tribunals to decide issues that do not


\(^{351}\) *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 June 1997, 5 ICSID Reports 186; Award, 9 March 1998, 5 ICSID Reports 200, para. 29; *Eureko B.V v. Republic of Poland*, Partial Award, paras. 244–60

\(^{352}\) *SGS v. Philippines*; *Eureko majority*, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay*, ICSID Case No ARB/07/9

\(^{353}\) *Joy Mining v. Egypt*, para 81; *CMS v Argentina* para 302-303; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, paras 66-68; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, paras. 96-116

\(^{354}\) The tribunal found that “BIT claims and contract claims appear reasonably distinct in principle. Complexities, however, arise on the ground, as it were, particularly where, as in the present case, each party claims that one tribunal (this Tribunal or the PSI Agreement arbitrator) has jurisdiction over both types of claims which are alleged to co-exist.” *SGS v. Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/01/13, para. 148

\(^{355}\) Id., para 155

\(^{356}\) Id., para 146

\(^{357}\) Id., paras 161-162
deal with the violation of standards under international law creates jurisdictional problems.\textsuperscript{358} With regards to the observance of undertakings clause, the tribunal stated that it applied the norms of customary international law on treaty interpretation\textsuperscript{359} to find that there was no convincing basis for accepting the claimant’s contention that that clause had the consequence of entitling an investor, where there is a valid forum selection contract clause, to “elevate” contract claims to treaty claims grounded on a BIT. The Tribunal expressed doubts as to whether such “unqualified and sweeping” result was intended by the parties when they concluded the BIT and held that it did not have jurisdiction over claims “which do not also constitute or amount to breaches of the substantive standards of the BIT”\textsuperscript{360}

Faced with similar issues, the opposite conclusion was reached by the \textit{SGS v. Philippines} tribunal.\textsuperscript{361} The tribunal interpreted the broad dispute resolution clause in light of the object and purpose of the BIT and with reference to the ICSID Convention and found that the tribunal could deal exercise jurisdiction over the contract claims.\textsuperscript{362} However, the Tribunal noted that the intention of the Swiss-Philippines BIT was not “to override an exclusive jurisdiction clause in a contract, so far as contractual claims are involved.”\textsuperscript{363} With regards to the umbrella clause, the tribunal held that a breach of contractual obligation could be elevated to BIT claims. The tribunal

\textsuperscript{358} Gaillard warns that “There is always a danger in divorcing the jurisdictional provisions from the substantive terms of the same treaty in that the treaty-based tribunal has jurisdiction but is invited to rule on a vacuum.”; See Emmanuel Gaillard (2005), \textit{SGS Cases Considered}, p. 336
\textsuperscript{359} \textit{SGS v. Pakistan}, Decision on Jurisdiction, para 165
\textsuperscript{360} Id., para. 162. See also paras. 165-168, 173
\textsuperscript{361} \textit{SGS v. Philippines}, ICSID Case No. ARB/02/6, Decision on Jurisdiction on 6 August 2003 18 ICSID Rev. FILJ 301 (2003); Stanimir Alexandrov (2004), ‘Breaches of Contract and Breaches of Treaty: The Jurisdiction of treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines ’, 5 (4) Journal of World Investment and Trade, 555; See also \textit{Eureko B.V. v. Poland}, Partial Award of 19 August, 2005. The Tribunal held that to follow the \textit{SGS v. Pakistan} ruling so as “to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law...”, para. 258d. The Tribunal in this case however reached a different result from the \textit{SGS v. Philippines} case; it did not suspend the proceedings pending a determination by the courts that have jurisdiction as per the investment contract; \textit{Nobel Ventures v. Romania}, ICSID Case No. ARB/01/11, where the Tribunal held that the acts of a governmental agency are to be attributed to the state for the purposes of applying an umbrella clause and that breached of a contract by a state are capable of constituting a breach of international law by virtue of the breach of the umbrella clause, para. 85; The Tribunal in \textit{LESI-Dipenta} also noted that the effect of the umbrella clause is to transform breaches of the state’s contractual commitments into treaty violations and give arbitration tribunals jurisdiction over contractual breaches, \textit{Consortium Groupement LESI-DIPENTA v. Algeria}, ICSID Case No. ARB/03/8, Award of 10 January 2005, para. 25; See also \textit{LG&E Energy Corp. v. Argentine Republic}, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/16, para. 46 (2004); \textit{ADC Affiliate Ltd. v. Republic of Hungary}, Award, ICSID Case No. ARB/03/16, para. 294 (2006); \textit{Sempra Energy Int’l v. Argentine Republic}, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/16, para. 101 (2005).
\textsuperscript{362} \textit{SGS v. Philippines}, paras. 134-135, 155
\textsuperscript{363} Id., para 147
criticized the SGS v Pakistan tribunal for adopting a presumption against a broad interpretation of the umbrella clause based on the principle of international law that a violation of a contract between an investor and a state is not a violation of international law. According to the tribunal, the question to be addressed was “essentially one of interpretation, and does not seem to be determined by presumption”. According to the tribunal, the SGS v. Pakistan tribunal therefore failed to give meaning to the clause. The Tribunal accepted jurisdiction but denied admissibility because it decided that claimant had to first go to the Philippine courts to hear the contract claims (because of the forum selection clause in the contract) so as determine the scope of the claimant’s obligations. Thus, the tribunal held it had jurisdiction over claims relating to the breach of the observance of undertakings clause but that it had to give effect to the contract dispute resolution mechanism.

Having earlier noted the different approaches to interpretation, the SGS cases applied varied discretion in the interpretation of two contradictory and unclear intentions. Especially as with regards the umbrella clause, the SGS v. Pakistan tribunal was more concerned with the effect of giving the clause a broad interpretation than applying the guidelines provided in the VCLT. The SGS v. Philippines tribunal on the other hand, went into analysis of the object and purpose of the BIT and found that contracts entered into by states with investors forms part of obligations a host state assumes with regards to investments and that it is consistent with the object and purpose of the BIT to hold that those contracts be brought within the framework of the BIT. The analysis in SGS v. Philippines is preferable because on the first level, it considered the umbrella clause, as it is, in light of the object and purpose of the treaty. Then secondly, it found that contracts were part of the obligations entered into by States and therefore found that the

---

364 Id., para 122
365 Id., para. 128
366 Id., paras 135-137. The Tribunal pointed out that the BIT was designed to “support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host state.”; see paras. 141, 143; The Tribunal further held that an arbitral tribunal could exercise jurisdiction over contractual claims where it is shown that serious circumstances (examples include force majeure and miscarriage of justice violating other terms of the BIT) prevent the claim from being brought or from being continued before a forum stated in the contract, paras. 154, 162; Prof. A Crivellaro in his dissenting opinion noted that the ICSID Tribunal had jurisdiction over all aspects of the contractual claim including the extent and content of the contract obligations since a BIT gives the investor the privilege to choose a preferential forum amongst those offered by the host state after the dispute has arisen.
368 SGS v. Pakistan, paras 168-171; SGS v Philippines, para 126
369 SGS v Philippines, paras. 116, 117
BIT’s intention was to give effect to obligations, of which such contracts and their provisions, including the dispute resolution provision are part of. The tribunal’s decision to stay proceedings in light of a contract forum selection clause is good practice of cooperating and coordinating with regards the issue of competence/jurisdiction.\textsuperscript{370}

3.4.2.2. International Investment Arbitration: Balancing Public and Private Agreements:

The design of the international investment arbitration system is unique in that it suggests the balancing of public agreements (international investment treaties), as well as private agreements (investment contracts), both containing different dispute resolution provisions and different laws.\textsuperscript{371} To accord jurisdiction to a forum selected by parties to an investment contract is not only proper but is also indicative of the respect accorded to the intentions of the parties to the contract by the arbitral tribunal. One of the reasons for this obligation on the part of the arbitral tribunal is that specific choices ought to take priority over the general provisions of a treaty.\textsuperscript{372} Likewise, investment treaties function to “support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host state.”\textsuperscript{373}

Additionally, domestic courts are better suited than international arbitral tribunals, with members mostly having expertise in international, to resolve contractual disputes in accordance with their proper law. To effectively coordinate the relationship between the investment arbitration regime and the domestic legal regime, each system must be seen to respect the general principles of specialibus non derogant, prior tempore portior jure and pacta sunt servanda.\textsuperscript{374} This solution is also preferred so as to avert or deal with the risk of multiple proceedings that could result in conflicting, contradictory and more importantly, unenforceable decisions. The decision to stay

\textsuperscript{370} Crawford calls this approach an ‘integrationist view’, because it preserves the distinction between treaty and contract and satisfies the purpose of the umbrella clause ‘to allow enforcement without internationalization and without transforming the character and content of the underlying obligation’, see James Crawford (2008), ‘Treaty and Contract in Investment Arbitration’, Arbitration International, Vol. 24, Issue 3, p. 370; See Zachary Douglas (2009), The International Law of Investment Claims, Cambridge University Press, pp. 388, 393

\textsuperscript{371} Matthew Wendlandt (2008), ‘SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes’, Vol. 43, No. 3, Texas International Law Journal, p. 553. The writer also notes in his article that the resolution of contractual claims by an arbitration tribunal has minimal implications for the investor’s expectations. And that since IITs vest arbitrators the authority, they should have the freedom to decide the methods employed in the resolution of disputes over which they have jurisdiction.

\textsuperscript{372} Campbell McLachlan et. al., (2007), p. 130. The authors note that this is an application of the \textit{lex specialis} rule.

\textsuperscript{373} \textit{SGS v. Philippines} (Preliminary Objections) 8 ICSID Rep 518, 557-558, para. 141

\textsuperscript{374} Z. Douglas (2009), note 178, pp.380-382
proceedings must however be carefully considered where the claimant may be subject to a denial of justice in the courts of the host state, the state interferes with the dispute settlement process or the courts are functionally incapable of rendering justice. In the future, there is no evidence that these contracts will omit the inclusion of dispute resolution clauses referring the parties to a domestic forum for the settlement of their disputes, so the more logical approach and way forward would be to concentrate on the coexistence and coordination of the roles of domestic courts or tribunals and international arbitration tribunals- the two forums for the settlement of disputes under investment contracts and under IITs respectively.\textsuperscript{376}

\begin{footnotesize}
\textsuperscript{375} Id., Chapter 10, Rule 44: “Where the tribunal has determined that the legal foundation of the claim is an investment treaty obligation, and the object of the claim is the vindication of contractual rights forming part of the claimants investment, and there is a bona fide dispute concerning the existence or scope of those rights, then the tribunal should generally stay its jurisdiction otherwise established in favor of a judicial or arbitral forum stipulated in the contract as having exclusive jurisdiction in relation to disputes arising out of the contract.”

\textsuperscript{376} Christoph Schreuer (2006), ‘The Coexistence of Local and International Law Remedies’, in Federico Ortino, Audrey Sheppard and Hugo Warner, Investment Treaty Law- Current Issues Vol. 1, BIICL, London, p.162; Gaillard also concludes that the forum selection clause contained in an investment contract and an investment treaty can be given effect in their respective scope of application, see Emmanuel Gaillard (2005), SGS Cases Considered, p. 344
\end{footnotesize}
Table 1: Cases considering whether MFN clause is broad enough to avoid resort to domestic courts.

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Jurisdiction Details</th>
<th>Decision on Jurisdiction Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>MFN BROAD ENOUGH TO AVOID RESORT TO DOMESTIC COURTS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Camuzzi Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/7, Decision on Jurisdiction of 10 June 2005</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 June 2005)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>National Grid plc v. Argentine Republic, UNCITRAL, Decision on Jurisdiction (20 June 2006)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impregilo S.p.A v. Argentine Republic, ICSID Case No. 07/17, Award (21 June 2011)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telefonica SA v Argentine Republic, ICSID Case No. ARB/03/2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Teinver SA and others v Argentine Republic, ICSID Case No. ARB/09/1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MFN NOT BROAD ENOUGH TO AVOID RESORT TO DOMESTIC COURTS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wintershall Aktiengesellschaft v Argentine Republic, ICSID Case No. ARB/04/14</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ICS Inspection &amp; Control Services Ltd. v Argentina, UNCITRAL, PCA Case No. 2010-9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Daimler Financial Services v Argentine Republic, ICSID Case No. ARB/05/1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v Turkmenistan, ICSID Case No. ARB/10/1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AWARD</td>
<td>TRIBUNAL’S REASONING</td>
<td></td>
</tr>
<tr>
<td>-------</td>
<td>----------------------</td>
<td></td>
</tr>
<tr>
<td>1 Ambiente Ufficio SPA v Argentina, (ICSID Case No. ARB/08/9)</td>
<td>Acts of the state prevented effective settling of claimants claims within the domestic legal system</td>
<td></td>
</tr>
<tr>
<td>2 Philip Morris Brands Sàrl &amp; Ors. v. Uruguay, ICSID Case No ARB/10/7</td>
<td>18 month requirement met before tribunal decided on jurisdiction</td>
<td></td>
</tr>
<tr>
<td>3 Urbaser SA and others v Argentine Republic, ICSID Case No. ARB/07/26</td>
<td>18 month period too short to reach a “decision on the substance”; Claimants would lack jus standi before domestic courts</td>
<td></td>
</tr>
<tr>
<td>4 TSA Spectrum v Argentina, ICSID Case No. ARB/05/5</td>
<td>18 month requirement met (administrative process)</td>
<td></td>
</tr>
<tr>
<td>5 BG Group Plc. v Argentina, UNCITRAL Award</td>
<td>Acts of the state constituted restrictions to the effectiveness of domestic judicial remedies</td>
<td></td>
</tr>
<tr>
<td>6 Abaclat v Argentina, ICSID Case No. ARB/07/5</td>
<td>The state was not in a position to adequately address the present dispute within the framework of its domestic legal system</td>
<td></td>
</tr>
</tbody>
</table>
Table 3: Case where claimant did not rely on the MFN Clause.

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ömer Dede and Serdar Elhüseyni v. Romania ICSID Case No. ARB/10/22</td>
<td>The tribunal declined to assume jurisdiction on the basis that the claimants failed to comply with the jurisdictional preconditions that must be satisfied prior to submission of their claims to arbitration, as provided by Article 6(4) of the BIT. Article 6(4) of the Romania/Turkey BIT provides that an investor is “entitled” to submit an investment dispute to arbitration at any time after either (i) exhaustion of domestic remedies or (ii) at the expiry of one year from the date the dispute was submitted to host-state courts if there has not been a final judgment within that twelve-month period. The claimant did not argue that jurisdiction might be based on the application of the MFN clause.</td>
</tr>
<tr>
<td>Teinver (Table 1)</td>
<td>The tribunal also considered that the 18 month requirement had been met because the claimant had initiated domestic proceedings in the Argentine courts and as such, the ‘core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met’, para. 135</td>
</tr>
</tbody>
</table>

* The tribunal in Teinver (Table 1) also considered that the 18 month requirement had been met because the claimant had initiated domestic proceedings in the Argentine courts and as such, the ‘core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met’, para. 135
Chapter 4: Domestic Court Review Of Arbitral Awards

“No court should recognize an award falling beyond the arbitrator’s authority. Thus some measure of judicial scrutiny over arbitral jurisdiction remains a vital safeguard to the integrity of the process, and constitutes an essential corollary to enforcement of legitimate awards.”

One of the signposts of the legitimacy of investment arbitration is the counterbalancing influence of domestic court review of arbitral awards. Domestic court scrutiny of investment awards ought to promote the efficiency of the arbitration process because courts may review arbitrators’ adherence to procedural fairness, whether arbitrators acted within their jurisdiction, or whether award is consistent with public policy. In some cases, courts may even correct legal errors of tribunals. While ICSID awards are not reviewable by domestic courts, non-ICSID awards, on the other hand, are subject to challenges by domestic courts, at the seat of arbitration, under the commercial arbitration laws of domestic jurisdictions. Most domestic laws on arbitration laws follow the UNCITRAL Model Law that prescribes the grounds under which arbitration awards can be challenged. Under the Model law and indeed most modern national arbitration laws, the review of the merits of a case is not permitted. The Model law provisions do not

---

379 Article 34 UNCITRAL Model Law
380 Section 69, 1996 English Arbitration Act
381 Articles 52 and 53 of the ICSID Convention provide for annulment of awards
383 See Article 34 UNCITRAL Rules. The grounds include: (1) the incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement, (2) lack of proper notice to a party or incapacity to present its case (3) inclusion in the award of matters outside the scope of submission (4) irregularities in the composition of the tribunal or the arbitral procedure (5) non-arbitrability of the subject matter and (6) violation of domestic public policy.
include standards under which courts can exercise their mandate, so to find guidance or inspiration, courts normally look to administrative and constitutional law principles, or general concepts of judicial review.

Gary Born notes that

“The degree of deference afforded to a tribunal’s positive jurisdictional award varies from state to state. As discussed elsewhere, many national courts appear to apply a de novo standard of judicial review to all positive jurisdictional awards. In contrast, some courts (notably in the United States) consider the issues submitted by the parties to the arbitrators’ decision and, where those issues included jurisdictional objections, will give only the same (very expansive) degree of deference to jurisdictional awards as is accorded to the substance of other awards; in contrast, where no agreement was made to resolve jurisdictional disputes by arbitration, then a jurisdictional award will be subject to de novo judicial review under the FAA”

In the review of the decisions of international investment tribunals by domestic courts, the default reaction is to accord deference to the decisions of investment tribunals. In light of this, this chapter addresses the following queries: How much deference is too much? When does deference by the court render the review provision in the Model Law meaningless? Other queries include: What standards are to be applied by courts so that they stay within their mandate? Do courts even possess the expertise to review decisions of international investment arbitration tribunals? Are domestic court reviews effective? And whether courts are the appropriate forums for the review of investment arbitration decisions.

385 Mexico v Cargill (Ont CA), 2011 ONCA 622. 10, para, 34-35, 40
388 The issue is the situation where courts accord so much deference that the review provision in the Model law becomes meaningless. “The principle of competence-competence, as such, cannot serve to exclude any such review [review by domestic courts] or subject it to such a high degree of deference that it becomes meaningless.” Celine Levesque (2014), p. 89
To attempt answers to these questions, the cases examined in this section are those dealing with the jurisdiction of tribunals and scope of submission to arbitration. The examination highlights the differences in standards applied by courts in different jurisdictions, especially Canada and the United States, and the challenges posed by the different standards applied. This exercise is important because it has implications for the jurisdiction and competence of courts and tribunals, and it is instructive as to how the court views its role vis-à-vis the arbitral tribunal and indeed, the whole arbitration process. In turn, the role adopted by the court highlights the cooperation or otherwise existing between both systems in the resolution of investment disputes.

Before proceeding, it is important to note that over 90% of awards challenged before domestic courts have been turned down. (See table summarizing cases before domestic courts and their outcomes) This paints a picture of some level of collaboration and cooperation as it shows that domestic courts are respectful towards the decisions of arbitral tribunals, and may be mindful of maintaining the sanctity of tribunal decisions. This statistics seems to be good precedence for courts that may be faced with challenges in the future. Again, the degree of deference accorded and the standard of review applied by courts vary.

4.1. Review Standards: United States Courts:

Generally, under the Federal Arbitration Act, courts are to accord deference to the decisions of arbitration tribunals. In practice, before deciding the standard of review to be applied, courts would usually make a determination as to whether the issue before the court is a ‘threshold question’ for the court to decide, without deference to the arbitral tribunal or a procedural matter, which the courts will considerably defer to the tribunal for determination.

---

390 Also known as ‘gateway’ questions under U.S. verbiage. They are issues that a court entertains at the threshold to ensure that the entire process has a foundation in party consent, see George Bermann, ‘The ‘Gateway’ Problem in International Commercial Arbitration’, in Stefan Kroll et al. (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Kluwer Law International, p. 55
4.1.2. BG Group v Argentina:

For the very first time, the United States Supreme Court was called on, in March 2014, to review an investment arbitration award arising out of an international investment claim under a BIT. Before analyzing the outcome of the Supreme Court decision, a look is had at the decisions of the courts below. Following an award by an UNCITRAL tribunal sited in Washington D.C, which found that Argentina denied BG Group fair and equitable treatment and awarded BG Group $185 million in damages, Argentina sought review in the Federal District Court to vacate the award under the Federal Arbitration Act (FAA). The main ground for vacatur was that the arbitrators exceeded their powers by ignoring the terms of the parties’ agreement, which was litigation in the local courts for a period of time before proceeding to arbitration. BG Group filed an opposition and a cross-motion for recognition and enforcement of the Final Award, and for a prejudgment bond. Argentina’s challenge was unsuccessful as the court upheld the award. That court stated that it is mindful of the principle that “judicial review of arbitral awards is extremely limited,” and “that this Court “do[es] not sit to hear claims of factual or legal error by an arbitrator” in the same manner that an appeals court would review the decision of a lower court...... In fact, careful scrutiny of an arbitrator’s decision would frustrate the FAA’s “emphatic federal policy in favor of arbitral dispute resolution.” The court held that the tribunal correctly resorted to sources of international law in interpreting the local litigation provision and in concluding that the matter was arbitrable.

On appeal by Argentina to the US Court of Appeals for the DC Circuit, that court questioned the ability of a tribunal to determine the scope of its jurisdiction and reversed the finding of the tribunal ruling that the court, and not the tribunal could decide whether a claimant can waive the local litigation requirement and proceed directly to arbitration. The court defined the gateway question as a matter of ‘arbitrability.’ Even though the court noted that the scope of judicial

review of the substance of arbitral awards is ‘exceedingly narrow’, it stated that an arbitrator cannot ignore the intent of the contracting parties. The court held that the BIT provided clear evidence of the parties’ intent for the tribunal to determine questions of arbitrability, however, the court excluded from the arbitrability category, the local litigation provision. It found that the interpretation and application of the pre-litigation requirement were matters for courts to decide de novo and without deference to the arbitrators’ views. The court, relying on domestic jurisprudence, was of the reasoning that the issue of ‘arbitrability’ was for the courts to decide and not the tribunal, unless the parties clearly and unmistakably provide otherwise. In essence, the court deviated from according the generally broad deference ordinarily applied to decisions of arbitration tribunals. Although the ruling conflicts with several other rulings by arbitral tribunals that have addressed the pre-litigation requirements, the ruling has implications for finality of awards, which is one of the major reasons for any party resorting to arbitration. It also has implications as to interpretations given to wordings of BIT provisions, a vital reminder of the important role of the law of the place where the enforcement of an arbitral award is sought, and choice for parties between ICSID and non-ICSID arbitration. This case was however appealed to the U.S Supreme Court.

The Supreme Court was called on to decide who should decide questions of conditions to arbitration, in this case, the issue of litigating before domestic courts of Argentina for 18 months before initiating arbitral proceedings contained in the UK-Argentina BIT. The Supreme Court, applying ordinary contract principles, overruled the decision of the DC Circuit and held that under the BIT, the tribunal, and not the court has competence to decide whether the preconditions to arbitration have been satisfied. The court reasoned that the local litigation clause

397 Id., pp. 9-17
399 The provision authorizes either party to submit a dispute “to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made,” i.e., a local court. Art. 8(1). And it provides for arbitration“(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal . . . , the said tribunal has not given its final decision; [or] “(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute.” Art. 8(2)(a). The Treaty also entitles the parties to agree to proceed directly to arbitration. Art. 8(2) (b).
in the BIT was a procedural prerequisite to commencing a particular arbitration and not a precondition to Argentina’s initial consent to arbitration.\footnote{For example, see Maffezini v Spain Award; For more tribunals following this reasoning, see section on Preconditions to Arbitration: Local Litigation Requirement, Chapter Three} The court considered whether to review the arbitrators’ interpretation and application of the local litigation provision de novo, or with the deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration.\footnote{SC decision, pp. 6-17, citing See also Hall Street Associates, L. L. C. v. Mattel, Inc., 552 U. S. 576, 588 (2008) (on matters committed to arbitration, the Federal Arbitration Act provides for “just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway” and to prevent it from be-coming “merely a prelude to a more cumbersome and time-consuming judicial review process” (internal quotation marks omitted)); Eastern Associated Coal Corp. v. Mine Workers, 531 U. S. 57, 62 (2000)(where parties send a matter to arbitration, a court will set aside the “arbitrator’s interpretation of what their agreement means only in rare instances”), at p. 6} The court noted that courts can review (with ‘considerable’ deference) the arbitrators’ decision to excuse the BG Group’s noncompliance with the local litigation requirement, that review shows that the arbitrators’ determinations were lawful. The court was of the view that the factual findings and conclusion of the tribunal that Argentina passed laws hindering recourse to the local courts by firms similar to BG Group thereby making it “absurd and unreasonable” to read Article 8 to require an investor in BG Group’s position to bring its claims before the Argentinian domestic court, before arbitrating, is not barred by the Treaty.\footnote{SC Decision, pp. 17-19} In the Supreme Court’s ruling, an exception to the rule of deference exists for threshold questions as to whether parties have agreed to arbitrate- arbitrability.\footnote{Alan Scott Rau (2013), ‘Arbitrating “Arbitrability”, University of Texas Law, Public Law Research Paper no 403; Shore notes that internationally, the term “arbitrability” refers only to whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute, because of either public policy or because they are outside the scope of the arbitration agreement. In the United States, the term assumes that meaning and more. “Arbitrability” also includes the jurisdictional question of who (arbitrator or court) should be the initial decision-maker on issues such as the validity of the arbitration agreement, the scope of the agreement and public policy issues barring the submission of the dispute to arbitration. See Lawrence Shore (2009), ‘The United States’ Perspective on ‘Arbitrability’ in Loukas Mistelis and Stravos Brekoulakis (eds.) “Arbitrability: International & Comparative Perspectives”, Kluwer Law International, pp. 69-83} In this case, the arbitrability question is whether a local litigation requirement in the BIT is a threshold question for the court to decide, without deference to the arbitral tribunal or is it a procedural precondition to arbitrate, which the courts will considerably defer to the tribunal for determination. The court concluded that the local litigation requirement is a purely procedural “claims-processing rule that
governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute^404, and so, the courts must defer to the tribunal.

In his dissenting opinion, Roberts C.J, emphasized the weight to be given to an Argentine court’s authoritative construction of Argentine law, rendered in the same dispute. He went on the list the benefits of local litigation before the dispute reaches arbitration. According to him, litigation before the courts could help to “narrow the range of issues that remain in controversy by the time a dispute reaches arbitration; it might even induce the parties to settle along the way. And of course the investor might prevail, which could likewise obviate the need for arbitration. This dissenting opinion is in line with other cases where arbitrators have opined that there is no inherent right of access to recourse by arbitration. If the criteria under the conditions provided in a BIT are not met, there is no meeting of minds, hence, no agreement to arbitrate.405

Again, the Supreme Court decision highlights the importance of drafting language contained in BIT provisions and the interpretations given to them. Even different courts within the same jurisdictions are likely to give these provisions different interpretations. This court ruling recognizes the rights of parties to an arbitration agreement to submit to the tribunal, the question of arbitrability. Such an agreement has the effect of shielding arbitrability decisions from the court’s review.406 Also the US Supreme court decision is likely to set a strong precedent in the US so that US courts may find that decisions of tribunals concerning procedural preconditions are to be accorded deference absent a clear language to the contrary. Given the divide between decisions interpreting the local litigation requirement it can be said that this recent US Supreme Court decision has not made the jurisprudence any clearer as to issue of litigating in domestic courts before instituting arbitration proceedings.

^404 SC Decision p. 9
^405 Impregilo v Argentina (Award) ICSID Case No. 07/17, see Dissenting Opinion by Brigitte Stern; Dissenting opinion of John Christopher Thomas QC in Hochtief v Argentina (Decision on Jurisdiction) ICSID Case No. ARB/07/31; ICS Inspection and Control Services Ltd v Argentine Republic, UNCITRAL, PCA Case No. 2010-9; Daimler Financial Services v Argentine Republic, ICSID Case No. ARB/05/1; Wintershall Aktiengesellschaft v Argentine Republic, ICSID Case No. ARB/04/14; see also the amicus brief of the US Solicitor General, Brief for United States as Amicus Curiae 25.
While a challenge to the award was pending in the Hague court, Ecuador argued before the D.C. Court that the confirmation of the award should be denied on the grounds that the court lacks subject-matter jurisdiction because the case does not meet the requirements of the arbitration exception to the Foreign Sovereign Immunities Act; that confirmation must be denied under the New York Convention because the award was beyond the scope of the submission to arbitration and is contrary to United States public policy. Finally, it requested that the court stay proceedings in this matter while Ecuador attempts to have the award set aside by courts in the Netherlands, where the award was rendered. In resisting the confirmation of the award under the FSIA exception, Ecuador raised a novel argument by contending that it never consented to arbitrate the underlying dispute, meaning that “the award was not rendered “pursuant to an agreement to arbitrate,” and that the Court must satisfy itself of the arbitrability of the underlying dispute before finding subject-matter jurisdiction over the enforcement proceeding.” Ecuador also contended that the tribunal’s decision on the arbitrability of the underlying dispute was incorrect and that the court must engage in a de novo review of the tribunal’s decision on jurisdiction and in an ‘independent determination’ of the Tribunal’s jurisdiction to resolve the underlying dispute. Chevron claims instead that the parties had ‘clearly and unmistakably” agreed that the Tribunal should decide the arbitrability of the dispute, and that the court should adopt a deferential standard in its review.

The court found that Ecuador consented to arbitration and it had subject matter jurisdiction. In deciding on the challenge to the tribunal’s decision on jurisdiction raised by Ecuador, the court first carried out an examination of whether an agreement to arbitrate existed, of which it found that there was a valid agreement to arbitrate under the U.S-Ecuador BIT. Siding with Chevron’s position, and referring to Article 21 of the UNCITRAL rules, the court found that there was clear and unmistakable evidence that the parties had agreed for the arbitrators to determine

---

408 Noting that the U.S.-Ecuador BIT, which forms the basis of the agreement to arbitrate provides that arbitration may be conducted “in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).”
questions of arbitrability, as such the court must give substantial deference to that decision. As to the standard of deference to be applied by the court, the court noted that it need not determine a standard to employ, as even under a mildly deferential standard, the tribunal’s decision appeared well reasoned and comprehensive. On the public policy exception, the court held that since it found that a valid agreement to arbitrate between the parties was formed under the BIT, ‘it cannot now say that enforcing it through the precise means contemplated by the treaty would contravene the strong public policy of the United States.’ Ecuador had requested a stay of proceedings pending the set-aside proceedings in the Hague. The court in consideration of this request identified a number of factors district courts should consider in evaluating a request for a stay of proceedings. The court noted that all the factors weighed in favor of confirmation of the award.

Before The Hague district court, one of the main challenges to the award by Ecuador was that the tribunal failed to adhere to its mandate and that the tribunal acted outside of the legal dispute between the parties. The district court of The Hague denied the request and Ecuador appealed the courts decision. Chevron and Texaco (Chevron) had entered into a contract with Ecuador to exploit oil reserves in Ecuador’s Amazon region in 1973. This contract was amended in 1977. Following several breaches of the agreements between Chevron and Ecuador, Chevron filed breach of contract claims before Ecuadorian courts and subsequently initiated arbitration claims.

---

410 See also the court’s referral to AT&T Technologies court, and noted that ‘ordinarily, arbitrability is an issue for judicial determination, it held that where “the parties clearly and unmistakably provide otherwise” – e.g., where they have submitted the arbitrability of the dispute to the arbitrators – the arbitrator determines the arbitrability of the dispute in the first instance. See 475 U.S. at 649; The court also referred to First Options, where that court stated that in such cases of delegation to a tribunal, a court may review that arbitrability decision, but it “should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.”’ First Options of Chicago Inc. v Kaplan, 514 U.S. at 943; The court cannot second-guess the construction of the parties agreement given by the tribunal, Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L’Industrie Du Papier (RATKA), 508 F.2d 969, 977 (2d Cir. 1974) See also Schneider v. Kingdom of Thailand, 688 F.3d 68, 74 (2d Cir. 2012)
411 Chevron and Texaco v Ecuador, D.D.C. June 6, 2013, p. 14
412 Id., p. 19
413 Id., p. 21. The factors include (1) The general objectives of arbitration (2) The status of the foreign proceedings and the estimated time for those proceedings to be resolved; (3) Whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) The characteristics of the foreign proceedings including (i) whether they were brought . . . to set the award aside (which would tend to weigh in favor of enforcement) . . . and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute; (5) A balance of the possible hardships to the parties . . .; and (6) Any other circumstance that could tend to shift the balance in favor of or against adjournment . . . Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 317 (2d Cir. 1998)
in 2006 alleging that Ecuador had breached the BIT by allowing its claims to languish in those courts without a resolution. The tribunal found that the Ecuadorian courts’ undue delay constituted a breach of the BIT.

As noted earlier, the rule that recognizes the right of parties to an arbitration agreement to submit the question of arbitrability to the arbitrators is found in the United States. Where the agreement is specific, it would have the “effect of largely shielding arbitrability questions from the court’s review.” The basis for such a rule is that competence-competence excludes the review of jurisdictional decisions. However, the power of the tribunal to rule on its own jurisdiction must be considered alongside the power of domestic courts to review, and if necessary, set-aside the decision of tribunals for excess of jurisdiction. If not, it would appear to render the review provision useless and without effect.

4.2. Review Standards: Canada:

In other jurisdictions, courts do not first consider whether there is ‘clear and unmistakable evidence’ that the parties have agreed to submit the question of arbitrability to the tribunal. The issue in other jurisdictions is exactly what standard of review is proper for review of tribunal’s jurisdictional decisions.

In the recent case before the Canadian courts, Mexico v. Cargill, an UNCITRAL tribunal had found that Mexico discriminated against United States investors, who were producers and distributors of high-fructose corn syrup (HFCS). Because Cargill produced HFCS in the US and imported to its subsidiary in Mexico, which sold and distributed the product, the tribunal held that ‘supplying HFCS to Cargill de Mexico was an inextricable part of Cargill’s investment.’

---

416 This case is part of three cases and Mexico only applied to have the award set-aside in this case. The cases are Archer Daniels Midland Co & Tate & Lyle Ingredients Americas, Inc v Mexico, ICSID Case ARB(AF)/04/05, Award, 21 November 2007 and Corn Products International, Inc v Mexico, ICSID Case ARB(AF)/04/01, Decision on Responsibility, 15 January 2008.
417 Cargill v Mexico (Award), ICSID Case No. ARB(AF)/05/2, para 523
Before the Ontario Superior Court of Justice, Mexico challenged the award claiming that the award of damages for Cargill’s lost US sales from the US to its Mexico affiliate were beyond the scope of the submission to arbitration. Applying international commercial arbitration jurisprudence and domestic law principles, the court noted that a high degree of deference must be accorded decisions of specialized tribunals, especially consensual arbitration tribunals. The court in considering whether the tribunal exceeded its jurisdiction applied the standard of reasonableness and referred to the “powerful presumption” that international arbitral tribunals act within their jurisdiction. The court found that the tribunal’s assessment of damages hinged on factual findings, of which the court has no jurisdiction under Article 34 of the Model Law to interfere. As to whether the tribunal exceeded its jurisdiction, the court, after reviewing the tribunal’s decision, found the decision to be reasonable.

On appeal, the Ontario Court of Appeal affirmed the Superior court’s ruling but rejected the standard of adopted by that court for jurisdictional issues. Mexico and Canada argued that the standard should be correctness, while Cargill argued that the appropriate standard was that of reasonableness. ADR Chambers, an intervener in the case, submitted that it was inappropriate to apply the domestic administrative law tests to the review of an international arbitration panel, and that the proper standard to be applied is that of deference. The Court of Appeal also rejected the ‘powerful presumption’ that an arbitrator acted within its authority as too deferential, as that “would effectively nullify the purpose and intent of the review authority of the court.” The court held that the scope of review is correctness – “The tribunal therefore had to be correct in the sense that the decision it made had to be within the scope of the submission and the NAFTA provisions. Its authority to make any decision is circumscribed by the submission and the provisions of the NAFTA as interpreted in accordance with the principles of international law. It

418 United Mexican States v Cargill Incorporated, 2010, ONSC 4656
419 Id., as a factual matter that Cargill subsidiary was part of Cargill’s business operation of selling HFCS into Mexico, and as such it was not unreasonable to find that the damages to the subsidiary were damages to the parent.
421 Id., “Any time the court reviews on the reasonableness standard, it undertakes an in-depth analysis of the reasoning and decision of the tribunal in order to decide whether the result is a reasonable one. That may include a review in the form of an exercise determining whether findings of fact made by the tribunal were reasonable. Once a court enters into a reasonableness review, it is effectively considering the merits of the tribunal’s decision and deciding whether that decision is acceptable because it is reasonable, not because it was made within the jurisdiction of the tribunal”, para 51
422 Id., “if courts were to defer to the decision of the tribunal on issues of true jurisdiction, that would effectively nullify the purpose and intent of the review authority of the court under Article 34 (2)(a)(iii)”, para 46
423 Id., para 47
has no authority to expand its jurisdiction by incorrectly interpreting the submission or the NAFTA, even if its interpretation could be viewed as a reasonable one.”

4.2.1. The Standard Applied by the Court in Cargill and Other Courts:

The court in Cargill referred to SD Myers, where the court stated that jurisdictional matters of law are reviewable on a standard of correctness and Metalclad where the court held that the standard of review on questions of jurisdiction was correctness. The court also looked at the English court decision in Dallah, where the court carried out a de novo examination of the existence of the agreement to arbitrate and did not defer to the arbitral tribunal’s decision on its own jurisdiction. Another English court in Occidental Exploration and Production Co. v Ecuador stated that “It is now well-established that a challenge to the jurisdiction of an arbitration panel under Section 67 proceeds by way of a rehearing of the matters before the arbitrators. The test for the court is: was the Tribunal correct in its decision on jurisdiction? The test is not: was the Tribunal entitled to reach the decision that it did.” On the basis of that standard, the Court looked at the factual aspects concerning the merits of OEPC’s claim and Ecuador’s defense, whilst taking care not to deal with the merits of OEPC’s claim. The Court sided with the Tribunal and found that it was correct in holding it had jurisdiction to consider the dispute between OEPC and Ecuador. In Czech Republic v European Media Ventures, the parties agreed that the correct approach to the Tribunal’s decision on substantive jurisdiction was correctly summarized by Aikens J in Republic of Ecuador v Occidental Exploration & Production Co (No 2)

The court likely reached a correct conclusion but the difficulty is the route taken to get to this decision. The court stated that courts are expected to intervene only in rare circumstances where there is a ‘true questions of jurisdiction’. There was not enough guidance as to what

424 Id., para 41
425 Canada v SD Myers (FC) (n 14) para 58. Other questions are to be reviewed under a standard of reasonableness; United Mexican States v. Metalclad Corp. (2001), 89 B.C.L.R. (3d) 359 (S.C.)
426 Dallah v Pakistan (2010), paras. 37-38
427 Rep of Ecuador and Occidental Exploration and Production Co [2006] (High Ct of J Queens Bench Div Comm Ct), para 7, EWHC 345 (Comm); 8 ITL Rep 948 (2006)
428 Id., para 110
429 The Czech Republic v. European Media Ventures SA, 2007 EWHC 2851 (Comm), para 13
430 Levesque (2014), pp. 84-86
431 Cargill, Court of Appeal, paras. 33 and 44
Again the court failed to deal with expertise, the argument presented by Mexico, and supported by United States and Canada on the common position taken by them, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, recognizing the territorial limitation on the scope of damages that can be awarded. The court stated that if that position of the three Parties (Mexico, United States and Canada) “was a clear, well-understood, agreed common position, in accordance with Article 31(3)(b) of the Vienna Convention, that prohibited the award of any losses suffered by the investor in its home business operation, even caused by the breach, it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation of the relevant provisions of Chapter 11. However, that does not appear to be the case. The common position, as far as it went, that damages must relate to the investment and to the investor as an investor, was understood and implemented by the Cargill tribunal, based on its findings of the nature of the losses in this case. In my view, no jurisdictional error was made.”

The court’s interpretation of the Vienna Convention is wanting, as it was not clear from the court’s statement what “a clear, well-understood, agreed common position” meant especially since the NAFTA Parties already agreed on and submitted their positions on a common view of the interpretation of Article 1116. Besides, it is not also clear whether the court took the position of the parties into consideration in its analysis because in its statement, it only referred to the tribunal’s understanding of the common position.

4.3. Effectiveness of Domestic Court Review:

The level of uncertainty in domestic court reasoning and analysis of arbitration awards, and interpretation of international treaties leads to the question as to whether domestic courts can effectively review international arbitral awards; whether they possess the expertise to carry out such review? In the light of the Cargill case, Levesque questions the expertise of domestic courts in ruling on the correctness of arbitral tribunal jurisdictions, based on interpretation of public international law instruments. Before offering suggestions on this challenge, this work looks at

432 The examples of true questions of jurisdiction offered by the court that would justify setting aside an arbitral award are- an award based on acts outside the dates covered by the submission to arbitrate, and the other an award based on an investment in a territory other than one covered by the authorizing statute, id, para 49
433 Id., para 84
434 Levesque (2014), pp. 85-86, 103
the *Metalclad* case\(^{435}\), where the court in reviewing an award, strayed into the merits of the award. The court partially set aside the award of the tribunal. While confirming that the intervention of the courts in international arbitration should be limited\(^{436}\), Mr. Justice Tysoe rejected the use of the 'pragmatic and functional' approach used in Canada for determining the appropriate standard of review.\(^{437}\) The judge examined Article 34(2)(a)(iii) of the ICCA\(^{438}\), which sets out the jurisdictional standards for court review of an arbitration award. He found that the arbitration tribunal exceeded its jurisdiction by including transparency principles, which are not part of customary international law, in the concept of 'fair and equitable' treatment as required by article 1105.\(^{439}\) In the same vein, the court held that the tribunal exceeded its scope of authority by basing its holding on expropriation on its misstatement of the standard expected under Article 1105 (fair and equitable treatment).\(^{440}\) The tribunal, according to the court, misstated the applicable law.\(^{441}\) The court however upheld the ruling of the Tribunal that the proclamation of an ecological decree by Mexico was tantamount to expropriation within the meaning of Article 1110 NAFTA.

The limiting of the jurisdictional boundaries of the tribunal by the court in *Metalclad* shows the extent of the deference accorded to the tribunal by that particular court.\(^{442}\) This also evidences

---

\(^{435}\) Application to set aside the Award of the NAFTA Tribunal (*The United Mexican States v. Metalclad Corporation* (2001), 89 BCLR (3d) 359; 14 BLR (3d) 285; Supplementary Reasons: [2001 BCJ No. 2268; 2001] BCSC 1529); *The United Mexican States v. Metalclad Corporation* 2001 BCSC 664

\(^{436}\) Article 5 of the British Columbia International Commercial Arbitration Act (ICCA) (based on the UNCITRAL Model Law)

\(^{437}\) The Judge noted that it would be erroneous to import into the ICCA, “an approach which has been developed as a branch of statutory interpretation in respect of domestic tribunals created by statute”, *The United Mexican States v. Metalclad Corporation* 2001 BCSC 664, para. 54

\(^{438}\) Art 34 (2)(a)(iii) the award deals with a dispute ... not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, ...; or (2)(a)(iv) ... the arbitral procedure was not in accordance with the agreement of the parties, ...; or (2)(b)(ii) the award is in conflict with the public policy of Canada.

\(^{439}\) “Hence, the Tribunal made its decision on the basis of transparency. This was a matter beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11”, *The United Mexican States v. Metalclad Corporation* 2001 BCSC 664, para. 72

\(^{440}\) Provisions establishing the duty of fair and equitable treatment are included in many BITs. In order to give content to this duty, the tribunal looked at references in NAFTA statement of objectives and in Article 1802 to transparency, and in its preamble and statement of objectives to creating “a predictable commercial framework” for investment and to increasing “investment opportunities”

\(^{441}\) *The United Mexican States v. Metalclad Corporation* 2001 BCSC 664, para. 70

the fact that courts may have much more power in the arbitral process than anticipated. Metalclad is also important for review of arbitration awards because it shows the extent which courts can turn substantial issues into jurisdictional questions. The judge, by ruling that the government’s failure to act in a clear, predictable and transparent manner did not constitute a breach of the fair and equitable treatment obligation contained in NAFTA Article 1105 (1), substituted his own interpretation of that article for the unanimous interpretation of the expert tribunal. He also overstepped his mandate (which is limited to findings on improper constitution of the panel, violation of British Columbian public policy and excess of jurisdiction) when he attempted to make a questionable interpretation of the role of transparency within the NAFTA framework. Even though the court offered a questionable analysis of the tribunal’s finding, the decision serves as a notice that the lines can blur in making a distinction between an error of law and an error of jurisdiction. Hence, Professor William Park noted that

“The text of the [review] law, of course, must be read in the context of its application. Even a statute that allows challenge only for defects related to procedural regularity may allow wriggle room for an overzealous judge to examine a dispute's legal merits under the guise of correcting arbitrator excess of authority.”

In this regard, it was noted that

---

23 Hastings International and Comparative Law Review, 311; Todd Weiler (2001), ‘Metalclad v. Mexico: A Play in Three Parts’, 2 Journal of World Investment 685; Canadian precedence recognizes the deference that should be accorded to arbitrators and that judicial intervention should be minimized- Quintette Coal Ltd. V. Nippon Steel Corp., 1. WW.R. 219, 229N(BCCA 1991)


444 Todd Weiler notes that that Judge Tysoe “may be an insolvency and bankruptcy law specialist without any particular background in international law, makes ‘second-guessing by “ordinary judges” of the merits of an arbitration award rendered by international law experts all the more dubious’, Todd Weiler (2001), ‘Metalclad v. Mexico: A Play in Three Parts, 2 Journal of World Investment, 685; Carl-Sebastian Zoellner (2006), ‘Transparency: An Analysis Of An Evolving Fundamental Principle In International Economic Law’, Michigan Journal of International Law, Vol. 27: 579, 611-614, footnote 195; See also Courtney N. Seymour (2002), ‘The NAFTA Metalclad Appeal—Subsequent Impact or Inconsequential Error?: Only Time Will Tell’, 34 U. Miami Inter-Am. L. Rev 189; The issuing of Notes of Interpretation of Certain Chapter 11 provisions (July 31, 2001) by the NAFTA Free Trade Commission may be a reaction to awards granted in the Metalclad cases and others. The Note holds that the concept of ‘fair and equitable treatment’ and full protection and security as used in Chapter 11 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

“the practical lesson to be learned from Metalclad is that courts at the place of arbitration will have the last word in an arbitration proceeding”.

4.4. Domestic Courts: Appropriate Forums for Review of International Investment Arbitration Awards?

The various questions examined in this chapter beg the question of whether courts are the proper forums for the review of investment awards. As noted, according blind deference may not always be in the best interest of the investment arbitration process. A thorough review of the decisions of arbitrators may actually lead to the improvement of the quality of awards, at least in terms of detailed and better reasoning on the part of tribunals. The amount of deference accorded to tribunal decisions in some cases depend on the expertise of the tribunal called on to review such decisions. In this regard, the Metalclad decision, again, highlights this query.

With regards to the mandate of domestic courts to review investment awards, a domestic court in its review of an arbitration award is limited to questions such as whether tribunal exceeded the scope of its jurisdiction. Where questions before the court go beyond the matters within the powers of the court, it is either they are not resolved or the court reviews the merits of the award, thereby exceeding their review mandate. At this point, a specialized appellate body may be appropriate to review merits of a tribunal’s findings. Since jurisdictional questions involve fundamental issues of international investment law - international investment treaty texts, drafting histories, and subsequent practice and understanding among the treaty parties, the Vienna

---

446 Guillermo Alvarez and William Park (2003), ‘The New Face of Investment Arbitration: NAFTA Chapter 11’, 28 Yale Journal of International Law 365, pp. 376-377. The authors further noted that “...care should be taken in selecting a venue where judges exercise a control function over the arbitration’s basic procedural integrity (looking at matters such as bias, excess of authority and due process), but do not second guess the arbitrator on the substantive merits of the dispute”. See also William Park (1999), ‘Duty and Discretion in International Arbitration’, 93 American Journal of International Law 805; Judge Tysoe has also been criticized “for saying the right things in his decision, but failing to apply the law consistently with the spirit of deference to arbitral awards. He “talked the talk”, but did not “walk the walk”, see Ian A. Laird and Rebecca Askew (2) (2006), ‘Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System?’, 2 Journal of Appellate Practice and Process 101; see the debate between Professor Chip Brower and Christopher Thomas referred to in Charles H. Brower, II (2003), ‘Structure, Legitimacy and NAFTA's Investment Chapter’, 36 Vand. J. Transnational L. 37; Charles H. Brower, II (2002), ‘Beware the Jabberwock: A Reply to Mr. Thomas’, 40 Colum. J. Transnational. L. 465


Convention on the Law of Treaties, and arbitral case law, an area in which domestic courts may lack expertise (as seen in the interpretation of the Vienna Convention by the Superior court in Cargill and the interpretation of international law by the Metalclad court), this specialized appellate body may be better equipped to handle these questions. Another option would be establishing specialized domestic courts to handle interpretative issues involving international law principles. This can be achieved by establishing within domestic judicial systems, special “international law” divisions or tribunals constituted of domestic judges who are well versed in international law. Alternatively and more plausibly, judicial interaction between investment arbitrators, the investment arbitration system and domestic court judges would help the analysis of court focus on the meaning of jurisdiction at public international law. Such interactions could lead to education and reforms in orienting domestic court analysis of international law issues that may arise in jurisdictional rulings and perhaps, an agreement on how best to handle such issues.

Ultimately, whatever standard is applied, the important determinant is how a domestic court views itself in relation to the investment arbitration process, and how it interprets questions of jurisdiction touching on international law. It is also important for courts to acknowledge the fact that arbitrators have greater experience and expertise in the interpretation of the text of BITs, international law, arbitral case law and other relevant treaties. For now, since courts are seized with the responsibility of ensuring that arbitrators act within their jurisdiction, they must focus on the proper international law interpretation of jurisdiction in their review role.

449 Id, p. 918, footnote 75, the WTO Appellate Body has authority to review panel decisions for errors of law but not of fact; Dodge suggesting an annulment procedure as an alternative method of review, see footnote 80
450 Levesque (2014), p. 103. As opposed to questions of jurisdiction as a matter of alternative forum or who decides certain issues (court v. arbitrator)
451 Reforms and interactions between domestic courts and arbitral tribunals are dealt with in the concluding chapter.
Table 1: Summary Of Challenges To The Decisions Of Arbitral Tribunals Before Domestic Courts And Their Outcomes.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Case</th>
<th>Grounds for Review</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Belgium</td>
<td>Republic of Poland v. Eureko B.V</td>
<td>Lack of arbitrator impartiality</td>
<td>Challenge Dismissed</td>
</tr>
<tr>
<td>2 Canada</td>
<td>Bayview Irrigation District No. 11 v. United Mexican States</td>
<td>Non-adherence to fundamental legal principles in reaching decision</td>
<td>Challenge Dismissed</td>
</tr>
<tr>
<td>3 Canada</td>
<td>United Mexican States v. Karpa</td>
<td>Tribunal drew impermissible inferences; Award contrary to public policy</td>
<td>Challenge Dismissed</td>
</tr>
<tr>
<td>4 Canada</td>
<td>Canada v. S.D. Myers Inc.</td>
<td>Award exceeded scope of arbitration agreement; Award contravened public policy</td>
<td>Challenge Dismissed</td>
</tr>
<tr>
<td>5 Canada</td>
<td>United Mexican States v. Metalclad Corp.</td>
<td>Consideration of matters beyond the scope of submission</td>
<td>Partially Set Aside</td>
</tr>
<tr>
<td>6 Canada</td>
<td>United Mexican States v. Cargill Incorporated</td>
<td>Award beyond scope of submission to arbitration</td>
<td>Challenge Dismissed</td>
</tr>
<tr>
<td>7 Czech Courts</td>
<td>Binder v. Czech Republic</td>
<td>Invalidity of BIT; Lack of jurisdiction</td>
<td>Challenge Dismissed</td>
</tr>
<tr>
<td>8 Denmark</td>
<td>Swembalt AB, Sweden v. The Republic of Latvia</td>
<td>Tribunal exceeded its mandate; Award contained matters beyond scope of arbitration agreement.</td>
<td>Challenge Dismissed</td>
</tr>
<tr>
<td>No.</td>
<td>Country</td>
<td>Case Name</td>
<td>Reason(s) for Challenge</td>
</tr>
<tr>
<td>-----</td>
<td>---------</td>
<td>-----------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>9</td>
<td>France</td>
<td>Czech Republic v. Pren Nreka</td>
<td>No agreement to Arbitrate; Lack of Jurisdiction</td>
</tr>
<tr>
<td>10</td>
<td>France</td>
<td>Kaliningrad Region v. Lithuania</td>
<td>Tribunal ruled without complying with mandate conferred upon it.</td>
</tr>
<tr>
<td>11</td>
<td>Germany</td>
<td>Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)</td>
<td>Lack of jurisdiction (Membership in the EU deprived tribunal of jurisdiction)</td>
</tr>
<tr>
<td>12</td>
<td>Netherland</td>
<td>Adria Beteiligungs GmbH v. The Republic of Croatia</td>
<td>Tribunal changed position on jurisdiction; Tribunal breached its mandate by failing to consider arguments central to claimants case; Tribunal neglected to give adequate reasons.</td>
</tr>
<tr>
<td>13</td>
<td>Russia</td>
<td>Yukos v. Roseneft (State-owned Company)</td>
<td>Violation of the right to equal treatment; Violation of the agreed rules of procedure; Appearance of the lack of impartiality and independence on the part of the arbitrators.</td>
</tr>
<tr>
<td>No.</td>
<td>Country</td>
<td>Party A &amp; Party B</td>
<td>Challenge Details</td>
</tr>
<tr>
<td>-----</td>
<td>----------</td>
<td>---------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>14</td>
<td>Sweden</td>
<td>CME Czech Republic B.V v. Czech Republic</td>
<td>Procedural irregularities in tribunal’s conduct; Failure to take into consideration applicable law thereby exceeding mandate</td>
</tr>
<tr>
<td>15</td>
<td>Sweden</td>
<td>Nagel v. Czech Republic</td>
<td>Failure to rule on all issues submitted to tribunal for resolution.</td>
</tr>
<tr>
<td>16</td>
<td>Sweden</td>
<td>Russian Federation v. Sedelmayer</td>
<td>Lack of jurisdiction; Improper party</td>
</tr>
<tr>
<td>17</td>
<td>Sweden</td>
<td>Petrobar v. Kyrgyz Republic</td>
<td>Incorrect decision on jurisdiction; Improper application of law; Lack of jurisdiction</td>
</tr>
<tr>
<td>18</td>
<td>Sweden</td>
<td>RosInvestCo UK Ltd. v. The Russian Federation</td>
<td>Tribunal lacked Jurisdiction</td>
</tr>
<tr>
<td>19</td>
<td>Switzerland</td>
<td>Saar Papier Vertriebs GmbH v. Poland</td>
<td>Lack of jurisdiction (Interim Award) Award exceeded tribunal’s jurisdiction; Award violated the parties’ right to be heard; Award violated public policy (Final Award)</td>
</tr>
<tr>
<td>20</td>
<td>Switzerland</td>
<td>The Czech Republic v. Saluka Investments B.V.</td>
<td>Lack of jurisdiction</td>
</tr>
<tr>
<td>21</td>
<td>Switzerland</td>
<td>Lebanon v. France Telecom</td>
<td>Lack of jurisdiction; Violation of public policy</td>
</tr>
<tr>
<td>No</td>
<td>Country 1</td>
<td>Country 2</td>
<td>Details</td>
</tr>
<tr>
<td>----</td>
<td>-----------</td>
<td>-----------</td>
<td>---------</td>
</tr>
<tr>
<td>22</td>
<td>United Kingdom</td>
<td>Republic of Ecuador v. Occidental Exploration and Production Company</td>
<td>Tribunal exceeded jurisdiction; Matters decided by tribunal outside sphere of the BIT</td>
</tr>
<tr>
<td>23</td>
<td>United Kingdom</td>
<td>Czech Republic v. European Media Venture</td>
<td>Lack of jurisdiction</td>
</tr>
<tr>
<td>24</td>
<td>United States</td>
<td>Tembec v. United States of America; Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America, UNCITRAL (formerly Canfor Corporation v. United States of America; Tembec et al. v. United States of America; Terminal Forest Products Ltd. v. United States of America)</td>
<td>Wrongful Decision to Consolidate Claims; Arbitrator Bias</td>
</tr>
<tr>
<td>25</td>
<td>United States</td>
<td>International Thunderbird Gaming Corp. v. United Mexican States</td>
<td>Manifest disregard of law</td>
</tr>
<tr>
<td>26</td>
<td>United States</td>
<td>Loewen Group Inc. v. United States of America</td>
<td>Misconduct of tribunal; Manifest disregard of law</td>
</tr>
<tr>
<td>27</td>
<td>United States</td>
<td>Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador</td>
<td>Lack of valid arbitration agreement; Tribunal incorrectly declared itself competent; Denying confirmation of award on the basis that case did not meet requirements of the arbitration exception to the Hague District Court- Challenge Dismissed Appeal to Higher Court- Pending US Court- Challenge Dismissed</td>
</tr>
<tr>
<td>No.</td>
<td>Country</td>
<td>Case Title</td>
<td>Reason</td>
</tr>
<tr>
<td>-----</td>
<td>--------------</td>
<td>-------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>28</td>
<td>United States</td>
<td>BG Group v. Argentina</td>
<td>Arbitrators exceeded their powers; Tribunal ignored terms of parties’ agreement.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>29</td>
<td>United States</td>
<td>National Grid plc v. The Argentine Republic</td>
<td>Challenge of arbitrator</td>
</tr>
</tbody>
</table>
Chapter 5: Arbitral Review of Domestic Judicial Acts

The traditional case law of international tribunals addresses state actions taken by mainly regulatory, administrative and legislative organs. Investment arbitration tribunals usually apply the public international law rules of ‘state responsibility’, so as to determine whether a state is responsible for acts of a state corporation, ministry, organization, and indeed its judiciary. This is because state judiciaries come under the rubric of a ‘state’ for purposes of state responsibility. The major source of authority of tribunals reviewing acts of a state, including domestic courts is the standing given to private parties to being direct claims against states under international law. While not the main object of investment tribunal scrutiny, in recent years, the actions of domestic courts have become subject to the review of investment arbitration tribunals. This study proceeds from the assumption that the review of domestic court actions by investment tribunals is based on the role of tribunals as auxiliary bodies in the settlement of investment disputes and based also on a level of complementarity between the two systems, as opposed to an appellate system.

This chapter analyzes the role and practice of an investment arbitration tribunal called on to review the lawfulness (under international law) of the conduct of domestic judicial organs- from the decisions of judiciary, the legality of domestic court review to the annulment, by courts, of commercial arbitration awards. This part is not concerned with anti-suit injunctions issued by domestic courts.\(^{452}\) The general basis for arbitral review of domestic court acts and decisions under international law is addressed. The study then goes on to examine the standards under which domestic court acts can be reviewed by investment arbitration tribunals. The standards include- denial of justice, judicial expropriation, violations of the effective means standard, fair and equitable treatment standard and full protection and security standard\(^ {453}\). Other standards

\(^{452}\) See Chapter Three; Stephen Schwebel (2005), ‘Anti-Suit Injunctions in International Arbitration: An Overview’, in Emmanuel Gaillard (Ed.), Anti-Suit Injunctions in International Arbitration, pp. 5-17, New York: Juris. Here Schwebel suggests that anti-suit (anti-arbitration) injunctions are a violation of Art. 2(3) of the New York Convention.

\(^{453}\) See William R. Slomanson (2003), Fundamental Perspectives on International Law, Thomson West, p. 57 where he categorizes the concept of State Responsibility for Injury to Aliens according to its conduct and customary violations: (1) Denial of Justice including wrongful arrest or detention and lack of due diligence; (2) Confiscation of Property or Expropriation; and (3) Deprivation of Livelihood; see also Edward Borchard (1915), pp. 35-36
under which a judicial system of a state may be challenged are prohibition of arbitrary and discriminatory measures. Further, this work examines the extent of the review, the standard of review adopted by tribunals, and the amount of deference accorded to acts of domestic judiciaries. Importantly, the aim of the research in this chapter is to bridge the gap between arbitral case law and scholarly writings with regards to a workable standard or set of workable standards to be applied by tribunals in the review of domestic court actions. This study then goes on to assess the possibility of distillation of standards of review for investment arbitration by looking at standards adopted by other international adjudication bodies and domestic administrative review by domestic courts. Finally, the prospects for a remand authority for international investment arbitration tribunals are also considered.

5.1. State Responsibility and Acts Of Judiciary:

Generally, in international law, a state is responsible for an injury arising from the taking or expropriation of the property of a foreign investor. Except for public purposes, any measures taken against foreigners to deprive them of their property are prohibited. Such measures must not be discriminatory or contrary to undertakings given by the state and there must be payment of compensation. Article 1 of the International Law Commission Articles (ILC) on the Responsibility of States for Internationally Wrongful Act, adopted in 2001 provides that every internationally wrongful act of a State entails the international responsibility of that State. There is an internationally wrongful act of a State when the conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of that State. Article 4 (1) provides that

‘the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions,

455 Id, ILC Draft, Article 2
whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.  

The domestic courts of a state are organs of the state so the acts of the courts which unfairly impinging on the investments of investors or constitute violations of protections contained in investment treaties can be attributable to the state. As mentioned earlier, investment tribunals generally on the doctrine of state responsibility in reviewing the actions of domestic courts which affect investments.

Tied to the doctrine of state responsibility for injury to aliens is the customary international minimum treatment standard. These standards were developed as a result of the growth of foreign investments in the 19th century. At that time, capital exporting countries were concerned that treating foreigners as nationals of the host country was not enough to protect their investments and interests “in countries whose methods of administering justice are very greatly at variance with the methods to which the people of the great body of civilized states are accustomed”. The main purpose of the minimum standard of treatment was to provide a base below which treatment of investors could not fall and provide a general standard separate from the Host State’s domestic laws. These standards have been developed through the common practice of civilized nations and the adjudication of claims arising out of the violations of the rights of these investors.

---

456 Id ILC Draft; See Robert Rosenstock, (2002), The ILC and State Responsibility, American Journal of International Law, 96(4), 792-797.
458 Elihu Root (1910), The Basis of Protection to Citizens Residing Abroad. American Journal of International Law, 4, 517-528, p. 521. For the Latin American opposition to this concept, under the Calvo Doctrine (per Argentine jurist C. Calvo) as a reaction to the interventions of Western capital-exporting countries, see Antonio Cassese (2001), International Law, Oxford University Press, pp. 28-29; “A “Calvo clause” is a clause in a contract between a state and an alien whereby the latter agrees to resort to local remedies and not invoke the protection of the state of which it is a national”, see D.J. Harris (2004), Cases and Materials on International Law. 6th Edition, Sweet and Maxwell, p. 650

“With the growth and necessities of commerce and the more frequent intercourse with aliens,……, the more onerous of the disabilities of aliens,……, were gradually abolished …so that at the present time, in his private relations, the legal position of the alien is practically the same as that of the national.”
The fair administration of justice is included in the customary international law minimum treatment standard.\textsuperscript{461} Other standards include those pertaining to the privileges of human existence like the right to life and elementary liberties connected with the earning of a living, and the protection of private property against confiscation.\textsuperscript{462} Also included in these principles are the obligation to ensure equal protection of the law, access to courts and the enforcement of rights granted by the courts.\textsuperscript{463} States therefore have a duty to facilitate access to justice. Where the acts of a host state judiciary fall below the threshold set for its treatment of foreigners, the acts of that court can be attributable to the host state.

5.2. Standards Under Which States Can Be Held Accountable For Decisions And Actions Of The Judiciary:

This section addresses the review, by investment arbitration tribunals, of judicial decisions and judicial actions under the standards of denial of justice (maybe claimed as part of the fair and equitable treatment standard),\textsuperscript{464} expropriation, and violations of the effective means standard, fair and equitable treatment standard and In its jurisdictional determination, the UNCITRAL tribunal in *Frontier Petroleum Services Limited v. Czech Republic*\textsuperscript{465} considered whether an award is an investment. The tribunal’s decision aligns with the *Saipem* decision as it accepted that the claimant’s original investments were transformed into “an entitlement to a first secured charge in

\textsuperscript{461} See OECD Working Paper on International Investment, Number 2004/3, ‘Fair and Equitable Treatment Standard in International Investment Law’, “Case law points to a number of areas across which the notion of an international minimum standard applies. They include: a) the administration of justice in cases involving foreign nationals, usually linked to the notion of denial of justice, (see US and Mexico General Claims Commission, Janes Claim, United Nations, Reports of International Arbitral Awards, 1926, IV, p.82.)”, footnote 34, p. 9
\textsuperscript{462} The Abs-Shawcross Draft Convention in Article 1 provided that

> “Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures.”

\textsuperscript{463} Borchard noted that

> “frequent reference to it [the standards of treatment] may easily give rise to the erroneous inference that it is definite and definable, whereas the variability of time, place and circumstance make it even less precise…”

\textsuperscript{464} Jan de Nul v. Egypt, Award (ICSID Case No. ARB/04/13), November 6, 2008, para. 188 , the tribunal noted that fair and equitable treatment standard encompasses the notion of denial of justice; In *Rumeli v Kazakhstan* (ICSID Case No. ARB/05/16), the tribunal also noted that allegations of denial of justice were better dealt with as issues falling under the fair and equitable treatment standard, para. 654; See also Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Victor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2; Glamis Gold v. U.S., UNCITRAL
\textsuperscript{465} Frontier Petroleum Services Limited v. Czech Republic PCA, UNCITRAL Award
the Final Award”. Further the tribunal stated that “by refusing to recognise and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment. Further, Article IX refers to “a measure” in the singular, such that this Tribunal’s jurisdiction ratione materiae may be established over this dispute if Claimant shows that it relates to the effects of at least one measure taken by Respondent on the management, use, enjoyment, or disposal of its investment.”

After the tribunal determined it had jurisdiction, it examined whether the refusal of the Czech courts to recognize and enforce an international arbitration award on grounds of public policy under the New York Convention was made in an arbitrary and discriminatory manner and also violated the fair and equitable treatment standard in breach of the Czech Republic’s obligations under the Canada –Czech BIT. Accepting Czech Republic’s public policy interpretation, the tribunal held that the refusal to enforce award did not amount to breach of BIT unless it is arbitrary, made in bad faith or discriminatory. The tribunal noted that courts could refuse to enforce the award on the basis of equality of creditors in bankruptcy proceedings and equitable distribution of assets, which were public policy principles.

5.2.1. Denial of Justice:

One of the aspects of the minimum standard is the administration of justice under which aliens are accorded substantive rights and procedural (and judicial) remedies for the assertion of those rights. Also, there is the requirement to give aliens access to impartial courts for the adjudication of their rights. In international investment arbitration case law denial of justice is considered to be part of the fair and equitable treatment standard. The theory of denial of justice has

---

466 Id., para 231
468 The tribunal in *Parkerings v Lithuania* (ICSID Case No. ARB/05/8) acknowledged that a denial of justice might violate the fair and equitable treatment standard; In Mondev International Ltd v United States, ICSID Case No ARB (AF)/99/2 and Loewen Group Inc. v United States, ICSID Case No ARB (AF)/98/3, the claimants did not succeed in their argument that the host state was responsible for denial of justice under Article 1105 of the NAFTA; See also *Jan de Nul N.V. v. Egypt*, ICSID Case No. ARB /04/13; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2)
undergone several phases in its evolution. This work does not trace the historical evolution of

5.2.1.2. What is Denial of Justice?:

In his leading text on denial of justice in international law, Jan Paulsson states that denial of justice “occurs when the instrumentalities of a state purport to administer justice to aliens in a fundamentally unfair manner”.\footnote{Jan Paulsson (2005), Denial of Justice, p. 62} He notes that “denial of justice covers all situations where a foreigner has been deprived of a proper judicial process, whether he is seeking to establish or to preserve legal interests”.\footnote{Id., p. 63}

The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners (1929 Harvard Draft)\footnote{Harvard Research in International Law, , Harvard Law School (1929), Art. 9, 23 Am. J. Int’l L. Sp. Supp. 131, 134. The Draft does not define what would constitute a “gross deficiency” or what would render a judgment “manifestly unjust”. In the Draft commentary, the authors note that “an exact definition seems neither possible nor advisable.”} notes:

Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.
Procedural denial of justice concerns access to courts and other procedural matters like, preparation of defense, production of documents, and undue delay in the proceedings. While substantive denial of justice would occur where there is a manifestly unjust judgment or outcome, legal opinion is divided as to the extent a tribunal reviewing the decision or acts of a domestic court can reach. On one end of the divide, denial of justice is considered to be only procedural, while at the other end, it is also deemed to be substantive, extending to the contents of a domestic court decision. As much as it has been advocated that there is a clear distinction between procedural and substantive review, the lines seem to blur halfway. Jan Paulsson who advocates that denial of justice is always procedural notes that in some extreme cases, in proving a failed judicial process, it may be found that “the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it”. He further states that a remedy for this would be a “sanction” on “state’s failure to provide a decent system of justice. They do not constitute an international appellate review of national law.” It is not clear what exactly he means by “sanction” in this instance. The effect and danger of this unclear standard is that the different tribunals/arbitrators have different persuasions and interpretations, some more inclined to cross the illusory procedural/substantive denial of justice divide and others less willing to. Basically, the terms of what constitute or do not constitute denial of justice, and the

473 Andrea Bjorklund (2005), Denial of Justice, p. 809; id., Research in International p.173
474 Charles Brower (2001), ‘Investor-State Dispute under NAFTA: A Tale of Fear and Equilibrium’, 29 Pepperdine Law Review, 43 at 44; Lawrence Herman (1998) ‘Settlement of International Trade Disputes – Challenges to Sovereignty- A Canadian Perspective’, 24 Canadian-US Law Journal 323 at 325; “The only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as ‘Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?’ If the answer to this question is in the negative, then, strictly speaking, it is immaterial how unjust the judgment may have been. Yet some authorities continue to suggest that substantive denial of justice may exceptionally occur with respect to national law” per Sir Gerald Fitzmaurice (1932), ‘The Meaning of the Term ‘Denial of Justice’, 13 BYIL 93, pp. 112-113
475 Vivendi tribunal stated, obiter, that the effect of a contractual jurisdiction clause referring to municipal courts was that no claim could arise against the state unless the claimants were treated unfairly in those courts (denial of procedural justice) or if the judgments of those courts were substantively unfair (denial of substantive justice) or otherwise denied rights [under a relevant bilateral treaty], Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, para 80
476 Paulsson (2005) Denial of justice “is always procedural”, p. 7
477 Id., p. 98
478 See Mondev International Ltd. v. United States of America, Case No. ARB(AF)/99/2, para. 144; See decision in Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3; See Andrew Newcombe (2006) Book Review, Paulsson (2005) Denial of Justice in International Law, European Journal of International Law 17 (3), pp. 692-696), Newcombe wrote “Having himself rejected arid conceptualism and formalism in categorizing and defining denial of justice, we may nevertheless query whether Paulsson slips into the same trap. Paulsson’s argument suggests that there is always a clear dividing line between procedural and substantive review. The legal realist may be skeptical of the process/substance distinction. In the context of constitutional law, critics have noted that courts take refuge in process, in order to avoid criticisms that they are engaged in substantive review of
interpretations given to the terms touch on the extent of review of judicial acts. The issue of procedural and substantive denial of justice has implications for deference accorded to domestic judicial bodies, and effective judicial review by arbitral tribunals.

This work adopts the meaning of denial of justice as summarized by the tribunal in Azinian v Mexico as it contains the main elements of the concept:

“A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way, or clear and malicious misapplication of the law.” 479 There is an additional requirement that claimants wishing to invoke a denial of justice claim must exhaust local remedies first. 480

5.2.1.2. Case Law on Denial of Justice:

Delays in domestic judicial systems may be subject to claims of denial of justice. The tribunal in Pey Casado examined such claim and found a breach of fair and equitable treatment due to a denial of justice. Following a closure by the Chilean government, of two Chilean newspapers whose shares were owned by Mr. Pey Casado, and a Spanish foundation that Mr. Casado founded, Casado brought a claim for unfair and inequitable treatment, including a denial of justice claim. The tribunal found that the Chilean courts had failed to decide the investor’s claims for seven years and that that amounted to a denial of justice.481 In its analysis, the tribunal stated government policy decisions. For this perspective, the shift from substance to procedure is seen as a strategy to depoliticize the ‘reality’ of constitutional adjudication. While judicial decision-making often relies on categorical distinctions, the conceptual difficulty is that there is always a twilight between the night and day of procedure and substance”, p. 694.

479 Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, paras 102-103
480 Generally, see Jan Paulsson (2005) Denial of Justice; Loewen Group Inc. v United States (7 ICSID Rep. 421), at 475 where the tribunal noted that it is an obligation to exhaust local remedies “which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated”. For opposing view, see Campbell McLachlan, Lawrence Shore & Matthew Weiniger, M. (2007) International Investment Arbitration: Substantive Principles. New York: Oxford University Press, p. 233
481 Victor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), Final Awards (May 8, 2008), para 659; The award in Siag v Egypt dealt with review of executive action rather than judicial action. There was a finding of denial of justice, see Siag and Vecchi v. The Arab Republic of Egypt (ICSID Case No ARB/05/15). The tribunal found that the President, Prime Minister and Minister of Tourism’s failure to comply with Egyptian court rulings amounted a denial of justice. See also denial of justice claims with respect to administrative proceedings, International Thunderbird v. United Mexican States, Award (NAFTA) January 26, 2006; Genin v. Estonia (ICSID Case No. ARB/99/2) (June 25, 2001)
that the standard has aspects of procedural fairness and a commitment not to deny investors justice.\textsuperscript{482}

Generally, denial of justice as applied by tribunals goes beyond procedure. The tribunal in \textit{Mondev v USA} stated that where a tribunal can conclude, given all the facts, that an “impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment”, then a denial of justice can be found.\textsuperscript{483} Additionally, it noted that its function was not to act as a court of appeal.\textsuperscript{484} Similarly, the tribunal in \textit{Jan de Nul v Egypt} held that there was no denial of justice in the court’s decision to join two claims related to the same contract, a fairly short written opinion despite proceedings spanning ten years, and the appointment of a second panel of experts after the first panel made findings unfavorable to the state\textsuperscript{485}. The tribunal also found that where there is no discrimination or severe impropriety, it would not “review the scope of the jurisdiction of national authorities or the application of law”.

The most controversial case in which a tribunal analyzed a denial of justice claim was \textit{Loewen v. USA}. In that case, a Mississippi funeral director had claimed in Mississippi state court, that Loewen, a Canadian funeral home, breached a contract for the purchase of funeral parlors. The jury awarded the Mississippi funeral director $500 million. When the Canadian attempted to appeal, he found that the state law required that he post a bond as security for payment of the judgment. Rather than post a $625 million bond to appeal the verdict, Loewen settled the claim

\textsuperscript{482} Pey Casado, id., para 656-57; A denial of justice was also found by the tribunal on the basis that the Chilean government paid compensation to the former shareholders of the company. That action, according to the tribunal constituted a discriminatory conduct that was unfair and inequitable, para 674

\textsuperscript{483} Mondev International Ltd. \textit{v. United States} (ICSID Case No. ARB (AF)/99/2), October 11, 2002, para 127; see also \textit{Waste Management Inc. v United Mexican States} (ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), para 130; \textit{SD Myers Inc. v Government of Canada}, Partial Award, November 13, 2000

\textsuperscript{484} Para 126 citing Azinian \textit{v. United Mexican States} “The possibility of holding a State internationally liable for judicial decisions does not, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA” Azinian \textit{v. United Mexican States 1999} (ICSID Case No. ARB(AF)/97/2) at p. 552 (para. 99); The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. Mondev International Ltd. \textit{v. United States} (ICSID Case No. ARB (AF)/99/2), para. 127

\textsuperscript{485} \textit{Jan de Nul v Egypt}, paras. 199 and 201
with the Mississippi rival. Loewen then filed a claim against the United States under the ICSID Additional Facility Rules, claiming that there had been a denial of justice citing improper conduct with the jury. The tribunal noted that it was not an appellate body and would not rule on substantive denial of justice, nonetheless the Loewen tribunal found that discriminatory decisions of the Mississippi court which violate municipal law amount to manifest injustice according to international law. Despite the finding, the tribunal could not rule that there was a denial of justice because local remedies that were reasonably available had not been exhausted. The tribunal did not consider the unavailability of remedy or futility of remedy, exceptions to exhaustion of local remedies rule thereby limiting judicial review only to appellate court decisions. Even with glaring injustices against Loewen, the tribunal still found for State based on the requirement for exhaustion of local remedies. Even though the tribunal stated that it was not an appellate court, if local remedies had been exhausted, it is doubtful whether the tribunal would have still found the court in violation of the treaty. This is because the tribunal’s analysis appeared to be more concerned about policy and political motives than the administration of justice.

Even though the Rumeli v. Kazashtan tribunal stated that standard is procedural, it pointed out that the

---

486 Loewen Group Inc. and Raymond Loewen v. United States (ICSID (NAFTA) No ARB (AF)/98/3, Award on Merits, June 26) 2003; In Apotex v United States, ICSID Case No. ARB(AF)/12/1, the tribunal dismissed the claim on the basis that Apotex failed to exhaust all local judicial remedies even though claimant argued that the chances of a successful outcome were “unrealistic” and that a petition to the US Supreme Court was “objectively futile”. The tribunal held that it lacked jurisdiction ratione materiae.

487 Id., Loewen, 135. The Mondev tribunal stated that a domestic court’s misapplication of domestic law does not necessarily equate to violation of international law, Mondev International Ltd. V. United States (ICSID Case No. ARB (AF)/99/2, paras 135-136; According to Jan Paulsson (2005) such misapplication “does not give rise to an international delict unless there has been a violation of due process as defined by international standards” Denial of Justice, p. 7


489 “Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what really is a local error (however serious) will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investment community demand that we must observe the principles which we have been appointed to apply, and stay our hands.” Loewen Award, para. 242
“substance of a decision may be relevant in the sense that a breach of the standard can also be found when the decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith”. 490

To make proper analysis of whether there has been a denial of justice, the substantive outcome of the case must be examined as it may give an indication of law of due process.491

5.2.1.3. Denial of Justice Through Legislative Acts:

A denial of justice through legislative acts was dealt with by the tribunal in LLC AMTO v Ukraine.492 The claimant claimed that the court judgment was influenced by a number of legislative acts adopted during the bankruptcy proceedings and thereby constituted a denial of justice. Adopting the language contained in Mondev, the tribunal in found that the claimants failed to show any evidence of legal error, abuse, undue delay or interference in the process by the Ukrainian courts. 493 More importantly, on the allegation that the court’s ruling incorrectly applied the law, the tribunal, like other tribunals before it held that it would not act as a court of appeal.494

5.2.2. Judicial Expropriation:

One of the bases under which arbitral tribunals have undertaken the review of domestic judicial actions is the expropriation standard contained in investment treaties. Under this heading, judicial interference is amounts to expropriation. Award creditors of commercial arbitration awards initiate BIT proceedings in order to secure enforcement of their awards, which have been wrongfully set aside or denied enforcement. In this case, the investors claim that the awards are investments.495 Only investments can be expropriated therefore a claim of judicial expropriation

490 Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16), para. 653
491 Liman Caspian Oil B.V and NCL Dutch Investment B.V v. Kazakhstan, ICSID Case No. ARB/07/14, para. 279
492 AMTO LLC v. Ukraine (SCC Case No. 080/2005, Award (March 26, 2008), para. 76
493 Id., para. 77-84
494 Id., para 80. The claimants claimed the breach of the effective means standard as part of denial of justice. In that case also, the tribunal ruled that the claimants failed to demonstrate that the Bankruptcy law was not effective for the enforcement of rights within the meaning of Art. 10(2) ECT. See paras. 85-89
495 Micheal Reisman refers to these cases as “Crossover” cases, ‘where actions of national courts with respect to respecting or enforcing commercial arbitral awards lead to “second bites” at the apple in the form of investor-state arbitrations’, Michael Reisman, W.M. (2011). Investment and Human Rights Tribunals as Courts of Last Appeal in International Commercial Arbitration, in Laurant Levy & Yves Derains (Eds.), Liber Amicorum en l’honneur de
turns on the meaning of investments under ICSID and investment treaties, and whether acts of
the judiciary constitute takings under investment treaties. Unlike denial of justice, there is no
requirement to exhaust local remedies before bringing a claim under this heading. A number of
cases have tribunals have considered claims under this heading. The conclusions and the
reasoning are varied.

5.2.2.1. Saipem v Bangladesh

The investor in this case claimed that the Bangladeshi local courts colluded with Petrobangla, a
State entity, to sabotage the ICC Arbitration and denied it of its right to arbitrate under the
Contract and to obtain satisfaction of its claims. Saipem alleged that its right to arbitrate disputes
with Petrobangla, specifically, was a contractual right, a “right accruing by law or by contract”\(^497\),
with economic value. Saipem also alleged that Bangladeshi courts lacked jurisdiction to revoke
the ICC Tribunal’s authority and that the actions of Petrobangla and of the courts of Bangladesh
are attributable to the Republic of Bangladesh. The disputed actions according to Saipem,
amount to an illegal expropriation without compensation of its rights to arbitration in violation of
Article 5 of the relevant BIT. Additionally, Saipem claimed that the subsequent decision by the
court declaring the ICC Award as non-existent precluded the enforcement of the award in
Bangladesh or elsewhere and thus deprived Saipem of the compensation for the expropriation
of its investment.\(^498\) Saipem claimed that the misconduct of the domestic courts also amounted to a
denial of justice, at least in the form of a "prevention from arbitrating", or, "obstruction of the
agreed mechanism for the settlement of the disputes arising from the contract".\(^499\) Saipem also
claimed that the actions of the courts and Petrobangla and their treatment of Saipem were below
the standard required by international law. However, the ICSID tribunal on the basis of Article
9.1 of the Italy-Bangladesh BIT did not have jurisdiction over a claim based on denial of justice
and a claim based on breach of the fair and equitable standard of treatment.

\(^{496}\)Saipem S. p. A v. The People’s Republic of Bangladesh (ICSID Case No. ARB/05/07, Award)
\(^{497}\)Article 1(e) of the Italy-Bangladesh BIT
\(^{498}\)Saipem Award, para 84.
\(^{499}\)Id., para. 121
Bangladesh in opposition stated that the courts of Bangladesh had jurisdiction to revoke the authority of the ICC Arbitral Tribunal being that the seat of the ICC Arbitration was Dhaka. Further, that the decision to revoke the authority of the ICC Tribunal was made in accordance with the applicable standards under Article 5 of the Bangladesh Arbitration Act 1940. Saipem did not lodge an appeal against the decision to revoke the authority of the ICC Tribunal and by this inaction, it deprived Bangladesh of the opportunity to rectify alleged wrongdoings of its lower courts in connection with the revocation of the ICC Arbitration, if any. On the ICC award, Bangladesh claimed that the award was erroneous and could have been vacated on appeal and that by agreeing on ICC Arbitration in Dhaka, Saipem accepted any potential failure to enforce an ICC award in its favor in Bangladesh as a calculated business risk.500

In the identification of the property at stake, the Tribunal considered that the allegedly expropriated property is “Saipem’s residual contractual rights under the investment as crystallised in the ICC Award”501 The tribunal held that the actions of the court substantially deprived Saipem of the benefit of the ICC award-

“Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.”502

The tribunal did not categorically state that the award is an investment for the purposes of the BIT or under ICSID, rather, the tribunal stated that

“The rights embodied in the ICC Award were not created by the Award, but arise out of the contract. The ICC Award crystalized the parties' rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystalized by the Award constitute an investment within Art. 1(1)(e) of the BIT”.503

The tribunal acknowledged the power and discretion of the courts to revoke an arbitrator’s authority for misconduct but stated the courts cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct. The tribunal pointed out that the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that

500 Id., para 86
501 See Saipem, Decision on Jurisdiction, para 127
502 Id., para 159-169,185-86
503 Id., para. 127
standard to the facts constituted an abuse of right. The tribunal concluded that the revocation of the arbitrators’ authority was contrary to international law, in particular to the principle of abuse of rights and the New York Convention. The tribunal described itself as a “Treaty judge”, called upon to rule exclusively on treaty breaches. The tribunal once again, conducted a substantive and appellate review of judicial acts of the Bangladesh courts masked with statements that tribunal is presiding only on procedural matters.

5.2.2.2. *GEA Group Aktiegesellschaft and Romak*:

A number of tribunals have examined investor claims arguing that their ‘investments’, in form of awards, have been expropriated. In these cases, the claimants lost but the reasoning of the tribunals vary especially as it concerns whether an award is an investment. In the two cases considered, one categorically ruled that an award is not an investment while the other found that the underlying transaction was not an investment, so the resulting award could not be categorized as an investment.

The ICSID tribunal in *GEA Group Aktiegesellschaft v. Ukraine* was called on to consider whether an ICC award constituted an investment under the Germany-Ukraine BIT and for the purposes of an ICSID arbitration. This tribunal was stringent in its reasoning and consideration of the claimant’s claims. It held that the unpaid ICC award not an investment but that the award was “a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement and Repayment Agreement.”

The case arose following a dispute relating to a conversion contract for the provision of fuel wherein a settlement and repayment agreement were entered into providing for ICC arbitration. An ICC award was rendered in favor of claimant, but attempts to enforce it in Ukraine failed. The claimant then brought ICSID proceedings under the BIT, claiming that Ukraine had breached its treaty obligations. This award marks a departure from the preceding award which either did not make a definitive statement as to whether an award constitutes an investment or make bold statements as to the nature of an award as an investment. On expropriation, the tribunal after citing the reasoning in *Saipem*, held that an

---

504 Id., paras. 159-161
505 Id., paras. 181-184
507 *GEA Group Aktiegesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, paras. 161, 162
expropriation may be found where the conduct of the national courts was “egregious” or was “deliberate” with the purpose to “thwart …..ability to recover.” In this case, the tribunal concluded that GEA failed to prove that the actions of the Ukrainian courts “amounted to anything other than the application of Ukrainian law.” 508 No expropriation was found. In response to the claim that the actions of the Ukrainian courts constituted a denial of justice and a breach of the fair and equitable treatment standard, the tribunal stated that it had no “justified concerns as to the judicial propriety of the outcome”. 509 Accordingly, it held that the refusal of the court to enforce the ICC awards did not constitute a denial of justice and did not breach the fair and equitable treatment standard

The tribunal under a Permanent Court of Arbitration (PCA) proceedings 510 refused to establish that an award is a covered investment under the Switzerland-Uzbekistan BIT because the underlying transaction was not an investment. The claimant, Romak, was involved in a supply contract with the Uzbek state-established company for the importation of grain. For failure to pay under the supply contract, Romak commenced GAFTA arbitration. The GAFTA tribunal found in favor of Romak but its attempts to enforce the award in Uzbek courts proved unsuccessful. Romak then commenced a PCS arbitration pursuant to Article 9 of the BIT, alleging breaches of the BIT arising from the refusal to enforce the GAFTA award and by reason of the Uzbek purchaser's conduct. Romak claimed that the GAFTA award constituted an investment. The PCA arbitrators stated that jurisdiction could not be upheld merely based on the literal definition of investment in the relevant BIT at issue, but that the term ‘investment’ had an inherent meaning, “entailing a contribution that extends over a certain period of time and that involves some risk.” 511 Furthermore, the tribunal noted that when determining what “investment” meant, it was necessary to have regard to the context, and the object and purpose of the BIT. As for the award, the tribunal held that it was merely an

“embodiment of Romak’s contractual rights (as determined by the GAFTA Arbitral Tribunal) stemming from the wheat supply transaction entered into by Romak. If the underlying transaction is not an investment within the meaning of the BIT, the mere

508 Id., para 236
509 Id., para 319
510 Romak S.A. (Switzerland) v. The Republic of Uzbekistan (2009) (Award, PCA Case No. AA280)
511 Id., para 207
embodiment or crystallization of rights arising thereunder in an arbitral award cannot transform it into an investment.”

This is in stark distinction to the award issued by the Saipem tribunal. The ruling in Romak may indicate a certain level of cautiousness by tribunals in classifying commercial awards as investments and reviewing the decision of state courts.

Although the claimant asserted a violation of the fair and equitable treatment standard and the full protection and security standards, the UNCITRAL tribunal in Frontier Petroleum Services Limited v. Czech Republic in determining its jurisdiction considered whether an award is an investment. The tribunal’s decision aligns with the Saipem decision as it accepted that the claimant’s original investments were transformed into “an entitlement to a first secured charge in the Final Award”. Further the tribunal stated that “by refusing to recognise and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment. Further, Article IX refers to “a measure” in the singular, such that this Tribunal’s jurisdiction ratione materiae may be established over this dispute if Claimant shows that it relates to the effects of at least one measure taken by Respondent on the management, use, enjoyment, or disposal of its investment.” After the tribunal determined it had jurisdiction, it examined whether the refusal of the Czech courts to recognize and enforce an international arbitration award on grounds of public policy under the New York Convention was made in an arbitrary and discriminatory manner and also violated the fair and equitable treatment standard in breach of the Czech Republic’s obligations under the Canada–Czech BIT. Accepting Czech Republic’s public policy interpretation, the tribunal held that the refusal to enforce award did not amount to breach of BIT unless it is arbitrary, made in bad faith or discriminatory. The tribunal noted that courts

---

512 Id., para 211
513 Id., see para, 186,

“Second, the mechanical application of the categories found in Article 1(2) would create, de facto, a new instance of review of State court decisions concerning the enforcement of arbitral awards. Under the scenario advocated by Romak, any award rendered in favor of a national of a Contracting Party (even one rendered in a purely commercial arbitration procedure) would be considered a “claim to money” or, arguably – as pleaded by Romak – a “right given by decision of the authority.” The refusal or failure of the host State’s courts to enforce such an award would therefore arguably provide sufficient grounds for a de novo review – under a different international instrument and on grounds different from those that would normally apply – of the State courts’ decision not to enforce an award”.

514 Frontier Petroleum Services Limited v. Czech Republic PCA, UNCITRAL Award
515 Id., para 231
could refuse to enforce the award on the basis of equality of creditors in bankruptcy proceedings and equitable distribution of assets, which were public policy principles.

5.2.2.3. Reluctance to Categorically Classify Awards as Investments:

The attempt to interpret an award as a covered investment under ICSID and under investment treaties goes to show that the language of these treaties and ICSID is subject to broad and boundless interpretation, to fit the needs of a claimant or even to delimit what constitutes an investment and what does not. Once the hurdle under Article 25 (1) of the ICSID is crossed and that of the relevant treaty, the next step is to determine if the judicial action is arbitrary, discriminatory, exercised in bad faith or amounts to an abuse of rights.516 If the answer is positive, a tribunal, depending on its constitution, may likely find a violation. The application of BITs and ICSID Convention, under unclear terms, to judicial acts sufficient to trigger state liability and investment protection, shows the vast interpretative powers of tribunals. However, it is noted that tribunals are likely to be cautious of wide interpretation of the ICSID Convention and BITs. This conscious cautiousness is likely so as to preserve the sanctity and credibility of BITs and ICSID Convention.

5.2.3. Effective Means Standard- Effective means of Asserting Claims:

The effective means clause in an investment treaty guarantees an investor an effective means to assert claims and enforce rights. Example is Article II (7) of the US/Ecuador BIT “Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations”.517 Claimants have relied on this standard to argue that non-enforcement of awards by domestic courts amounted to a breach of their investment treaty obligations. This is another treaty standard independent of the denial of justice standard under which the actions of domestic courts can be subject to investment tribunal review. Again, the threshold for making a finding is lower than finding a denial of justice. This lower threshold is arguably in favor of investors, as they do not have to jump the rigorous denial of

516 Loukas Mistelis (2013), ‘Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement’ (Award as an Investment), ICSID Review, 28, No.1, pp. 64-87
517 Found only in US BITs, the Energy Charter Treaty (Article 10 (2) of ECT) and a few other BITs. This clause has been considered in Petrobart v. Kyrgyz Republic (SCC Case No. 126/2003); Amto v Ukraine (SCC Case No. 080/2005); and in Duke Energy v. Ecuador (ICSID Case No. ARB/04/19).
justice hurdles. Where there is executive interference with the domestic judiciary, a tribunal can make a finding that the state has breached the effective means standard.

5.2.3.1 *Chevron and White:*

Two notable cases decided under this standard found that the domestic court’s failure to enforce commercial awards was attributable to the state and a violation of the relevant investment treaties.

In *Chevron v Ecuador*, Chevron was awarded about $100 million by an arbitral tribunal for delays in adjudicating domestic court contract disputes (13 to 15 years) arising out of Ecuador’s diversion of oil revenues in the 1980s. Chevron claimed that Ecuador’s actions breached Article II (7) of the US/Ecuador BIT, and that undue delays and manifest unjust decisions by Ecuadorian courts amounted to a denial of justice under customary international law. In its analysis of the effective means standard, the tribunal described the standard as the undue delay component of denial of justice and had lower thresholds than customary international law standard of denial of justice.\(^{518}\) According to the tribunal, a mere failure by the domestic courts to enforce rights “effectively” would occasion a violation of that standard. The tribunal as expected, noted that it is not a court of appeal but that it will examine the enforcement of rights at issue in particular cases but in doing that, it will accord a measure of deference to domestic judicial systems.\(^{519}\) The tribunal did not find it necessary to carry out a further consideration of the denial of justice claim as the tribunal, under the effective means standard had already dealt with the actions of the Ecuadorian courts. As no additional claims for damages were made under other standards of the BIT and customary international law, the tribunal did analyze the other claims.\(^{520}\) The tribunal also noted that the effective means standard did not require the exhaustion of local remedies.\(^{521}\) This case evidences a denial of justice finding, albeit under a lower standard, cloaked in another name and without the requirement of exhaustion of local remedies.

\(^{518}\) *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 34877. Partial Award on the Merits (March 30, 2010), paras. 242-44 (citing *Duke Energy v Ecuador*, para. 391. The tribunal in *Chevron* noted that even though the standard is directed at potentially the same wrongs as denial of justice, the standard is an independent treaty obligation and does not make any explicit reference to denial of justice or customary international law.)

\(^{519}\) Id., para. 247

\(^{520}\) Id., para 275

\(^{521}\) Id., paras 321-332
White won an ICC arbitration against a state owned Indian company after a contractual dispute with Coal India, a state owned company over the supply of equipment and development of a coal mine in India. White brought enforcement proceedings and the defended set-aside proceedings brought by India for about nine years. White then commenced UNCITRAL proceedings against India\(^{522}\) alleging amongst other things that the Indian courts denied it fair and equitable treatment by preventing it from enforcing the award in a fair and reasonably timely manner. Relying on the MFN clause in the Australian-India BIT to incorporate Article 4 (5) of the India- Kuwait BIT.\(^{523}\) White also alleged that India’s failure to enforce the award and the delay in dealing with its jurisdictional claim constitute breach of the obligation to provide effective means of asserting claims and enforcing its rights with respect to its investments.

The tribunal ruled that the delay by the courts was not in bad faith and did not in the mind of the tribunal amount to “a particularly serious shortcoming” or “egregious conduct that ‘shocks or at least surprises, a sense of judicial proprietary”’. Hence, White’s denial of justice claim failed.\(^{524}\) The tribunal however found that the Indian judicial system’s inability to deal with White’s jurisdictional claims in a timely manner amounted to undue delay and constituted a breach of the obligation to provide effective means of asserting claims and enforcing rights. The delays in the enforcement proceedings however, were found not to amount to a breach of the effective means standard because White did not appeal the decision to stay the enforcement proceedings. The tribunal concluded, in line with Saipem and Chevron, that the rights under the awards constitute part of White’s original investment and subject to protection under the BIT.\(^{525}\) The ruling again shows the willingness of tribunals to examine judicial conduct under standards other that denial of justice.

\(^{522}\) White Industries Australia Ltd v. Republic of India, UNCITRAL, Final Award, November 30, 2011
\(^{523}\) “Each Contracting State shall, in accordance with its applicable laws and regulations, provide effective means of asserting claims and enforcing rights with respect to investments.”
\(^{524}\) White Award, para 10.4.22
\(^{525}\) Id., para 7.6.10
5.2.3.2. Violation of Effective Means Standard: Executive Interference:

The investor in *Petrobart Ltd v. Kyrgyz Republic*\(^{526}\) alleged that the state violated the guarantee of an effective means to assert his rights and other aspects of the Energy Charter Treaty provision on the fair and equitable treatment standard including denial of justice.\(^{527}\) In this case, following a claim by Petrobart to recover sums unpaid under a contract with Kyrgyzgazmunaizat (KGM), a state owned energy company, the court ruled in its favor but shortly after, on the order of the Vice Prime Minister, granted a request by KGM to stay execution of the judgment for a period of three months. Two months later, the court declared KGM bankrupt. The tribunal found that the government intervention in judicial proceedings was a failure to respect the investor’s rights and as such a breach of the fair and equitable treatment standard under Article 10(1) of the treaty. The tribunal ruled that the order of the Vice Prime Minister, which gave support for a stay of execution violated the state’s obligation under Article 10(12) of the Treaty to ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments.\(^{528}\) The tribunal made a blanket finding of breach of Article 10(1) as it did not state exactly which element/elements of Article 10(1) were violated by the state.\(^{529}\)

5.2.4. Other Standards: *Bosh and Vannessa:*

The application of general principles of law in domestic jurisdiction may vary from jurisdiction to jurisdiction. Where the application of such principles does not offend a sense of judicial propriety, it may be difficult for a tribunal to find that a domestic courts application amounts to a breach of an investment treaty standard. Such reluctance may be premised on the fact that arbitral tribunals are sometimes careful not to act as appellate courts or to question the application of domestic laws by courts, especially where they consider such application fair and non-discriminatory. This was the reaction of the tribunal in *Bosh v Ukraine*. The Claimants

\(^{526}\) *Petrobart Ltd v. Kyrgyzstan Republic* (SCC Arb No 126/2003, Award, 29 March 2005); See also *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador* where claims under the effective means standard and denial of justice was dismissed.

\(^{527}\) Id., *Petrobart Award*, pp. 25-29, 73-74

\(^{528}\) Id., p. 77

\(^{529}\) According to the tribunal, it did not “find it necessary to analyze the Kyrgyz Republic’s action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments. In the Arbitral Tribunal’s opinion, it is sufficient to conclude that the measures for which the Kyrgyz Republic is responsible failed to accord Petrobart a fair and equitable treatment of its investment to which it was entitled under Article 10(1) of the Treaty.”, p. 76 Award
asserted that Ukraine was responsible for a breach of the obligation to accord fair and equitable treatment contrary to Article II(3)(a) because the Ukrainian courts failed to act consistently with the principle of *res judicata* during the Ukrainian court proceedings initiated by the University to terminate a 2003 Contract. The tribunal in determining whether the fair and equitable standard had been breached, the tribunal assessed whether the law applicable to the proceedings before the Ukrainian courts, which was Ukrainian law, was properly and fairly applied. The tribunal found that the application of the *res judicata* principle by the courts did not offend a sense of judicial propriety and could not be assessed under international standards.

Some tribunals have noted the high threshold required to prove a lack of due process. According to these tribunals, the outcome of the action must offend judicial propriety. This position was adopted by the tribunal in Vannessa Ventures v Venezuela where the claimant argued that it was mistreated by the Venezuelan judicial system because delays and dismissals of its claims by courts, which were not independent and impartial and were acting against the background of political controversy, had the effect of denying its right to arbitration. Even though the tribunal acknowledged the delays in the Venezuelan courts, it found that the delays did not violate Venezuela’s obligations under the relevant treaty. With regards to the allegations of a lack of independence and impartiality, the tribunal noted that it was more difficult to deal with as proving them required more than “inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence.” According to the tribunal, they must be specifically proved and must related to specific cases in which the impropriety is alleged to have occurred. As the claimants failed to support its evidence, the tribunal held that the allegations do not amount to breaches of

---

530 Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, para. 260
531 Id., para 280; The tribunal noted that the fact that certain legal systems recognise that it is only final judgments that attract the status of *res judicata*, rather than all procedural decisions made by a court or tribunal, also does not offend such a principle, para 281; The Tribunal also found that the representatives of the Ministry of Justice did not abet the Ukrainian courts in any breach of the BIT, para. 285; See also Marion Unglaube & Reinhard Unglaube v Republic of Costa Rica, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20
532 See Waste Management v. United Mexican States, ICSID Case No. ARB(AF)/00/3, para. 98; Loewen Group v. United States of America, ICSID Case No. ARB(AF)/98/3, para.132; Alex Genin v. The Republic of Estonia, ICSID Case No. ARB/99/2, para. 371
533 Vannessa Ventures v Venezuela, ICSID CASE NO. ARB(AF)/04/6
534 Id., para. 217
535 Id., para. 226
536 Id., para 228
either the right to fair and equitable treatment or the right to full protection and security. The claimant also failed to support its allegations that its treatment by Venezuela was discriminatory.537

5.3. Standard Of Review And Deference: Theoretical Impacts and Perspectives:

When investment arbitration tribunals review the acts of a state, the term ‘deference’ is often repeated. With regards to review of judicial acts, this section examines the notion of deference, the idea behind the concept and the measure of deference accorded by tribunals to domestic court acts and their decisions. Such an examination is imperative as it delimits the role and powers of international investment tribunals and domestic courts in the adjudication of investment disputes.538

5.3.1. The Notion of Deference and Sovereignty:

The general notion of deference in international arbitration as it concerns national courts is that acts involving the administration of justice ought to receive greater deference than acts of legislative and executive branches.539 Stephan Schill540 aptly identifies the different notions of deference. For the purposes of this work, I adopt the third notion stated in his work as it presents a clean and uncomplicated meaning of the concept. He notes that “deference refers to a limitation in a court’s or tribunal’s level of scrutiny concerning decisions taken or determinations made by a host state institution because the adjudicator respects the reasons for a state’s decision or conduct even if its own assessment was different”. Additionally, he states that deference

537 Id., paras. 231-233
539 Distinction adopted by several arbitrators in the Mexican Claims Commission cases, see Andrea Bjorklund (2005), Denial of Justice, pp. 839, 854; See also Loewen Award, paras. 49-56
“can refer to the respect an arbitral tribunal pays to the determination of facts by a
domestic agency or a domestic court, to the state’s substantive policy choices, including
the weight attributed to non-investment interests, and to the interpretation of law, both
domestic and international, by the decision-making body whose decision is under
review.”

Such respect is mainly grounded on the doctrine of sovereignty. Other grounds for deference in
other settings may include the expertise of a domestic tribunal or court and political
accountability. The question is what is sovereignty and when does a review interfere with
sovereignty? The second part of this question can be answered by considering the ‘intensity of
review’ and the measure of deference accorded to domestic judicial acts.

Generally, sovereignty is a characteristic of statehood whereby each individual state is
independent of other states and each having attributes of legal authority such as the capacity to
govern itself and set its own rules. The doctrine of sovereignty is fundamentally indefinite,
fluid and malleable often adopted to suit different situations. In most cases, sovereignty is

541 Id., Schill (2012), pages 6-7, citing the tribunal in S.D. Myers v. Canada, which stated that tribunals do not have
an open-ended mandate to second-guess government decision-making. Governments have to make many potentially
controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded
on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over
others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were
one, for errors in modern governments is through internal political and legal processes, including elections, see S.D.
Myers v Canada, UNCITRAL Award, para. 261.

Treaties, Journal of World Trade, 41, 273 at 291; Joachim Karl (2008), International Investment Arbitration: A
Threat to State Sovereignty, in Wenhua Shan et al (eds.), Redefining Sovereignty in International Economic Law,
Portland: Hart Publishing Company; “Investment treaties as international law disciplines interfere in domestic
regulatory and administrative sovereignty, that is their very purpose”, see Thomas Wälde (2004), Investment
Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation
Experience, in Nobert Horn and Stefan Kröll (eds.) Arbitrating Foreign Investment Disputes, The Hague: Kluwer
Law International page 193 at 210

543 See generally, Anna Katselas (2012), Do Domestic Treaties Prescribe a Deferential Standard of Review?, 34
Michigan Journal of International Law, 34, pp. 142-148. The author conducts a comparative analysis of the U.S.
Administrative Procedure Act’s (APA) Arbitrary and Capricious Standard of Review and the Fair and Equitable
Treaty and Arbitrary or Discriminatory Measures Treaty Standards.

544 Federico Ortino (2012), The Investment Treaty System as Judicial Review, pp. 18-22

545 Others include the ability to commit itself to international obligations, the constitution of a government and
authority over a distinct territory and people; See Case of the SS ‘Wimbledon’ (1923) (PCIJ Series A No 1, 25);
Island of Palmas case (Netherlands v USA) Award of 1928, 2 RIAA 829; Ian Brownlie (2003), Principles of Public

546 Thomas Ilgen (ed.) (2003), Reconfigured Sovereignty: Multilayered Governance in the Global Age, Hampshire:
Ashgate Publishing Company; See Louis Henkin (1995), International Law: Politics and Values, Dordrecht:
“invoked in a context or manner designed to avoid and prevent analysis, sometimes with an advocate's intent to fend off criticism or justifications for international “infringements” on the activities of a nation-state or its internal stakeholders and power operators.”

States and supporters often argue that investment tribunal review of the domestic courts is an affront to the sovereignty of the state. It must be noted that by signing up to these treaties, there is an implied agreement or consent to open up a considerable amount of “sovereign space” to international scrutiny where a State’s actions do not meet up to international standards. An analogy would be that one agreed to play in the international sphere, so he must abide by the rules that govern that sphere. In this instance, if a state operates and abides by international law standards relating to the administration of justice, then there would be no need for tribunal scrutiny, even if a foreign investor does not get desired results.

To accord respect to the sovereignty of states, there must be clearer guidelines for reviewing domestic judicial acts. Where tribunals review based on for example, international law requirements for a finding of denial of justice, in most cases, such standards are ambiguous and subject to any interpretation a tribunal gives it. The interpretation given to the ambiguous standards, and not review itself, may actually offend the concept of sovereignty. In this regard, Bjorklund notes for example, that

“an investment tribunal operating under a “shock the conscience” standard may similarly be expected to act in equity: when faced with a facially disturbing judicial or quasi-judicial decision the tribunal can adjudge the questionable act wrongful without thoroughly exploring the justifications the municipal decision maker might offer to support the decision and without explaining how international law supports such a conclusion.”

---

Martinus Nijhoff, p. 8, “It means many things, some essential, some insignificant; some agreed, some controversial; some that are warranted and should not be accepted”.

547 John Jackson (2003), ‘Sovereignty Modern: A New Approach to an Outdated Concept’, American Journal of International Law, 97, p. 782 where the author examines the issues raised in the sovereignty debates and analyzes those issues for their impact on policy.

548 Andrea Bjorklund (2005), Denial of Justice, pp. 883-890

549 Examples include “substantive error”, “mere error”, “shocks the conscience”, “fundamental unfairness”, “manifest injustice”, “offends a sense of judicial propriety”.

550 Andrea Bjorklund (2005), Denial of Justice, p. 873
Where courts don’t know how tribunals may decide, there is much uncertainty and fear of the arbitration process. Standards must conform to the administration of justice and in reviewing domestic judicial acts, tribunals must apply standards which are unambiguous, and not open to different interpretations. Additionally, tribunals should also give detailed reasoning on the basis of standards and of their decisions because a review that criticizes a nation’s judicial process without giving reasoned reasons still intrudes on its sovereignty and leaves the state with no chance to examine why its judicial system does not meet international standards. Courts knowing that there is a potential for their decisions to be reviewed and measured against standards are more likely to get it right in the first instance. It is arguable that a more detailed scrutiny could lead to defined and consistent standards instead of different tribunals attempting, albeit haphazardly, to decipher judicial actions which amount to a manifestly unjust judgment.

The measure or intensity of the review applied by tribunals determines the actual amount of deference accorded to domestic courts. The intensity or measure of review may be dependent on the wording of the treaty standard, the requirements for a finding of a wrong under international law, the proclivities and legal backgrounds of different arbitrators, the particular state court

551 Id., p. 895 where she discusses the setbacks of imprecise standards. “By creating a coherent, well-reasoned body of jurisprudence, investment tribunals bolster their legitimacy, fulfill the goals of both investors and sovereign states, and enhance the possibility of norm development resulting from the dialogue between international and national courts”

552 As to the lack of clarity of the Saipem tribunal in classifying an award as an investment and exactly what specific breach of the BIT to which the conduct of the court amounted, see Loukas Mistelis (2013), *Award as an Investment*, p. 75; Jose Alvarez (2013), Crossing the “Public/Private” Divide, pp. 423-424

553 Addressing judicial fairness in the International Court of Justice, Thomas Franck, notes that “The final decisions of the Court are not its most important contribution. More significant is the rigorous and principled reasoning by which those decisions are reached. Through that reasoning the Court exercises a vital influence over the evolution of the international systems’ normative foundations.”, see Thomas Franck (1998), *Fairness in International Law and Institutions*, Oxford University Press, p. 318

554 Andrea Bjorklund (2006), *The Cost of Deference: State Sovereignty and International Denials of Justice* (Conference Paper, Berkeley)- “Establishing standards that create a strong international jurisprudence, which can then be referred to by national courts, is the best way to ensure that the goals of establishing supranational dispute settlement are met. Well reasoned decisions based on transparent criteria should enhance respect for international dispute settlement and allay fears of impermissible, unexplained intrusions into a core area of sovereign authority. To the extent that decisions are well reasoned too, they are more likely to be perceived as persuasive and important arbiters of what constitutes justice even if they are not binding precedent on further international tribunals or no national courts.”

555 See Federico Ortino (2012), ‘The Investment Treaty System as Judicial Review’

involved, the nature of the court involved, whether tribunals look at the procedural denial of justice or substantive denial of justice, and distinctions between questions of law and fact.

5.3.2. Lack of Judicial Restraint v. Too Much Deference:

The inconsistency with regards to lack of set standards poses a challenge to the relationship between domestic courts and international investment tribunals. Goldhaber notes that tribunals make standard disclaimers, in the descriptions of the denial of justice doctrine, that they do not act as supranational appellate bodies but “from a realist perspective, this is nonsense”. He went on to say that

“perhaps arbitrators mean that they do not review domestic opinions for their correctness under domestic law. But arbitrators do review domestic opinions for adherence to international law—just as the U.S. Supreme Court reviews U.S. state opinions for adherence to federal law……..an arbitral tribunal will review domestic court decisions for serious procedural inadequacies, and for clear and malicious misapplication of the law. Some commentators take the view that such an egregious error on substance is merely proof of a procedural taint like bias or corruption. But a review remains a review even if it is arguably confined to grave procedural flaws. Pretend otherwise though it might, the Saipem tribunal overruled the Bangladeshi courts, and thus performed the role

557 “..the fact that exhaustion of local remedies was found necessary to stop a claim against the US but dispensed with to allow claims against Ecuador and Bangladesh raises the question whether the rule ought to be so flagrantly molded to suit different preferences of party-appointed arbitrators, see Mavluda Sattorova (2012), ‘Denial of Justice Disguised: Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct’ (Denial of Justice Disguised), International Comparative Law Quarterly, 61, p. 242; See BG v. Argentina (UNCITRAL Final Award December 24 2007); Sempra v Argentina (ICSID Case No. Arb/02/16, Award September 28, 2007); See Jose Alvarez (2013), Crossing the “Public/Private” Divide, p. 428, “As critics of the Loewen decision have suggested, we are not entirely clear whether these arbitral decisions would have come to the same result had the courts of the United States or a Western European country been the subject of scrutiny”, Noting that the arbitrators in ATA, White and Saipem clearly se second-guessed the national judges.


559 The tribunal in Chevron v. Ecuador (Award, 2010) noted “if the alleged breach was based on a manifestly unjust judgment rendered by the Ecuadorian court, the Tribunal might apply deference to the court’s decision and evaluate it in terms of what is “juridically possible” in the Ecuadorian legal system. However, in the context of other standards such as undue delay under Article II (7), no such deference is owed”, para 379. However, the tribunal in Jan de Nul v Egypt (Award, 2008) in order to make a finding of denial of justice, was ready to examine whether a court judgment was “improper” and “discreditable” because it did not remedy a fraud. The tribunal had to first examine whether there was a fraud, para. 207

560 “Importantly, both the unresolved tension between the local remedies rule and denial of justice and a consequent practice of distinguishing between denial of justice, expropriation and the effective means standard betray the existing indeterminacy about the role of investment arbitration and the relationship between international tribunals and national courts”, see Mavluda Sattorova (2012), ‘Denial of Justice Disguised’, p. 241
of an appellate chamber. Observers must focus on what a tribunal does, and not what it
says. “I’m not creating a new kind of supranational appeal,” is exactly what one might
expect an adjudicator to say when she is doing exactly that.”

In his thoroughly researched work about how arbitrators make fundamental choices on how to
represent themselves in relation to other decision-makers, Van Harten examines the different
approaches to judicial restraint applied by different domestic jurisdictions and international
adjudicators so as to assess and compare how the role of arbitrators is constructed. Van Harten
who is critical of the investment arbitration process notes that

“there were no clear reasons for arbitrators to disregard or downplay judicial approaches
to restraint. Institutional rationales for restraint stem from the acknowledgment that
adjudicators have strengths and weaknesses relative to other decision-makers. Investment
treaty arbitrators are not different in this respect”.

A noted earlier, most tribunals proceed from the standpoint that they have an obligation to grant
deferece to the acts of a state. Some of these tribunals in the name of deference, do not
redress the abusive or unjust actions of courts when really, these actions ought to be redressed.
The danger is that an under-reaching decision would overlook flaws in the judicial system of a
state that a tribunal could address. Praising the Saipem award, Radiati and Malintoppi note that

“States are not free to act as they please when it comes to arbitrations taking place on
their territory, only because the parties have fixed the seat there. This is the unmistakable
message sent by the Tribunal, and which hopefully will bury once and for all the notion
that, by accepting the supervisory jurisdiction of the local courts, foreign parties must

---

Litigation Vol. 1:2, pp. 388-89; See also Jose Alvarez (2013), Crossing the “Public/Private” Divide, where he noted
“…like the NAFTA decision in Loewen v. United States, these crossover cases raise the prospect that investor-state
arbitrations will become vehicles for de facto appellate review of national courts”, p. 406
563 Id., p. 48
564 S.D Myers v Canada, para 263; Saluka Investments BV (The Netherlands) v Czech Republic, (UNCITRAL,
Partial Award, 17 March 2006), para 304ff; Glamis Gold v United States, UNCITRAL, para 617; Lemire v Ukraine,
(ICSID Case No ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, para. 505; Unglaube v
Republic of Costa Rica, (ICSID Case No ARB/08/1 and ARB/09/20, Award, 16 May 2012), paras. 246-247, 258
565 Id., pp. 814, 817, 895. The terms are no more than equitable standards criticized for their malleability and
unpredictability. These standards are random and do not guarantee respect for sovereignty. See also Loewen case,
while stating that it would not nitpick at the decision of the trial judge, the tribunal ruled the whole trial as unfair
without giving specific reasons and instances where the acts of the court failed to meet international minimum
standard, paras. 119-123
accept the latter’s decisions for better or for worse, regardless of how arbitrary they may be”.

In reviewing the actions of domestic courts, tribunals must balance between being over-reaching thereby overstepping their role and likely offending the sovereignty of states, and being under-reaching and therefore doing nothing for the effectiveness of domestic court systems. The Mondev tribunal rightly calls for balancing deference with responsibility of doing justice itself.

**5.3.3. Distilling Standards of Review I:**

Domestic courts of appeal have set and well established standards of review. While not appellate bodies, investment arbitration tribunals on the other hand have no set standards of review and have not adopted the standards of review used by other bodies carrying out public law adjudication. The challenge with finding or setting up ‘defined’ and ‘consistent’ standards is that different investment treaties contain different guarantees and protections, and the definitions given to these guarantees differ from investment treaty to investment treaty. A solution may be found in distilling standards from different international and domestic sources, bearing in mind, the diversity of BITs and their language and the scenarios which they may arise, so that investor-state arbitrators can choose from a pool of standards on a case-by-case basis. This would require a considerable amount of work.

In light of this, Bjorklund notes that the

“challenge for governments and investors is to develop a denial of justice standard that minimized the dispensation of justice to a particular investor and minimizes intrusion on the sovereignty of the state whose system is being called into question”.

To meet this challenge, she suggests a “sequential review”. This approach complements Professor Robert Ahdieh’s work on the recurring engagement among international tribunals and

---

567 Mondev International Ltd. V. United States (ICSID Case No. ARB (AF)/99/2, para 126  
569 Andrea Bjorklund (2005), Denial of Justice, pp. 812-813  
570 Id., p. 873
national courts that could ultimately yield a system of harmonized legal norms. Her approach does this by ‘requiring that tribunal decisions be reasoned sources from which national courts can draw’.

The first stage of this review involves measuring court decisions against the requirements of municipal law. In this instance, review is both on questions of substance and procedure. Even though it appears that tribunals will be acting like appellate court, she argues that this process in fact less far-reaching in result than a review of the legal system of a nation as there is some element of deference balanced with the need for meaningful inquiry into decisions of courts.

She proposes the hard-look doctrine employed by the D.C. Circuit under which courts are required to

“examine the adequacy of an agency’s reasoning and explanation, including its consideration of material comments, all relevant factors, and the like, without substituting their judgment for that of the agency.”

Under this process, tribunal would have to give reasons for their conclusions. The next step is to measure action and/or national law against international law by checking whether the laws are consistent with the requirements of international law. This case arises only if necessary to evaluate the merits of a claimant’s case or to calculate damages. She acknowledges the difficulty of this second stage because of the difficulty in establishing customary international law and because of the diversity in national legal systems.

Schill suggests that tribunals in devising a standard of review need to look at public international law for directly relevant criteria that influence the standard of review or set it at a specific level. The next step would be to analyze, in a comparative fashion, standard of review other domestic and international courts use under similar factual circumstances and legal conditions. This would serve the purpose of concretizing standard of review, increasing predictability of arbitral decisions, making and distillation of common public law principles.

---

572 Andrea Bjorklund (2005), Denial of Justice, p. 883
573 Id., p. 875.
575 Stephan Schill (2012), Deference in Investment Treaty Arbitration, p. 30
5.3.4. Distilling Standards of Review II: International Adjudicative Bodies and Domestic Administrative Law Systems:

Somewhat akin to Schill’s suggestions, this thesis looks at the allocation of power between courts and tribunals, one in the national plane and the other in the international plane. This work is of the view that a comparative analysis of standards of review adopted by international adjudicative institutions and domestic administrative law systems hold lessons for international investment arbitration.

The standards usually applied in international law include, the least restrictive alternative, the margin of appreciation and the good faith standard. The least restrictive alternative which stems from GATT and WTO jurisprudence is a measure designed to protect or further a permissible objective under a relevant treaty, this standard examines whether the measure is necessary and whether there are possible alternatives to the challenged measure. The measure applied must be the least restrictive available. The margin of appreciation accords deference to the state for the objectives a state may wish to pursue and equally prevents unnecessary restrictions on the full extent of the protection which the European Convention on Human Rights (ECHR) can provide. This is based on the belief that courts possess greater expertise and are better placed to appreciate what is in the public interest. Under Article 1 of Protocol 1 to the ECHR, a wide margin is accorded to states in their pursuit of social and economic policies. Any measures taken by the state must also meet the requirements of lawfulness and proportionality. Other tribunals have applied the margin of appreciation as a judicial standard of review, especially WTO tribunals. Others include the European Court of Justice, the Inter-American Court of Human Rights and NAFTA. On the relationship between proportionality and margin of appreciation, it is noted

that the wider margin of appreciation, the greater deference is accorded and the less stringent the proportionality test. A narrow margin leads to a stricter proportionality-balancing test.\textsuperscript{580} The good faith standard which derives from a general principle of international law is a lenient standard that allows states to balance conflicting rights and interests ‘defers to the states’ own resolution of that balancing, as long as the state’s determination was made in good faith and was reasonable”. The state must be engaged in honest and fair dealing, and there must be a rational basis for the action taken by the government.\textsuperscript{581}

Domestic constitutional adjudication\textsuperscript{582} and administrative law review of agency acts often contain consistent and coherent levels of standards of judicial review. This work focuses on the domestic administrative law review of agency acts because investment arbitration is considered to be a form of administrative review of the exercise of public authority by states.\textsuperscript{583} Of course, this conceptualization of international investment arbitration does not fully capture the very complex nature of investor-state arbitration, given that domestic reviews definitely vary from jurisdiction to jurisdiction. However, this conceptualization is applied because it is least a first step in comparative analysis between domestic systems, and of domestic and international standards in finding cohesive and reliable models, standards or principles that can be applied in international investment arbitration for the review of domestic judicial acts, on a case by case basis.

In administrative law, deference is usually accorded to agency’s interpretation and administrative action because of the agency’s expertise in the field. In the U.S., courts recognize that administrative agencies are often better positioned and have greater expertise to make policy


\textsuperscript{580} Id., p. 308
\textsuperscript{581} Id., p. 312
\textsuperscript{582} Id., pp. 314-322 for an analysis of standards of review applied by United States and German courts in their adjudication of public law issues. For the review of constitutional claims, the US courts apply the rational basis review, intermediate scrutiny review and the strict scrutiny review to legislative acts, which are alleged to be unconstitutional.

determinations.\textsuperscript{584} The Chevron deference is most popular for setting out a two-step approach to judicial review of agency determinations. Under this standard of review, a court first asks, “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expresses intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue for the courts is whether the agency’s answer is based on a permissible construction of the statute.”\textsuperscript{585}

Basically, Congress has power to determine the applicable law and courts make a determination of whether the Congress has defined the law based on the clarity of the law. In the next stage, the court then accords deference to the agency based on the fact that from the court’s view, interpretative authority\textsuperscript{586} is given to the agencies and not the courts.

Having mentioned that US courts accord deference on the basis that agencies possess expertise to make scientific and technical judgments in the course of performing their roles (with the courts then having the function of filling in the gap left by Congress), by analogy, domestic court expertise may justify deference by arbitration tribunals to the regulatory interpretation of host-state laws. This is because the courts are part of the domestic system and are better placed than international arbitrators to interpret host-state laws. It is important to note that investment tribunals do not explicitly possess the power to make determinations on the contents of domestic legislation.\textsuperscript{587} In this regard, using the expertise justification, tribunals may examine the effect of

\textsuperscript{584} For analysis of different standards of judicial deference to agency statutory interpretation and their application in US Supreme Court, see William Eskridge & Lauren Baer (2008), ‘The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan’, 96 Georgetown Law Journal, 1083


\textsuperscript{586} Id., 843-44:

“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”

\textsuperscript{587} That does not mean tribunals cannot do it, See AES Summit Generation Ltd and AES-Tisza Erérőm Kft v Republic of Hungary, ICSID Case No ARB/07/22, where the tribunal found that “a state may not invoke domestic law as an excuse for alleged breaches of its international obligations. As such, Hungary was precluded from relying on the defense that the decrees were required by EU competition law, para 7.6.6
the interpretation given by courts, if it appears discriminatory, arbitrary and/or unfair. The other considerations include whether a ruling by a tribunal would amount to an undue interference in domestic court functioning, and the fact that agency regulators are more politically accountable than judges. With regards to accountability, Katselas notes that although it may not be present in investment arbitration in the same way as under US administrative review, it may be relevant in that host states are accountable for the treaties they conclude and ratify, and are also accountable for national laws and policies that are likely to be grounds for claims before investment tribunals. Investment arbitrators, on the other hand, are not politically accountable and charged with the same responsibilities as US courts. With regards to judicial acts of domestic courts, host states are accountable for such acts that may be subject to international investment arbitration claims.

This work does not suggest the whole adoption of US standard of administrative review or any other domestic administrative standard of review. The idea is that an examination and comparison of different systems, both international and domestic can offer lessons for international investment arbitration, especially since cases and issues are different. As mentioned earlier, it is a good first step and serves as a guide in fashioning the standard of review to be applied, with consistency, in international investment arbitration. In addition to the finding and adopting a suitable standard of review, this work proposes the consideration of a “remand” scheme in investment arbitration where cases or issues are sent back from a tribunal to a domestic court in cases where the analysis of a tribunal cannot be completed due to a domestic court decision or action which lacks factual information or evidence, or an error by the court which is not so grave as to occasion a complete analysis of the case by the tribunal.

588 Anna Katselas (2012), Do Domestic Treaties Prescribe a Deferential Standard of Review?’, 34 Michigan Journal of International Law, 34, pp. 143-48
589 Id., p. 148
590 Anthea Roberts notes the importance of analogies and paradigms as being capable of suggesting “radically different ways of analyzing concrete problems, often with outcome-determinative consequences.” Anthea Roberts (2013), ‘Clash Of Paradigms: Actors And Analogies Shaping The Investment Treaty System’, American Journal of International Law, Vol 107, 45. In pages 68-74 she points out the challenges of applying domestic and international law public law paradigms to investment treaty arbitration.
5.4. Possible Remand Authority?

Following exploration of scholarly writing and case law of the issues relating to the review of domestic court actions by arbitral tribunals, there still appears to be a lacuna with regards the appropriate standard or standards of review and the amount of deference to be accorded to domestic court decisions. So by way of conclusion, this part explores the possibility of a remand scheme in investment arbitration.

Part of the justification for a remand requirement under domestic law is the belief that the trier of fact is in a better position to make factual findings than an appellate/reviewing court. In domestic administrative law, a remand order gives an agency an opportunity to correct its action. In international investment arbitration, especially since tribunals are wont to state that they are not court of appeals, it would only be proper to remand so that tribunals are not deciding domestic laws de novo or dealing with questions of facts, where a tribunal expresses reservations. Where a court fails to give a satisfactory explanation its legal analysis or the basis for its decision, the tribunal can remand the case to give the court an opportunity to explain its decision. That way, the tribunal does not substitute its decisions for the judgments of the court.

The clarification or provision of factual information by domestic courts will certainly aid tribunal

591 For a remand by U.S. federal courts back to a decision making federal agency, see generally Patrick Glen (2010), ‘To Remand, or Not to Remand: Ventura’s Ordinary Remand Rule and the Evolving Jurisprudence of Futility’, Richmond Journal of Global Law and Business, 10.
593 Even though the tribunal in Chevron Corp. v. Republic of Ecuador, UNCITRAL Arb., PCA Case No. 34877, Partial Award on the Merits, 247 (Mar. 30, 2010), stated that “the tribunal is not empowered by [the effective means] provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system de novo”, the Goldhaber notes that “When a claim has never been adjudicated, arbitrators cannot overrule the courts—but they may choose to step into the shoes of the first-instance decision maker. In such a case, the tribunal functions not only as an appellate body, but a highly-intrusive one”; see Goldhaber (2013), The Rise of Arbitral Power over Domestic Courts, p. 391; Chevron Corp. v. Republic of Ecuador (2012), UNCITRAL Arb., PCA Case No. 2009-23, Opinion of Jan Paulsson, 16; Saipem S.p.A v. The Peoples Republic of Bangladesh (2007), ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 181-84; See also Rudolf Dolzer & Christopher Schreuer (2008), Principles of International Investment Law, 165; David Palmeter (1998), ‘The WTO Appellate Body Needs Remand Authority’ 32 Journal of World Trade 41, 43 stated that ‘[d]e novo decisions of the Appellate Body lack the primary benefit of appellate review, which is a second, more focused examination of a contentious issue, by individuals other than those who made the initial decision.’
594 Loewen Decision para 242. “As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that national to provide adequate means of remedy may amount to an international wrong but only in the last resort…..Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself”
in reaching decisions which are much more acceptable and this in turn will improve the legitimacy of the process.

A remand requirement would strengthen the cooperation between domestic courts and arbitral tribunals and act as a check on the excess of courts, while giving the court the opportunity to redress a wrong committed by it. When there is a remand, a domestic court in a sense would also be acting as a check on the authority of a tribunal because tribunals are not subject to appeal so even errors committed by tribunals cannot be corrected on appeal. When cases or issues are remanded, domestic courts will get detailed reasoning as to how their interpretation of laws, acts and procedures are defective, thereby giving them a chance to redress and restructure their analysis. In essence, what it does is to strengthen the domestic system and the synchronization of court and tribunal roles in the adjudication of investment disputes. When remanded, the court’s conduct must be consistent with the tribunal’s mandate or instructions.\textsuperscript{595} In that capacity, tribunals would appear to have supervisory roles. Tribunal review and remand also provides incentive for states to organize their judiciaries and for judiciaries to rule in accordance with national laws and international standards. Importantly also, a remand requirement would help the distribution of competences between courts and arbitration tribunals.

A remand requirement is not without its challenges. Remand can be time consuming and occasion a waste of resources. Delays caused by remands could exacerbate the injury caused by the challenged measure. Where a matter and not the whole dispute is remanded, should the tribunal stay the proceedings for the court to deal with the matter or should the tribunal continue with its proceedings on other matters? How expeditious will the court be in resolving the matter remanded to it? Will the same judges sit over the issue or issues remanded to a court? What are the chances of an uncooperative party disrupting the process? Can the expenses incurred by the parties, if any, be justified? Other considerations for a remand process or scheme include when a remand should occur, time limits for a remand order, the design and operation of different domestic judicial systems, and how a tribunal is to rule if a court comes back with an unsatisfactory decision. These issues may be addressed and the challenges met to a reasonable

\textsuperscript{595} Perhaps a more cautious approach would be to “remand” the case to national court, by ordering the Republic to make the investor’s assertion of rights effective, while retaining supervisory jurisdiction and holding onto the possibility of de novo review as a last resort. Investor counsel would respond that such an approach is not only impractical, but legally unavailable, because the finding of either denial of justice or effective means strips the national courts of jurisdiction – Goldhaber (2013), \textit{The Rise of Arbitral Power over Domestic Courts}, footnote 81
extent depending on the remand process adopted by the investment arbitration system. An expedited process that does not lend itself to delay tactics of any party would be ideal. A remand authority could, in fact, create an incentive for courts to effectively address claims that come before them so as to avoid the possibility of remands. Perhaps, a few lessons could be learnt from the remand discussions underway in the WTO596 and the various cases being made for a remand authority under the Dispute Settlement Understanding (DSU).597 Overall, it must be stressed that where a remand is used as a delay tactic, it could run contrary to the object of investment arbitration, which is the fair, prompt and effective settlement of investment disputes. Distilling components of a remand scheme for international investment arbitration is outside the scope of this thesis. This issue should provoke further assessment.

596 See the remand scheme proposed in the text prepared by the Chair of the DSU amendment negotiation.; Jaemin Lee (2013), ‘Remand To Fast-Track Prompt Implementation: A Critical Assessment Of The ‘Double Adoption’ Remand Proposal In Chair’s Text And An Argument For A ‘Single Adoption’ Alternative’, Journal of International Economic Law 16 (3), 635-667 criticizes the scheme proposed in the Chair’s text as having the potential of making final dispute settlement elusive and time-consuming. Rather, he suggests a ‘single-report’, ‘single-adoption’ remand where an appellate body completes analysis after receipt of factual information from an underlying panel. At completion of analysis, a single report based on a single adoption will be produced. This approach, according to him, will ensure an easier and quicker implementation by the implementing Member and offers the least disruption to the current framework and practice of the WTO dispute settlement mechanism; Joost Pauwelyn (2007), ‘Appeal without Remand: A Design Flaw in the World Trade Organization (WTO) Dispute Settlement and How to Fix It, Project on Dispute Settlement Series, Issue Paper 1
Chapter 6: Conclusion

This chapter summarizes reasons as to why conscious and increased co-operation and coordination is required between domestic courts and investment arbitration tribunals. This thesis then outlines research findings through questions raised in the study. The main questions which this thesis addresses are:

1. Can international investment arbitration tribunals and domestic courts share competencies in the adjudication of investment disputes?
2. Can international investment arbitration tribunals review the lawfulness of the conduct of domestic courts under international law?
3. In terms of reliability, accuracy and objectivity, is it convenient for domestic courts to review the decisions of investment tribunals?

This thesis suggested answers to these questions and they are summarized in sub-categories under this chapter. The findings of this research to a great extent, emerged from tracing the policy and developmental outcomes of investment arbitration, the implications of conscious and effective collaboration between domestic courts and investment tribunals, the examination of investment treaty arbitration case law, case law of other international adjudicatory bodies, domestic case law, international treaties, domestic law, the practice and procedure of domestic courts and international tribunals, and treatises.

Importantly, the commendable practices of other adjudicatory bodies, in terms of their interactions with domestic courts, are also examined so as to distill lessons, if any, for international investment arbitration. This examination was carried out being mindful of the differences in structure, mandate and procedure between these bodies and investment tribunals. The findings cover the roles ‘carved out’ for and assumed by domestic courts and investment arbitration tribunals in the international investment arbitration process, the jurisdiction and competence of both forums for the settlement of investment disputes, and the review powers of both domestic courts and investment tribunals. Areas of positive interaction between both forums are highlighted and commended.
This study found that there are signs and traces of a symbiotic relationship between domestic courts and investment tribunals. However, more work needs to be done so as to give more steam and coordination to this synergy. This chapter concludes and makes suggestions as to future strategies for the coordination of the competencies of domestic courts and investment tribunals so as to confer greater legitimacy to the international investment arbitration system.

6.1. General Findings On The Interaction Between Domestic Courts And Investment Tribunals

In almost all investment arbitration cases, tribunals are called on to review jurisdictional issues, especially as it concerns an alternative domestic forum. This trend does not seem to be going away as even in recent cases, tribunals have to deal with matters of jurisdiction and competence. As mentioned earlier, there is no indication that parties, in their investment contract, would leave out dispute resolution clauses referring the parties to domestic forums. Perhaps in the future, these contracts will provide for investment arbitration. In the mean time, these suggestions are made with regards to the contending jurisdiction of domestic courts and investment tribunals, to the power of review held by both forums, and the coordination of their roles in the settlement of investment disputes.

Majority of cases examined show that investment tribunals override domestic court jurisdiction and do not accord them the deference they sometimes deserve, for various reasons, both legitimate and otherwise. This study does not advocate that deference be accorded just for the sake of it, but that arbitrators exercise careful discretion when analyzing jurisdictional issues, so as to allocate competence rightfully. In doing so, they positively encourage domestic courts, raising their confidence and fostering cooperation in the settlement of investment disputes. The study found that some courts, predominantly in developed arbitral jurisdictions, are more ready to defer to the decisions of investment tribunals than are investment tribunals. Often times, domestic courts are faced with the problems of lack of sophistication with regards to the interpretation of international law principles and treaties, and manipulation by the executive to evade their treaty obligations. Domestic courts when faced with jurisdictional matters and in reviewing arbitral awards, must also exercise discretion so as to promote the effective resolution of investment disputes. With regards to the proper interpretation and application of international
law, judicial education and judicial interaction between judges and arbitrators may help judges’ understanding of treaty interpretation.

6.2. Basis For Co-operation:

The rationales justifying conscious and increased cooperation and coordination between domestic courts and investment tribunals gave impetus to this study. It was found that such cooperation and coordination would advance the rule of law. When arbitral tribunals act in a consistent manner and issue fair, reliable and neutral decisions, positive influence may be transferred to domestic courts thus promoting adherence to the rule of law.\textsuperscript{598} While it is the dominant view that investment tribunals are alternatives to domestic courts, however, when investment tribunals act as complements rather than substitutes for domestic courts, the is the possibility that the rule of law may be advanced. By contributing to the development of courts that they interact with, it was found that international adjudicatory bodies promote the rule of law.\textsuperscript{599} This is a useful lesson for the investment arbitration system.

Cooperation between domestic courts and investment tribunal was also found to have development implications. The term ‘development’ was used in this work not directly from the perspective of economic growth but from the standpoint that such cooperation advances the social goals of states, one of which is creating and maintaining effective judicial systems capable of working effectively alongside investment tribunals for the resolution of investment disputes. It was concluded that investment arbitration furthers social goals, like the development of domestic courts in that coordinated alliance with domestic judicial systems would help build capacity and solidify courts, making them effective partners in the overall process of foreign investments protection and resolution of investment disputes.\textsuperscript{600} Overall, it was concluded that encouragement of the rule of law on the domestic level through coordination and cooperation between domestic courts and investment tribunals, gives greater credibility, legitimacy and integrity to the international investment arbitration process.

\textsuperscript{598} See ‘Adjudication of Investment Disputes and the Rule of Law’, in Chapter two
\textsuperscript{600} For example, it is noted that the purpose of ICSID is closely related to the major purpose of the World Bank, which is to encourage economic development, Michael Reisman (1992), Systems of Control in International Adjudication and Arbitration: Breakdown and Repair, Duke University Press, pp. 46-47
6.3. Existing Relationship:

A general overview of relationship between domestic courts and investment tribunals shows that it is all a matter of perception - how domestic courts view themselves relative to their roles in the adjudication of investment disputes, and how investment tribunals view or perceive the role of courts, and their own mandate. In most cases, the interpretations by tribunals of provisions “creating” roles for domestic courts give an indication that tribunals do not view courts as particularly necessary partners in this process. Courts on the other hand were on some occasions not so willing to relinquish their authority or jurisdiction.601 While a majority of domestic courts are willing to accord tribunals and their interpretations deference, the recent decision of the DC Circuit revealed that some domestic courts are less willing to defer to the decisions of arbitral tribunals and perhaps posses the power to question the competence of an arbitral tribunal to rule on its own jurisdiction, in certain cases. The dissenting opinion in the Supreme Court ruling and the amicus brief of the US Solicitor General are also telling in this regard.602 In a few cases however, positive interactions between both forums were found and encouraged as good precedents for tribunals to follow.603 In interpreting BIT provision, the study found some courts to be lacking in interpretative skills with regards to international law principles and concepts.604 Hence judicial education, awareness and cross-fertilization are to be encouraged.

Bearing in mind the doctrine of separation of powers, host states must not act in suggestive or direct ways so as to encourage the issuance of anti-arbitration injunctions by courts, with the aim of derailing the arbitration. This is because tribunals can take these measures into account when allocating costs and for finding state liability. In other words, there is a possibility that anti-arbitration injunctions can be found to be treaty violations. There is also the possibility that a tribunal can rule that anti-arbitration injunctions amount to a state reneging on its obligation to arbitrate, and thus states may be directly responsible for the actions of their courts [whether or

601 See Chapter three on anti-suit injunctions, preconditions to arbitration and chapter four on review of arbitral awards by domestic courts.
602 BG Group Plc v Argentina, 572 U.S. (2014) and Brief For The United States As Amicus Curiae In Support Of Vacatur And Remand
603 For example SGS v. Philippines decision, The Belize courts in British Caribbean Bank v Belize; The Second Circuit in Republic of Ecuador v Chevron; Generation Ukraine award and Parkerings v Lithuania, Parkerings v Lithuania, ICSID Case No. ARB/05/8
604 HUBCO v WAPDA; See the Metalclad review by a Canadian court; The Belizean court is commended for good interpretation in British Caribbean Bank v Belize.
not the state interferes with the judiciary] Generally, investment arbitration has limited power to prohibit parties from having recourse to domestic courts unless there is likelihood of grossly abusive conduct, a term which leaves much discretion to arbitrators. In the case of ant-suit injunctions, arbitrators are urged to consider the effect of the measures they impose, which may affect the legal rights of litigants. In the case of *Chevron v Ecuador*, it is clear that tribunals in ‘extending’ and protecting their jurisdiction, can issue measures which extend to parties that are not even parties before the tribunal. According to Goldhaber, this case is the purest example of an arbitral attempt to “suspend judicial action.”\(^605\) This situation is troubling because tribunals then assume appellate positions over domestic judicial decisions and actions, a position which they claim not to occupy. The issuance of an order to terminate judicial proceedings was given by an arbitral tribunal in the *ATA* case as a final award, marking the first of its kind. This also presents a clear case of suspension of judicial action, as opposed to the preservation of rights by a tribunal.

Tribunal decisions providing that claimants exhaust local remedies as a substantive requirement are some of the positive interactions identified because such cooperation strengthens domestic courts. Even in the area of denial of justice, the interpretation given to exhaustion of local remedies favors cooperation and the development of domestic judicial and regulatory systems. When such mandate falls on domestic courts, there is a possibility that they would be hard at work to get it right. The interpretation given to the fork-in-the-road clause encourages parallel proceedings because a majority of awards distinguish between treaty claims and contract claims. Because there is a fine line between contract claims and treaty claims, as often times, claims brought before local courts are “identical as to their substance”\(^606\) to the investor’s claims before the BIT tribunal, where a claimant elects to come before the courts, the courts can deal with the contractual claims and the tribunal can assume jurisdiction only if the decision of the court amounts to a breach of the investment treaty. The utility of this approach is to reduce the costs and double recovery associated with parallel proceedings. Hence the Vivendi tribunal is lauded as recognizing that tribunals are not alternatives to courts, rather they are partners, with each forum acting as a check on each other at different stages of the process. In other to foster cooperation, arbitrators must use careful discretion in their interpretation of treaty provisions and

---

\(^{605}\) See chapter Three on anti-suit injunctions by investment tribunals.

\(^{606}\) See Mariel Dimsey (2008), *The Resolution of International Investment Disputes: Challenges and Solutions*, Eleven International Publishing, pp. 53-54
international law principles. The *SGS v. Philippines* interpretation of the umbrella and BIT dispute resolution clauses, and its decision to stay proceedings in light of the contract forum selection clause is commendable because for example, it is questionable whether the object and purpose of investment treaties is to override arrangements negotiated between investors and host states. Rather, these treaties ought to act as supplements to the extent that the domestic arrangements are lawful and valid. As between adjudicatory bodies, the principles of comity, *generalia specialibus non derogant*, *prior tempore portior jure* and *pacta sunt servanda* ought to guide arbitrators in according respect to domestic courts or tribunals provided for in investment contracts. Other reasons to exercise restraint include the fact that domestic courts are better equipped to tackle contract issues in accordance with their proper law.

The 18-month local litigation period is concluded to be a precondition to arbitration that cannot be obviated so as to give meaning to that BIT provision and accord respect to the intents of the parties to the BIT. Additionally, this provision offers a chance to domestic courts to deal with matters within their purview while referring matters which are better suited to be resolved by international tribunal to arbitration.607 The Tribunal in the *Wintershall* award608 noted that the 18-month period offers

“an opportunity to the courts of each State Party to apply and uphold international law and grant a proper remedy- if appropriate. Argentina and Germany having agreed that disputes would be referred during a certain period to local courts, an arbitral tribunal could not ignore this requirement established by the parties on any ground – even on the alleged ground that the Argentine judiciary was not equipped to issue a decision on the merits within such period. Besides, case law was cited to show that the Argentine Judiciary could issue (and had issued) decisions on merits within eighteen months.”609

6.4. Supervisory/Review Powers:

607 William Dodge notes that ‘in cases where an international proceeding cannot in the end be avoided, domestic courts may develop the issues of fact and of domestic law, which are often intertwined with the international claims and about which arbitral tribunals may lack expertise’, see William Dodge (2009), ‘*Investment Treaties between Developed States: The Dilemma of Dispute Resolution*’ in Catherine Rogers and Roger Alford (eds), Future of Investment Arbitration, Oxford University Press, p. 174.

608 *Wintershall* Award, ICSID Case No.ARB/04/14

609 Id para. 108
Supervisory and review powers of both domestic courts and investment tribunals in international investment arbitration signal a good regulatory mechanism for the process.

6.4.1. Courts:

In general, statistics show that in a majority of cases examined, the awards challenged before domestic courts have been upheld. Precedence of cooperation? Yes. However, this study raised the following questions with regards to domestic court review of arbitral awards due to the varying standards of review applied by different courts (even courts within the same jurisdiction): how much deference should be accorded to tribunal’s jurisdictional awards?, when does deference by the court render the review provisions in the Model Law meaningless?, do courts even possess the expertise to review decisions of investment arbitration tribunals?

A case in point is the recent BG case\(^{610}\), where the US Court of Appeal and the US Supreme Court applied varying standards in the review of the tribunal’s decision on jurisdiction, especially with regards to questions of conditions to arbitration, were they ‘threshold’ issues for the courts to decide or pre-conditions to arbitrate which tribunals should decide? While the Court of Appeal held that the interpretation of conditions to arbitrate were matters for the court to decide de novo, the Supreme Court held that the local litigation requirement was not a ‘threshold’ question for the courts to decide but a pre-condition to arbitrate which the tribunal had jurisdiction to determine. The effect of recognizing the parties’ rights to submit questions of arbitrability to tribunals is that it shields arbitrability decisions from court review. In this way, the Supreme Court decision sets precedence, predominantly in the United States, by classifying questions of conditions to arbitration as issues of arbitrability which the parties have submitted to the tribunal to decide. According deference to the decisions of arbitral tribunals must be on set grounds, so as not to render the review provision of the Model Law redundant. Other jurisdictions do not recognize the agreement of parties to submit questions of arbitrability to the courts, so rather than according blind deference to tribunal jurisdictional decisions, the concern is the appropriate scope and standard of review to be applied. For example, the Court of Appeal in the Cargill case rejected the presumption that a tribunal acted within its authority as “too

\(^{610}\) See chapter Four for analysis of the reasoning of the US courts in the BG v Argentina case.
deferential” and that such a presumption would “effectively nullify the purpose and intent of the review authority of the court.”

The issue of courts interpreting international law instruments brings into focus, the question of whether courts are capable of reviewing awards of arbitral tribunals. The interpretation of the Vienna Convention by the Court of Appeal in the *Cargill* case and the interpretation of the fair and equitable treatment clause by the court in the *Metalclad* case show that there is a need for some level of knowledge and expertise in international law lacking among judges. To give credibility to the kind of cooperation sought between both forums, judicial education, interaction and reforms is vital so as to orientate domestic court in their analysis of international law issues that may arise in jurisdictional rulings and review. Alternatively, specialized domestic courts committed to interpretation of international law aspects of review may be better able to deal with jurisdictional questions involving fundamental issues of international law.

### 6.4.2. Tribunals:

As at the time of writing this thesis, of all the tribunals that have examined denial of justice claims, only one tribunal has found that the domestic court acts violated the relevant investment treaty. There has been a somewhat silent presumption of deference for the acts of domestic courts under the denial of justice standard. Even in cases where the injustices of the courts were glaring, tribunals have refused to make a finding. The *Loewen* tribunal’s refusal to assume jurisdiction despite a finding that the claimant suffered “manifest injustice as that expression is understood in international law” defeats the whole object of investment arbitration and does not serve as good practice for collaboration. According to the tribunal stepping into the domestic arena to correct a “local error”, no matter how serious would be too hasty and would damage both the integrity of the domestic judicial system and the viability of NAFTA itself. Further, it stated that in the “interests of the international investment community” it must observe the principles which they were appointed to apply, and stay their hands.”

By the tone of the tribunal, had Loewen exhausted local remedies, there does not appear to be an indication that it

---

611 See p. 133; see also the English case *Dallah* where the court carried out a de novo review of the existence of an agreement to arbitrate and did not defer to the arbitral tribunal’s decision on its own jurisdiction.

612 For analysis of the Canadian courts reasoning, see chapter Four.

613 *Loewen*, Decision on Jurisdiction, para 242
would have ruled any differently because it categorized the act of the court as a “local error” and also talks about abstaining from making a finding so as not to damage the ‘integrity of both domestic judicial and NAFTA systems’. However, the decision does more damage to the systems because investment arbitration through tribunal decisions ought to define standards of good governance and contribute to the rule of law. When a tribunal has been called on to review the injustices of courts and does nothing, the rule of law is not achieved and it does not portray positive signals to those courts to do anything to fix their systems. To encourage courts as credible partners in the resolution of investment disputes, it is suggested that there should be agreements and understandings between courts and tribunals regarding the standards and extent of review, and the possible reactions of the tribunals in given instance, bearing in mind the multiplicity of issues that can arise in different cases. For example, in cases where the claimant has exhausted local remedies and the tribunal believes that the threshold for finding a denial of justice has not been reached, it can remand the case to the courts for reassessment, according to the terms of the tribunal.

The application of the expropriation standard and the effective means standard for the review of domestic court action shows the willingness of tribunals to examine judicial conduct under standards other than denial of justice. It also shows that tribunals are willing to lower the threshold for a finding of denial of justice, so as not to include a requirement for exhaustion of local remedies. While the rulings finding courts liable have been praised for sending a signal to states that they bear responsibility for the acts of their domestic courts, it is noted that tribunals are likely to be wary of wide interpretation of investment treaties and the ICSID with regards to classification of commercial arbitration awards as investments and review of domestic court actions concerning such awards. Such cautiousness was exemplified by the tribunal in Romak as it refused to classify an award as an investment. That tribunal also cautioned against reviewing of domestic courts decisions on the grounds when the decisions are not favorable to the investors.\footnote{See pp. 159-160; See also Frontier Petroleum Services Ltd v Czech Republic, PCA, UNCITRAL Award} It is noted that such conscious restraint is likely to preserve the sanctity and credibility of investment treaties and the ICSID Convention.

With regards to the standards of judicial review applied by arbitration tribunals, the ‘intensity’ of review and the measure of deference accorded to domestic judicial acts, it is summarized that
these may depend on the wording of the treaty standard involved, the requirements for a finding of a wrong under international law, the proclivities and legal backgrounds of different arbitrators. As to the particular state court involved, the findings in Loewen, Chevron v Ecuador, Saipem and White leads one to wonder whether there are ‘special’ criterion applied to different states courts. Other factors include the nature of the court involved, whether tribunals address procedural denial of justice or substantive denial of justice and distinctions between questions of law and fact. This study points out the danger of under-reaching decisions of tribunals reviewing the acts of domestic courts. The result is that domestic judicial flaws are overlooked denying the state the opportunity to address these flaws. Thus, according to the Mondev tribunal, deference must be balanced with the responsibility of doing justice itself.615

The utility of set standards of review is not only in uniformity and predictability of outcomes but it is likely that domestic courts would know ahead of time how to act so as to avoid scrutiny. Where there is unpredictability as to tribunal reactions and rulings, there is much uncertainty and fear of the arbitration process, especially by states. Standards ought to conform to the administration of justice, and the ruling must contain detailed reasoning on the basis of standards. This is because a review per se does not intrude on the sovereignty of states but a review that criticizes a nation’s judicial process without giving reasoned reasons really interferes with sovereignty. In searching for consistent and clear standards for investment arbitration, this thesis examined different international and domestic sources, bearing in mind, the challenges involved in making comparisons between the investment arbitration model and other domestic and international public law models.616 The idea is that an examination and comparison of different systems may offer lessons for investment arbitration. Perhaps, given the diversity of issues before tribunals, such distilled standards can be picked from on a case-by-case basis.

Finally, this work suggests the consideration of a “remand” scheme in investment arbitration. Such a scheme would provide for the remand of cases from a tribunal to a domestic court in cases where the analysis of a tribunal cannot be completed due to a domestic court decision or action which lacks factual information or evidence, or an error by the court which is not so grave

615 See footnote 567
as to occasion a de novo analysis of the case by the tribunal. Such a requirement is premised on the view that the trier of fact is in a better position to make factual findings than an appellate/reviewing court. The benefits of a remand scheme include (1) Tribunals would not be at risk of substituting their own decisions for the judgment of courts (2) Clear factual information produced after a remand will help tribunals reach well reasoned decisions, in the event they have to deal with treaty issues later (3) The legitimacy of the investment arbitration process is greatly improved (4) The strengthening of the cooperation between domestic courts and arbitral tribunals would be achieved and the effective synchronization of their roles (5) Both systems in a sense act as a check on the excess of the other (6) Strengthens the domestic system by providing an incentive for states to organize their judiciaries and for judiciaries to act in accordance with international standards.

The study highlights the challenges of establishing a remand scheme in investment arbitration and the considerations for a remand process- where part of a dispute is remanded, should the tribunal stay the proceedings for the court to deal with the matter or should the tribunal continue with its proceedings on other matters? Should there be time limits for remanded cases? Will the same judges sit over the issue or issues remanded to a court? What are the chances of an uncooperative party disrupting the process? Can the expenses incurred by the parties, if any, be justified? The design and operation of different domestic judicial systems, and how a tribunal is to rule if a court comes back with an unsatisfactory decision. These issues may be addressed and the challenges met to a reasonable extent depending on the remand process adopted by the investment arbitration system. As noted earlier, distilling components of a remand scheme for international investment arbitration is outside the scope of this thesis. In any case, where a remand is used as a delay tactic, it could run contrary to the object of investment arbitration, which is the fair, prompt and effective settlement of investment disputes.

6.5. Positive Interactions And Positive Cross-Influences: Lessons for Investment Arbitration?

The relationship that exists between an international legal order and a domestic institution would determine the sort of influence that the international legal order would have on the domestic institution. In the case of international investment tribunals and domestic courts, there seems to
exist a non-hierarchical horizontal relationship between the two systems. This work considers that both systems ought to act as complements to each other. Where this is the case, the international arbitration system influences the domestic judicial system and contributes to its effective functioning and vice versa. This study considers interactions between select domestic judicial institutions and international adjudicatory bodies in order to distill positive influences that can be adopted by the investment arbitration system. To give further impetus to such interaction and cooperation, it is noted that:

“The process of globalization and the emergence of new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years. From cross-border pollution to terrorist training camps, from refugee flows to weapon proliferation, international problems have domestic roots that an interstate legal system is powerless to address. To offer an effective response to these new challenges, the international legal systems must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives”

Anne-Marie Slaughter and William Burke-White maintain that international law plays an active role in shaping national political choices by ensuring that national governments function in pursuit of collective aims. The engagement of international law with domestic institutions may take the form of strengthening these institutions, backstopping them and compelling them to act

---


619 Id, pp. 328-329; See also Anne-Marie Burley (now Slaughter) & Walter Mattli (1993), ‘Europe before the Court: A Political Theory of Legal Integration’, 47 Int'l Org. 41--43
in such a manner as not to be considered “interference”, manipulation and imposition. The European Union (EU) system, they point out, is a good example of this kind of interaction between international systems and domestic systems. This is possible because the unique history and the culture in the Union have garnered the necessary political will amongst the states and economic and social forces. Additionally, because of the fact that the substantive issues adjudicated by the European Court of Justice (ECJ) involve key issues of domestic policy and the structure of domestic institutions, EU states are more willing to undertake reforms in order to work in concert with the Union. Again, the institutional provisions of the EU judicial structure “have set incentives for independent institutions, judges and citizens to act as guardians of the rule of law in European integration.”

Another good example of interaction between international and domestic legal systems is the ‘complementarity’ policy of the International Court of Justice (ICC) whereby the ICC encourages and assists states in undertaking domestic prosecutions of international crimes and therefore contributing to the effective functioning of domestic judiciaries. In criminal cases, domestic courts are deemed to have the best access to evidence and witnesses, and courts are cost effective entities. For the system of international criminal justice to function effectively, collective accountability is required by both ICC and domestic courts. In a sense, both systems feed off each other as the ICC can reach its utmost utility and in turn it can use its political and legal power to encourage domestic prosecutions of international crimes. In current practice, the ICC is highlighted as a backstop to domestic jurisdictions in that it undertakes its own

---

620 Anne-Marie Slaughter & William Burke-White (2006), pp. 328, 330, 352 “By strengthening, backstopping, and compelling action at the national level, the international legal system has powerful tools at its disposal to alter domestic political outcomes”.

621 Id, pp. 352

622 William W. Burke-White (2008), ‘The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina’, 46 Columbia Journal Of Transnational Law, 279, p. 293

623 Ernst-Ulrich Petersmann (1999), Dispute Settlement in International Economic Law—Lessons for Strengthening International Dispute Settlement in Non-Economic Areas, 2 J. Int’l Econ. L. 189, 238

624 The principle of complementarity: serves to give precedence to national jurisdiction, renders ICC’s jurisdiction subsidiary, plays a regulatory role.

prosecutions only where domestic courts fail to prosecute and where the ICC has jurisdiction.626 The greatest lesson from the ICC case is that both systems (domestic and international systems) help themselves develop to achieve a common goal. Through the policy of “proactive complementarity”, the ICC is able to aid domestic judicial reform towards the purpose of effective prosecution of international crimes. The ways in which the ICC can aid the judicial reform process include the provision of information, developing standards and best practices, the jurisprudence of the ICC may also provide guidance to domestic courts. Again, the ICC can also provide technical assistance to the courts that are unable to prosecute through seminars and training of domestic officials.627

The operation and processes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) sets another good example of how the relationship between international tribunals and domestic judicial institutions influences domestic governance, catalyzes judicial reforms and the development of judicial systems. Burke-White contends that the jurisdictional relationship between the ICTY and domestic courts played a critical role in influencing domestic actors to embark on judicial reform and institutional development in Bosnia and Herzegovina.628 The development of the ICTY’s Completion Strategy in 2002 created an incentive for the tribunal to oversee domestic institutions thereby catalyzing the necessary reforms and improving the quality of the institutions.629 The ICTY has also organized a number of training sessions for judges, prosecutors, and judicial officials in Bosnia and Herzegovina, Croatia, Kosovo, Former Yugoslav Republic of Macedonia and Serbia.630 The analysis is that international criminal tribunals are still able to influence state behavior even though they have jurisdiction over individuals and not states. The fact that investment arbitration tribunals have jurisdiction over states gives further impetus to their ability to influence state behavior.

626 See Art. 13 Rules-The ICC is complementary to national criminal jurisdictions which have the primary duty of prosecuting international crimes-So the ICC can only investigate or prosecute where national governments fail to act or where they undertake investigations or prosecutions that are not genuine-Art. 17 Rules; The ICC as backstop to national jurisdictions: See John Holmes (2002), Complementarity: National Courts versus the ICC, in Antonio Cassese et al. (eds.), The Rome Statue of the ICC: A Commentary, Vol. 1, Oxford University Press, p. 667. This concept is contained in the Rome Statute of 1998- Article 17 of the Rome Statute of the International Criminal Court, July 12 1998, 2187 U.N.T.S.;
629 See Rule 11 bis of ICTY Rules of Procedure and Evidence
630 See online at http://www.icty.org/sid/244, last visited April 2014
6.5.1: Judicial Reform To Aid Effective Channeling of Influences:

Judicial reform is suggested in this part, bearing in mind the differences between developed nation courts, having more advanced judicial systems, and developing nation courts with less sophisticated judicial systems. Generally, reforms are necessary in the judicial sector so as to make the domestic judicial system effective enough to play a coordinated role in the international adjudication of investment disputes. The reform of domestic institutions may also be necessary in order to make them more receptive to such international influence and for the effective channeling of influence from the domestic to the international legal order. With regards to foreign investments, there have been suggestions that foreign investors ought to be stakeholders in reform process. It is doubtful and appears impracticable to consider the role of foreign investors as contributors to or agents for domestic rule of law reform. This is because the aims of foreign investors and host states differ, and responsibilities, benefits and risks of foreign investments are shared between host states and foreign investors. However, investors must not act in a way that will deter host state achieving its own objectives. This places states, governments negotiating investment treaties and multilateral agencies (institutional influence outside the bilateral arrangements) in a better position to make calls for reforms. It is considered that multilateral agencies are better positioned to exert the necessary influence on states and the investment arbitration system and are also better able to coordinate cooperation since they are already involved in domestic judicial system reforms.

A number of international organizations are involved in the reform of domestic judicial sectors. According to a 2002 report, the World Bank, the Inter-American Development Bank, and the Asian Development Bank have extended over $800 million in loans for judicial reform. The lending operations of the World Bank for capacity building and institutional development

631 “The substantive values, the methods, processes and decisions adopted by transnational tribunals have an impact on domestic institutions. So reform of domestic institutions may be needed to adopt these positive norms which overall benefit the society and promote economic development and stability”, see Yuval Shany (2006), 37: 3-56
632 Hirschman notes that “the BIT enclave enables foreign investors to exit from domestic legal regime and this, in turn, implies a withdrawal of their voice from the domestic debate over the need for, and character of, good laws and legal institutions”, see Albert Hirschman (1970), Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States, Cambridge, Massachusetts casse
633 “Although multinational business will benefit as a group from more clarity and stability in the legal environment and may be allies in the reform effort, the world community cannot rely on their individual profit-maximizing deals to push countries reliably down the path of reform”, Susan Rose-Ackerman, Contracting in Politically Risky Environment: International Business and Reform of the State, p. 33. Draft Working Paper
sometimes include components related to legal and judicial reform. Legal and judicial reforms can also be stipulated as conditions or components of structural adjustment programs supported by Bank financing. The United Nations Development Program, the European Union and its member states, and the American, Australian, Canadian, and Japanese governments have provided significant grant aid to help developing nations improve the operation of the judicial branch of government.\footnote{See Economics and the Rule of Law: Order in the Jungle, The Economist, March 13, 2008 (“Western donors have poured billions into rule-of-law projects over the past 20 years”).} The American Bar Association (ABA) through its Rule of Law Initiative is also heavily involved in the reform of the judicial sector of many states. The International Monetary Fund sometimes conditions its facilities and arrangements on judicial reform. Since ICSID is an arm of the World Bank, the Bank ought to be more concerned with the reform of domestic courts in aid of international investment arbitration. To this end, interaction between ICSID and the Justice Reform sector of the World Bank is called for so as to coordinate efforts aimed at increasing awareness of the issues related to investment arbitration and the role of domestic courts in the process. Also, such interaction would help states and investors know the level of development of domestic courts and in turn serve to inform the investment arbitration system of domestic practices relevant to issues arising in international investment arbitration. The investment arbitration system and domestic courts systems can also leverage on this interaction to educate and exchange information relevant to the resolution of disputes between states and foreign investors.

Other ways in which international tribunals can impact state behavior and judicial reforms is through monitoring, imposing sanctions and promoting norm socialization.\footnote{William W. Burke-White (2006), \textit{The Domestic Influence of International Criminal Tribunals}, p. 291} In the case of international investment arbitration, because the relationship that exists between investment arbitral tribunals and domestic courts is horizontal and not vertical, investment tribunals in their relations with domestic courts do not have a sanctioning, review or monitoring role. They also cannot impose sanctions. Norm socialization would be more appropriate in this case, as the international arbitration system and domestic judicial systems can cooperate through meetings and seminars, dissemination of information and exchange of knowledge.\footnote{Id, p. 307; Martha Finnemore & Kathryn Sikkink (1998), \textit{International Norm Dynamics and Political Change}, 52 Int'l Org. 887-88 at 893; Anne-Marie Slaughter (2004), \textit{A New World Order}, Princeton University Press, 65-103}
chance that domestic judges may adopt or adjust the views of the transnational tribunals.\textsuperscript{637} For example, the ECHR “has begun to see its rulings change the shape of domestic law, through legislative revision and administrative decree as well as judicial decision.”\textsuperscript{638}

6.6. A Vision of A “Global Community of Courts”:

Over ten years ago, Anne-Marie Slaughter envisioned a ‘global community of courts’.\textsuperscript{639} This global community of courts is constituted of courts which their “institutional identity and the professional identity of the judges who sit on them is forged by their common function of resolving disputes under rules of law, rather than differences in the law they apply and the parties before them”.\textsuperscript{640} These courts include international and national judges, and judges applying international law, national law, or a mixture of both. She includes international arbitral tribunals in her definition of courts.\textsuperscript{641}

According to her, constitutional cross fertilization\textsuperscript{642} (leading to emerging global jurisprudence) and the combination of both active cooperation and vigorous conflict among national courts involved in transnational litigation between private parties across borders reflect an emerging global community of courts. However, she is of the view that to become a genuine community, “the members must ultimately do more than meet and interact. They must share the common values and principles that constitute the normative understandings of a community.”

With regards to transjudicial cooperation and dialogues, Slaughter notes the cooperation amongst bankruptcy courts and cites a “mini-treaty” concluded by a U.S. and a British court regarding each side’s role in resolving the particular dispute, an agreement then memorialized in an Order


\textsuperscript{640} Id., p. 192

\textsuperscript{641} Id., para 4

\textsuperscript{642} Conscious interactions between national and international judges through training sessions, seminars, and judicial organizations, id., p. 192
and Protocol. This case-by-case approach is worthy of emulation as it presents a workable system for cooperation and effective resolution of disputes. Of course, the dynamics of entering into ad hoc judicial agreements would be fundamentally different and challenging for the investment arbitration system as a tribunal has no way of knowing all the courts may be involved in the particular dispute. A preliminary step would perhaps be dialogues or more ambitiously but tenable, agreements between an investment tribunal and the judicial system of the state party and that of the place of arbitration.

6.7. Laudable Advancements:

Twenty years ago, Judge Schwebel and Judge Holtzmann called for an international court to decide, on a uniform and consistent basis, the interpretation and application of the 1958 New York Arbitration Convention for the recognition and enforcement of all international arbitration awards in all states parties to the Convention. Part of their dream materialized at the ICCA Singapore Congress Series in 2012 when eleven senior judicial figures from five continents addressed scenarios under the New York Convention from their specialist knowledge and experiences as national appellate judges in arbitration matters. The judges addressed questions relating to the interpretation of the New York Convention, the submission of an arbitration agreement, jurisdiction, setting aside and enforcing awards, arbitrability and public policy. This assembly was the first of its kind and the participants expressed satisfaction with the exchange and its importance for building bridges. This sort of conscious cooperation and coordination was conceptualized when this study began. Hopefully, more of this type of interaction will take place and involve more diversified panels (judges from the continent of Africa were not

---

643 “The intense debates among bankruptcy scholars over the virtues of a universal versus a territorial system—whether distribution of assets should be centralized globally or should proceed state by state, wherever assets are located—often reflect a desire to supplant ad hoc judicial agreements with a rationalized global framework established by treaty. However, at least one scholar sees transjudicial cooperation as a system of its own, arguing that “a decentralized system of courts applying evolving legal standards on a case by-case basis is the most workable system for developing legal international insolvency cooperation.”, Slaughter, id., pp. 214-15
645 The Hon. Murray Gleeson (Australia), The Hon. Ellen Gracie (Brazil), The Hon. Xi Xiangyang (People’s Republic of China), The Hon. Dominique Hascher, (France), The Hon. Robert Ribeiro (Hong Kong, SAR), The Hon. Bellur Narayanaswamy Srikrishna (India), The Hon. Hossein Abedian Kalkhoran, (Iran), The Hon. Oksana Kozyr, (Russian Federation); The Hon. Sundaresh Menon (Singapore), The Hon. Lord Jonathan Mance (United Kingdom), The Hon. Judith Kaye (United States of America)
646 Supra note 46, p. 693
represented). This cooperation is needed not only to give effect to the decisions of arbitrators, but also to enhance and smoothen the roles played by the two forums in the adjudication of investment disputes.

6.8. Final Thoughts:

In sum, the investment arbitration system (non-ICSID arbitration) needs domestic courts. The question of ICSID annulment procedure vs. domestic court review is beyond the scope of this work. Domestic courts also need investment tribunals in terms of transfer of positive influences. While investment tribunals exercise power over domestic courts, their own power is also subject to domestic court review. This is because the awards issued by investment tribunals need to be enforced by domestic courts. In other words, both forums have a measure of control over each other, with neither of them being more superior to the other. This heightens the need for a conscious cooperation and coordination of the roles both forums play in the resolution of investment disputes. I will not pretend at this point not to see the challenges with regards to differences in domestic courts and investment tribunals - developing state courts v. non-developing state courts, the lack of independence and impartiality present in some domestic courts, the inefficiency and delay, insufficient knowledge of international law, and executive interference with the judiciary; high-handed and presumptuous arbitrators, under-reaching arbitrators, and ‘politically’ motivated arbitrators. I believe that to achieve a credible and more legitimate system of investment dispute settlement, reforms and a total overhaul in terms of perception of roles in needed in both forums.

Furthermore, a little competition never hurt anyone. From the examination of the relationship between domestic courts and investment tribunals, this work is convinced that there is room for competition in the settlement of investment disputes. This is because investment treaties do not prevent investors from bringing their claims for violations of domestic law, which relate to their investments, before domestic courts. Practice has shown that investors can refer their international law claims to arbitration tribunals and still refer their domestic claims to domestic

647 Indeed it was noted that “The New York Convention is nothing without judges: arbitrators write mere words on paper: they have no imperium, no bailiff's and no tipstaffs; but judges exercise the full legal powers of the state to give those mere words the force of law. It is judges who make the New York Convention work; and we welcome the closest co-operation between national judges and ICCA”, p. 671
Competition between international tribunals and domestic courts may have the tendency to put pressure on domestic courts to improve their quality. Domestic courts may also get signaling from the decisions of international tribunals. Signals as to the latter’s commitment to co-operation and respect. Walde is of the view that “investment arbitration is a useful tool of good governance to create longer-term interests in the stewardship of economic, human and natural resources. It can be improved and complemented, but such improvement requires an extensive in-depth understanding of the world’s realities rather than a quasi-religious approach valuing sentiment more than outcome.”

6.9. Areas For Future Research:

This thesis identified a remand scheme as a possible solution to the maintenance of mutual respect and jurisdiction of investment tribunals and domestic courts. While bearing in mind the challenges of a remand procedure, distilling components of a remand scheme for international investment arbitration requires heavy procedural and substantive considerations and a good level of cooperation between investment tribunals and domestic courts.

Specialized domestic courts are proposed to handle interpretative issues involving international law principles. This can be achieved by courts having special arms constituted of domestic judges who are well versed in international law. While the challenges and difficulties of such a proposal is not lost on the writer, it is however noted that this may smoothen the interaction between domestic judiciaries and investment tribunals and give more credibility to the investment arbitration process.

648 See Occidental v. Ecuador (ICSID Case No ARB/06/11), where the investor pursued its domestic remedies related to Ecuadorian administrative law before an Ecuadorian national tribunal, and simultaneously initiated arbitration under the treaty for the alleged violations of international law.
651 Id., Thomas Walde, ‘Investment arbitration and sustainable development: good intentions—or effective results?’
It is believed that the coordination of the roles of investment tribunals and domestic courts addressed in this work requires more than silent or unspoken cooperation, establishing a more formal system of cooperation and coordination is required to achieve and sustain a positive relationship between the two forums. The nature and structure of this system requires further research and input from the investment arbitration system and domestic judicial systems.
BIBLIOGRAPHY:

Textbooks


**Journal Articles**


Bachand, F. (2005) ‘Must an ICC Tribunal Comply With an Anti-Suit Injunction Issued by the Courts of the Seat of Arbitration?’ 20 (3) MEALEY’S International Arbitration Reports. 16


De Visscher, C. (1935). ‘Le de’ni de justice en droit international’ 54 Recueil des Cours. 390


Fitzmaurice, G. Sir. (1932) ‘The Meaning of the Term ‘Denial of Justice’ 13 British Yearbook of International Law. 93


Meron, T (1959) ‘The Incidence of the Rule of Exhaustion of Local Remedies’, 25 British Yearbook of International Law. 95


Mistelis, L. (2013) ‘Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement’ 28 (1) ICSID Review.

Mistelis, L. and Baltag, C. (2008), Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices. The American Review of International Arbitration. 19


Root, E. (1910) ‘The Basis of Protection to Citizens Residing Abroad’ 4 American Journal of International Law. 517


219


**Working, Research And Draft Papers**

Analysis of Documents Concerning the Origin and Formulation of the ICSID Convention, Vol.1. (1970); Art 30 of the First Draft.


Rose-Ackerman, S. ‘Contracting in Politically Risky Environment: International Business and Reform of the State’ Draft Working Paper


‘The Rule of Law and Economic Development’ a white paper presented at the International Rule of Law Symposium, organized jointly by the American Bar Association (ABA) and the International Bar Association, 2006


White & Case, Queen Mary University of London School of International Arbitration 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process


Digital/Electronic Sources


http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home, last visited May 2014


http://www.univie.ac.at/intlaw/pdf/98_futureinvestmentarbitr.pdf last visited April 2014


Others


ILC Commentary 2001

International Court of Justice Statute


Resolution of the UN General Assembly of 24 October 2005, UN Doc. A/res/60/1

United Nations Code of Conduct on Transnational Corporations