Interaction of International Tribunals and Domestic Courts in Investment Law

Christoph Schreuer

I. Prior Use of Domestic Courts
   A. Exhaustion of Local remedies?
   B. A Reasonable Attempt in Domestic Courts

II. Competition between Investment Tribunals and Domestic Courts
   A. Competing Jurisdiction
   B. The Fork in the Road
   C. Forum Selection and Claim Splitting

III. Support by Domestic Courts in Investment Arbitration
   A. Interim Measures by Domestic Courts in Investment Arbitration
   B. Enforcement of International Awards by Domestic Courts

IV. Interference by Domestic Courts in Investment Arbitration

V. Mutual Scrutiny of Investment Tribunals and Domestic Courts
   A. Review of Domestic Court Decisions by International Tribunals
   B. Review of International Court Awards by Domestic Courts

INTRODUCTION

One of the main purposes of investment arbitration is to avoid the use of domestic courts. From the investor’s perspective, domestic courts are not an attractive forum for the settlement of their disputes with the host State. Rightly or wrongly, the investor will fear partiality from the courts of the State against which it wishes to pursue its claim. In many countries there is no independent judiciary. Executive intervention in court proceedings is often normal. Even if there is no intervention, a sense of judicial loyalty to the forum State is likely to influence the outcome of proceedings especially where large amounts of money are involved. In addition, in many countries domestic courts are bound to apply the local law even if it is at odds with international legal rules protecting the rights of investors.1 Even if the

investor succeeds in proceedings before domestic courts, the executive may choose to ignore the verdicts of the judiciary.\(^2\)

The courts of the investor’s home country and of third States are usually not a viable alternative. In most cases they lack territorial jurisdiction over investments taking place in another State. An additional obstacle to using domestic courts outside the host State would be State immunity. Host States dealing with foreign investors will frequently act in the exercise of sovereign powers (jure imperii) rather than in a commercial capacity (jure gestionis).

An agreement to arbitrate between the host State and the foreign investor does not mean that domestic courts no longer have a role to play. The transfer of competences from domestic courts to an international tribunal is only the beginning of a story that is surprisingly complex. Numerous points of contact between the two remain.\(^3\) The present paper can offer no more than a broad overview of the interplay between international tribunals and domestic courts.

It is possible to identify a number of typical forms of interaction between domestic courts and international investment tribunals. Some of these interactions are regulated by treaty or customary international law others have been developed through the practice of courts and tribunals. For purposes of the present paper these interactions are broken down into the following categories: I. Prior use of domestic courts, II. Competition between investment tribunals and domestic courts, III. Support by domestic courts in investment arbitration, IV. Interference by domestic courts in investment arbitration, and V. Mutual scrutiny of investment tribunals and domestic courts.

I. PRIOR USE OF DOMESTIC COURTS

A. Exhaustion of Local Remedies?

Under traditional international law, before an international claim on behalf of an investor may be put forward in international proceedings by way of diplomatic protection, the investor must have exhausted the domestic remedies offered by the host State’s domestic courts. But it is well established that, where consent has been given to investor-State arbitration, there is generally

\(^2\) See Siag v. Egypt, Award, 1 June 2009, paras. 33-87, 438, 448, 454-455.

no need to exhaust local remedies. This principle applies in ICSID as well as in non-ICSID arbitration. Article 26 of the ICSID Convention makes it clear that a State may make the exhaustion of local remedies a condition of consent to arbitration. But that possibility is hardly ever used. One of the purposes of investor/State arbitration is to avoid the vagaries of proceedings in the host State’s courts.

Only few, mostly older bilateral investment treaties (BITs) contain a requirement to exhaust local remedies. There are good reasons for this. Going to the local courts of the host State before starting international arbitration would mean delay and additional expense to the investor. But it would also carry disadvantages for the host State. Public proceedings in the domestic courts are likely to exacerbate the dispute and may affect the host State’s investment climate. Once the host State’s highest court has made a decision, it may be more difficult for the government to accept compromise or a contrary international judicial decision. ICSID and non-ICSID Tribunals have

---

4 See esp. Hehnan v. Egypt, Decision on Annullment, 14 June 2010, paras. 9, 28-57.
5 See e.g. Rosinvest v. Russian Federation, decided under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction, October 2007, para. 153: “So far as it is necessary to do so the consent to investor-state arbitration, as explained, amounts to a waiver of the principle of exhaustion of local remedies. By choosing international arbitration to settle third party investment arbitration disputes the principle of exhaustion of national legal remedies is excluded.”
7 ICSID Convention, Article 26 second sentence: “A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”
confirmed that the claimants were entitled to institute international arbitration directly without first exhausting the remedies offered by local courts.

Some BITs provide that before an investor may bring a dispute before an international tribunal it must seek its resolution before the host State’s domestic courts for a certain period of time, often eighteen months.\textsuperscript{11} The investor may proceed to international arbitration if the domestic proceedings do not result in the dispute’s settlement during that period or if the dispute persists after the domestic decision.

Tribunals have held that this was not an application of the exhaustion of local remedies rule.\textsuperscript{12} The usefulness of such a requirement is questionable. It creates a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute. A substantive decision by the domestic courts in a complex investment dispute is unlikely within eighteen months, certainly if one includes the possibility of appeals. Even if such a decision should have been rendered, the dispute is likely to persist if the investor is dissatisfied with the decision’s outcome. Therefore, arbitration remains an option after the expiry of the period of eighteen months. It follows that the most likely effect of a clause of this kind is delay and additional cost. One tribunal called a provision of this kind “nonsensical from a practical point of view”.\textsuperscript{13}

In actual practice, investors were mostly able to avoid the application of such a rule by invoking most favoured nation (MFN) clauses in the same BITs which allowed them to rely on other BITs of the host State that did not contain that requirement.\textsuperscript{14}

But see \textit{Loewen v. United States}, Award, 26 June 2003, 7 ICSID Reports 442, paras. 142-217.

\textsuperscript{11} For more detail see \textit{C. Schreuer}, Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration, 4 The Law and Practice of International Courts and Tribunals 1, 3-5 (2005).


\textsuperscript{13} \textit{Plama v. Bulgaria}, Decision on Jurisdiction, 8 February 2005, 13 ICSID Reports 272, para. 224.

B. A Reasonable Attempt in Domestic Courts

Some tribunals have required parties to resort to domestic courts before initiating international arbitration not as a matter of jurisdiction or admissibility but as a substantive requirement. The violation of the international standard of protection would not have occurred until at least an attempt had been made to obtain redress through domestic courts. Some but not all of these cases involved the question whether a denial of justice had occurred.

In *Generation Ukraine v. Ukraine*, the Claimant complained of an indirect expropriation. The Tribunal found that the Claimant should at least have attempted to bring its claim before the domestic courts and explained its reasoning as follows:

In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable—not necessarily exhaustive—effort by the investor to obtain correction.


17 Vivendi v. Argentina, Award, 21 November 2000, 5 ICSID Reports 299, para. 80; Rompetrol v. Romania, Decision on Jurisdiction, 18 April 2008, paras. 58, 111, 114; Jan de Nul v. Egypt, Award, 6 November 2008, paras. 191, 255-261; Chevron & Texaco v. Ecuador, Interim Award, 1 December 2008, paras. 80, 90, 214-238.


19 At para. 20.30. Emphasis in the original. See also Lauder v. Czech Republic (UNCITRAL), Award, 3 September 2001, 9 ICSID Reports 66, para. 204; Encana v. Ecuador (UNCITRAL), Award, 3 February 2006, 12 ICSID Reports 427, para. 194.
In another case, *Waste Management v. Mexico II*, the Tribunal discussed the issue of exhaustion of local remedies in connection with the State’s obligation to ensure investors fair and equitable treatment and full protection and security.\(^{20}\) The *Waste Management II* Tribunal also considered the issue important not only on a procedural level, but also with respect to a State’s compliance with substantive standards.

Therefore, under this doctrine an attempt to seek redress in the domestic courts would be required to demonstrate that a substantive standard, such as protection against uncompensated expropriation or fair and equitable treatment, has indeed been violated.

The decision to dispense with the requirement to exhaust local remedies was made consciously and for good reasons. It is doubtful whether the reintroduction of a requirement to use local remedies through the back door of an element attached to the substantive standards of protection serves any useful purpose. Once it is accepted that the investor must make an attempt at local remedies it is only a small step to require that the attempt should not stop at the level of the lowest court but should be exhaustive. It is better to leave the rule intact that in investment arbitration there is no need to exhaust local remedies. The only accepted exception from this principle is a claim for denial of justice.

II. COMPETITION BETWEEN INVESTMENT TRIBUNALS AND DOMESTIC COURTS

A. Competing Jurisdiction

In principle, consent to international arbitration means the exclusion of other remedies. That is, unless the parties agree otherwise. The most important document governing investment arbitration, the ICSID Convention provides to this effect:

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.\(^{21}\)


\(^{21}\) ICSID Convention, Article 26.
Similarly, the NAFTA in Article 1121 provides as a condition for the bringing of a claim before an international tribunal that the investor must waive any right to initiate or continue any proceedings before domestic courts with respect to the alleged breach.\textsuperscript{22}

Despite the recognition of this principle, respondents have at times turned to domestic courts in the hope of obtaining a more favourable decision than by an international tribunal. Investment tribunals have firmly asserted their own jurisdiction in the face of attempts to seize domestic courts.\textsuperscript{23} In a number of cases ICSID tribunals have actually issued provisional measures enjoining parties from pursuing related claims in domestic courts.\textsuperscript{24}

In \textit{Amco v. Indonesia}, the Tribunal found that any decision by a domestic court would not be binding upon an international tribunal. The Tribunal said:

\ldots an international tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that parties—rightly or wrongly—feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international tribunal such a procedure could be rendered meaningless.\textsuperscript{25}

\textsuperscript{22} For cases applying this provision see \textit{Waste Management v. Mexico I}, Award, 2 June 2000, 5 ICSID Reports 445, para. 18; \textit{Waste Management v. Mexico II}, Decision on Jurisdiction, 26 June 2002, 6 ICSID Reports 549; \textit{Loewen v. United States}, Award, 26 June 2003, 7 ICSID Reports 442, paras. 158-164 at 164; \textit{Thunderbird v. Mexico}, Award, 26 January 2006, paras. 111-118. See also Article 10.18 CAFTA and the following cases: \textit{Railroad Development Corp. v. Guatemala}, Decision on Objection to Jurisdiction, 17 November 2008; \textit{Pac Rim Cayman LLC v. El Salvador}, Decision on Preliminary Objections, 2 August 2010, paras. 173-188, 239-243, 250-253.


\textsuperscript{25} \textit{Amco v. Indonesia}, Award, 20 November 1984, para. 177.
As a general rule, investment tribunals will insist on their priority when confronted with attempts to bring the same or a closely related claim before a domestic court. This does not preclude an international tribunal from relying on decisions of domestic courts, especially where the applicable law is the law of the domestic courts’ forum State. As will be discussed below, the distinction between treaty claims and contract claims has considerably complicated the delimitation of the spheres of activity of investment tribunals and domestic courts.

B. The Fork in the Road

"Fork in the road" provisions are attached to the consent clauses of some BITs. They offer the investor a choice between the host State’s domestic courts and international arbitration. The choice, once made, is final. If the investor resorts to the host State’s domestic courts to have the dispute settled it loses the right to international arbitration. For instance, Article 8(2) of the Argentina–France BIT provides:

Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.

Similarly, under the Energy Charter Treaty consent of the States Parties listed in Annex ID does not apply where the investor has previously submitted the dispute to the host State’s courts.

Investors are often drawn into local legal disputes of one sort or another in the course of investment activities. These legal disputes may concern appeals against administrative measures taken by the host State or private...
law disputes with local business partners including State entities. However, not every appearance before a court or tribunal of the host State will constitute a choice under a fork in the road provision. While such disputes may relate in some way to the investment, they are not necessarily identical to “the dispute” referred to the international tribunal on the basis of the BIT’s provisions on investor-State dispute settlement.

The practice on fork in the road clauses shows that they have had little practical impact on the jurisdiction of tribunals. Tribunals have held consistently that a “fork in the road” clause will prevent access to international arbitration only if the same dispute involving the same parties and cause of action had been submitted to the courts of the host State. If the claimant before the international tribunal bases its claims on a BIT’s substantive provisions, the identity of the dispute will only exist if the same claimant has relied on the BIT before the domestic court. This principle is now well established and has been confirmed in a considerable number of decisions.28

C. Forum Selection and Claim Splitting

The most difficult problems in the relationship between investment tribunals and domestic courts have arisen from competing jurisdictional clauses in treaties and contracts. Contracts between investors and host States frequently

contain forum selection clauses that refer disputes arising from the application of these contracts to the host State’s domestic courts. When disputes arise in connexion with the investments, investors will typically invoke provisions in treaties, most often BITs, to gain access to international arbitration. The host States typically insist on the contractual forum selection arguing that by signing the contracts the investors had opted for domestic courts rather than international arbitration.

Tribunals have insisted on their jurisdiction in disputes of this nature. In cases where the tribunal’s jurisdiction was based on an offer contained in a treaty subsequently accepted by the investor, the tribunals have uniformly upheld their jurisdiction despite the presence of contractual dispute settlement clauses pointing to domestic courts. At the same time tribunals have recognized that the contractual forum selection clause applied to claims based on the contract rather than on the treaty. In *Vivendi v. Argentina* the Annulment Committee stated that breach of treaty and breach of contract had to be distinguished and that these related to independent standards:

A state may breach a treaty without breaching a contract, and vice versa...whether there has been a breach of the BIT and whether there has been a breach of contract are different questions...the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.... A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.

This decision has established the principle that a forum selection clause in a contract pointing to domestic courts will not oust the international tribunal’s jurisdiction based on a treaty. The decisive reason is that contract claims and treaty claims have a different legal basis.

---

Investment tribunals have since generally followed the distinction between contract claims, which are subject to contractual forum selection clauses, and treaty claims, which are unaffected by such clauses. Under this consistent practice, the treaty-based jurisdiction of international arbitral tribunals to decide on violations of treaties is not affected by domestic forum selection clauses contained in contracts. The contractual selection of domestic courts is restricted to violations of the respective contracts.32

The distinction between contract claims and treaty claims has appeared in many investment arbitrations. The respondents’ objection that the case only involves contract claims and the claimants’ insistence that treaty rights are involved, have become routine features in these cases.33


33 See e.g. El Paso v. Argentina, Decision on Jurisdiction, 27 April 2006, paras. 63-65; Jan de Nul v. Egypt, Decision on Jurisdiction, 16 June 2006, paras. 79-82; LESI de Astaldi v. Algeria, Decision on Jurisdiction, 12 July 2006, para. 84; Telenor v. Hungary, Award, 13 September 2006, paras. 32, 50, 47(1), 50; Saipem v. Bangladesh,
The separation of contract claims and treaty claims is intellectually attractive but leads to a number of practical problems. A clear-cut separation of treaty claims and contract claims is often difficult and hinges on the facts of each case. As pointed out by several tribunals, a particular course of action by the host State may well constitute a breach of contract and a violation of international law. On the other hand, a mere breach of contract may, but need not, amount to a treaty violation. The two categories are not mutually exclusive, but, rather, two different standards have to be applied to determine whether one or the other or both have been violated.\footnote{See also S.M. Schwelb, On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law, in: International Law at the Time of its Codification, Essays in Honour of Roberto Ago, III, 401 (1987).}

The situation is made even more complex by the fact that many treaties offer jurisdiction for any investment dispute, a terminology which may be interpreted to include contract claims while others restrict jurisdiction to alleged violations of the treaty. Therefore, it is incorrect to assume that the jurisdiction of treaty-based tribunals is necessarily restricted to violations of the treaty’s substantive provisions. The jurisdiction of a tribunal is not determined by its establishment through a treaty but by the wording of the clause offering consent to jurisdiction.

A further complication is caused by so-called umbrella clauses. Under an umbrella clause the States parties to the treaty undertake to observe any obligations they may have entered into with respect to investments.\footnote{An example for an umbrella clause is the last sentence of Article 10(1) Energy Charter Treaty: “Each Contracting Party shall observe any obligation it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”} A violation of this obligation will amount to a treaty violation. An umbrella clause is not jurisdictional in nature but contains a substantive obligation. However, it can have jurisdictional consequences since the violation of a contract may amount to a violation of the umbrella clause contained in the treaty. The exact meaning and effect of umbrella clauses has been the subject of much debate and disagreement in arbitral practice.\footnote{For a brief survey see Dolzer, R./Schreuer, C., Principles of International Investment Law 153-162 (2008).}
III. SUPPORT BY DOMESTIC COURTS IN INVESTMENT ARBITRATION

A. Interim Measures by Domestic Courts in Investment Arbitration

Interim measures ordered by domestic courts are a normal feature of international commercial arbitration. But the question whether domestic courts are permitted to order such measures in the context of investment arbitration, especially ICSID arbitration, is somewhat controversial.

Article 47 of the ICSID Convention provides for provisional measures by the tribunal to preserve the respective rights of the parties. The controversy surrounding the power of domestic courts to order provisional measures in ICSID arbitration is usually phrased in terms of whether the power of the ICSID tribunal under Article 47 is exclusive or not.

The decisions of domestic courts and of ICSID tribunals, on the question of whether interim measures by domestic courts in the context of ICSID arbitration are permissible, were uneven and somewhat contradictory. A

---


38 For more comprehensive treatment see C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, The ICSID Convention A Commentary, 2d ed. 2009, Article 26, paras. 162-183

39 See also ICSID Arbitration Rule 39.


1984 amendment to the ICSID Arbitration Rules has however clarified the situation and the controversy seems to have disappeared. Under the rule as amended provision of measures by domestic courts are permissible only if the parties have expressly agreed to them in the instrument recording their consent to arbitration.

This rule does not apply in non-ICSID arbitration. For instance, the UNCITRAL Arbitration Rules specifically provide that a party to arbitration proceedings may address a request for interim measures to a judicial authority. Similarly, the Additional Facility Rules provide that a party may apply to a competent judicial authority for interim or conservatory measures.

B. Enforcement of International Awards by Domestic Courts

At the enforcement stage, domestic courts play a potentially important role in investment arbitration. Under Article 54 of the ICSID Convention awards are to be recognized as binding and their pecuniary obligations are to be enforced like final domestic judgments in all States parties to the Convention. Recognition and enforcement may be sought in any State that is

Morocco)—Some Legal Problems, 51 BYIL 123 at 132 et seq. (1980) reproduced in 1 ICSID Reports 645; Guinea v. MINE, Autorité de surveillance des offices de poursuite pour dette et de faillite, Geneva, 7 October 1986, 4 ICSID Reports 45; MINE v. Guinea, Award, 6 January 1988, 4 ICSID Reports 68; Guinea v. Atlantic Triton, France, Cour d’appel, Rennes, Judgment, 26 October 1984, 3 ICSID Reports 3; Guinea v. Atlantic Triton, France, Cour de cassation, Judgment, 18 November 1986, 3 ICSID Reports 10; Atlantic Triton v. Guinea, Award, 21 April 1986, 3 ICSID Reports 17; Cable TV v. St. Kitts and Nevis, Award, 13 January 1997, 5 ICSID Reports 108, paras. 1.05, 2.20, 4.04, 4.05, 4.11, 4.15.

42 ICSID Arbitration Rule 39(6).
43 UNCITRAL Arbitration Rules as revised in 2010, Article 26(9): “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”.
44 Additional Facility Rule 46(4): “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.”
46 Article 54(1) of the ICSID Convention provides in relevant part: “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 territories as if it were a final judgment of a court in that State.”
a party to the ICSID Convention. In other words, the prevailing party may select a State where enforcement seems most promising.

The procedure for the enforcement of ICSID awards is governed by the law on the execution of judgments in each country. The Contracting States are to designate a competent court or authority for this purpose. Some countries have designated a single court or authority. Others have designated certain types of courts such as the locally competent district courts. Most designations refer to courts but some refer to executive authorities. Where courts have been designated, these are sometimes the courts of first instance or district courts and sometimes the respective supreme courts.47

The powers of domestic courts when enforcing ICSID awards are limited. There is no review. Therefore, the domestic court may not examine whether the ICSID tribunal had jurisdiction, whether it adhered to the proper procedure or whether the award is substantively correct. It may not even examine whether the award is in conformity with the forum State’s ordre public (public policy). The domestic court or authority is limited to verifying that the award is authentic. However the court’s obligation to enforce an ICSID award is subject to applicable rules on the immunity from execution that States enjoy.48 In practical terms this means that as a rule execution will be possible only in respect of a debtor State’s property that does not serve the State’s official purposes.

Practice on the enforcement of ICSID awards by domestic courts is relatively scant.49 Compliance without enforcement appears to be the rule. It is


48 Article 55 of the ICSID Convention: “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 foreign State from execution.”

obvious that the possibility to call upon an effective enforcement mechanism is a strong inducement for compliance.

The enforcement of non-ICSID awards is different. It is subject to the national law of the place of enforcement and to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{50} Article V of that Convention lists a number of grounds on which recognition and enforcement may be refused.

A new threat to ICSID awards is their review by the domestic courts of States that are award debtors. Argentina has recently developed a theory that would subordinate its compliance with an ICSID award to prior enforcement by its own domestic courts. This would mean that the investor who has prevailed in the arbitration proceedings would have to go through the domestic court system of the host State before receiving payment under the award. This would undermine one of the basic ideas of investment arbitration: to absolve the investor from having to pursue its case before the host State’s courts.

This theory confuses two different provisions of the ICSID Convention. Under Article 53 the parties are under an obligation to abide by and comply with an award.\textsuperscript{51} This is the obligation incumbent upon the award debtor. By contrast, Article 54 on enforcement comes into play only after a default has occurred. It applies in situations in which a party to ICSID arbitration has failed in its obligation to abide and comply with the award and is designed for worldwide enforcement against a defaulting award debtor.\textsuperscript{52} Ad hoc Committees charged with deciding requests for annulment under the ICSID Convention have clearly rejected Argentina’s theory.\textsuperscript{53}

\textsuperscript{50} 330 UNTS 38; 7 ILM 1046 (1968).

\textsuperscript{51} Article 53(1) of the ICSID Convention provides: “(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”


\textsuperscript{53} Enron v. Argentina, Decision on the Request for Continued Stay of Enforcement, 7 October 2008; Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, Decision on the Request for Continued Stay of Enforcement, 4 November 2008; Sempra Energy Intl. v. Argentina, Decision on the Request for a Continued Stay of Enforcement, 5 March 2009. Argentina’s position even prompted a letter from the United States Department of State to the Secretary of the ad hoc Committee which rejected the position of Argentina and pointed out that its own
IV. INTERFERENCE BY DOMESTIC COURTS
IN INVESTMENT ARBITRATION

In some cases respondents have sought to challenge the jurisdiction of international tribunals through action in domestic courts.\textsuperscript{54} Investment tribunals have resisted these attempts. The decision of a national court, especially a court of the host State, cannot determine the jurisdiction of an international tribunal. An ICSID tribunal’s power to determine the scope of its jurisdiction independently is specifically preserved by Article 41(1) of the ICSID Convention.\textsuperscript{55} Similarly the UNCITRAL Arbitration Rules\textsuperscript{56} and the Additional Facility Rules\textsuperscript{57} provide that the tribunal has the power to rule on its own jurisdiction.

These provisions give tribunals the exclusive power to decide on matters of their jurisdiction and competence. Their primary purpose is to prevent a frustration of the arbitration proceedings through a unilateral denial of the tribunal’s competence by one of the parties including its courts. Therefore, domestic courts must defer to an investment tribunal’s decision on its jurisdiction and not vice versa.\textsuperscript{58} ICSID tribunals have held in a number of cases that a national authority does not have the power to determine their competence.\textsuperscript{59}

In Incexsa v. El Salvador the legality of the investment was a condition of the Tribunal’s jurisdiction.\textsuperscript{60} Therefore the Tribunal had to determine whether the investment had been made in accordance with host State law. The Tribunal held that it had to make an autonomous decision on the
investment’s legality and would not submit to any decision of a domestic court on this point.\textsuperscript{61}

In particular, an international tribunal will not submit to an attempt by a domestic court to curtail or negate its jurisdiction.\textsuperscript{62} In SGS v. Pakistan, the Tribunal resisted the attempt of the Supreme Court of Pakistan to deny the Tribunal’s jurisdiction and to halt ICSID proceedings. The Supreme Court of Pakistan had issued a judgment restraining the Claimant from pursuing or participating in the ICSID arbitration on the ground that ICSID lacked jurisdiction.\textsuperscript{63} The ICSID Tribunal thereupon issued a procedural order in which it squarely rejected the Supreme Court’s attempt to interfere with the Tribunal’s power to determine its jurisdiction. The Tribunal said:

[Although the Supreme Court Judgment of July 3, 2002 is final as a matter of the law of Pakistan, as a matter of international law, it does not in any way bind this Tribunal. We have already adverted to the requirement of Article 41 of the ICSID Convention that this Tribunal determine whether it has the jurisdiction to consider the claims that have been advanced and that we cannot decline to do so.\textsuperscript{64}]

In its Decision on Jurisdiction the Tribunal declined to follow the Pakistani Supreme Court’s finding and reached the result that it had jurisdiction.\textsuperscript{65}

\textsuperscript{61} At paras. 212, 213. The Tribunal in Fraport v. Philippines, Award, 16 August 2007, para. 391 cited Inceysa with approval stating that: “… holdings of municipal legal institutions cannot be binding with respect to matters properly within the jurisdiction of this Tribunal.” See also Petrobart v. Kyrgyz Republic, Award, 13 February 2003, 13 ICSID Reports 337, 360, sec. 5.3.2; Lucchetti v. Peru (sub nomine: Industria Nacional de Alimentos), Decision on Annulment, 5 September 2007, paras. 81-87.


\textsuperscript{63} SGS v. Pakistan, Judgment, Supreme Court of Pakistan, 3 July 2002, 8 ICSID Reports 356.

\textsuperscript{64} SGS v. Pakistan, Procedural Order No. 2, 16 October 2002, 8 ICSID Reports 388.

\textsuperscript{65} SGS v. Pakistan, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406 at paras. 35-40, 71, 107, 119, 154, 184.
V. MUTUAL SCRUTINY OF INVESTMENT TRIBUNALS AND DOMESTIC COURTS

A. Review of Domestic Court Decisions by International Tribunals

It is clear that a State is responsible also for the acts of its judiciary and that a violation of investors’ rights may occur as a consequence of the actions of domestic courts. The classical case would be a denial of justice which is well recognized under customary international law. Almost by definition, denial of justice would be committed by domestic courts.

In Azinian v. Mexico the Tribunal defined denial of justice in the following terms:

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…. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law.

Denial of justice as well as other shortcomings in domestic courts will also be contrary to a number of standards contained in treaties for the protection of investors. The United States Model BIT of 2004 specifically clarifies that the fair and equitable treatment standard covers protection from denial of justice and guarantees due process. Article 5(2)(a) provides:

“fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;

Tribunals have held consistently that the absence of a fair procedure or serious procedural shortcomings in domestic courts were important elements

---

66 See ILC Articles on State Responsibility, Article 4.
69 Azinian v. Mexico, Award, 1 November 1999, 5 ICSID Reports 272, paras. 102, 103.
in a finding of a violation of the fair and equitable treatment standard.\textsuperscript{70} The Tribunal in \textit{Jan de Nul v. Egypt} held that "the fair and equitable treatment standard encompasses the notion of denial of justice."\textsuperscript{71}

There is also authority to the effect that the treaty standard of full protection and security\textsuperscript{72} reaches beyond physical violence and requires legal protection for the investor including protection by domestic courts.\textsuperscript{73}

An uncompensated expropriation can be the result of an act of the national judiciary and may lead to State responsibility.\textsuperscript{74} In addition, an expropriation, in order to be legal, must meet certain requirements. Some investment protection treaties require a procedure in accordance with due process.\textsuperscript{75} This may include the possibility to appeal to a domestic court.\textsuperscript{76}

Somewhat paradoxically, investment tribunals may even review the legality of decisions of domestic courts by which these courts annulled arbitral awards rendered in commercial arbitrations.\textsuperscript{77}

Therefore, it is clear that an investment tribunal may examine the legality of decisions of domestic courts and that it may hold the forum State responsible for any violations of international standards committed by its courts.


\textsuperscript{71} \textit{Jan de Nul v. Egypt}, Award, 6 November 2008, para. 188.


\textsuperscript{74} \textit{Saipem v. Bangladesh}, Decision on Jurisdiction, 21 March 2007, paras. 129-133; Award, 30 June 2009, paras. 120-190.

\textsuperscript{75} See e.g. Article 6(1)(d) of the United States Model BIT of 2004.

\textsuperscript{76} See Article 5(3) of the BIT between Austria and Bosnia-Herzegovina of 2000.

B. Review of International Awards by Domestic Courts

The opposite may also be true: the award of an investment tribunal may be subject to the scrutiny of a domestic court. Here we have to distinguish clearly between ICSID awards and non-ICSID awards. Awards governed by the ICSID Convention are protected by the exclusive remedy rule of Article 53:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

Therefore, under the ICSID Convention its review procedures are exhaustive. The Convention provides for its own self-contained system of review of awards such as annulment and revision. Consequently, a party to ICSID proceedings may not initiate action before a domestic court to seek the annulment or another form of review of an ICSID award. A court of a State that is a party to the ICSID Convention would be under an obligation to dismiss such an action.

The situation is different with respect to non-ICSID awards. Awards stemming from other arbitration systems such as the ICC, the LCIA or the Arbitration Institute of the Stockholm Chamber of Commerce as well as ad hoc arbitration under the UNCITRAL Rules are subject to review procedures by the courts of the arbitration forum. The same applies to arbitration under the ICSID Additional Facility. Unlike ICSID awards, these awards are not insulated from national law and their review, recognition and enforcement is governed by the national law of the place of arbitration and by any applicable treaties including the 1958 [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

This means that a non-ICSID award will be subject to any setting aside proceedings that the national law of the place of the arbitration may provide. 79


See e.g. Czech Republic v. CME Czech Republic BV, Judicial Review, Sweden, Svea Court of Appeal, 15 May 2003, 9 ICSID Reports 439; Republic of Ecuador v. Occidental Exploration and Production Company, England, High Court, Queen’s Bench Division, 29 April 2005, Court of Appeal (Civil Division), 9 September 2005, 12 ICSID Reports 104, 129, High Court, Queen’s Bench Division, 2 March 2006, Court of Appeal (Civil Division) 4 July 2007, [2006] EWHC 345 (Comm); Nagel v.
It also means that in proceedings before a domestic court for the award’s enforcement, the award will be subject to the reasons for non-enforcement listed in Article V of the New York Convention.

Investment arbitration under the NAFTA does not take place under the ICSID Convention since neither Canada nor Mexico are parties to the ICSID Convention. As a consequence, a number of awards rendered by NAFTA tribunals have been subjected to the scrutiny of domestic courts. For instance in *Metalclad v. Mexico* a Canadian court, the Supreme Court of British Columbia held that—on the basis of the British Columbia *International Commercial Arbitration Act*—it had jurisdiction to review a NAFTA award rendered in Vancouver. The court partially set aside the Award on the ground that the Tribunal had exceeded its competence in finding that the breach of the fair and equitable treatment standard was triggered by a lack of transparency.

**CONCLUSIONS**

This survey demonstrates the diverse ways in which domestic courts interact with investment arbitration. From the perspective of an efficient settlement of disputes between States and foreign investors some activities of domestic courts are clearly necessary. This applies in particular to the enforcement
of investment awards by domestic courts. To a lesser degree this may apply to interim measures in support of investment arbitration. Practice indicates that this possibility, though useful in principle, is rarely used.

The review of international awards by domestic courts may advance or stand in the way of efficient dispute settlement depending on the particular circumstances. In the framework of ICSID any supervisory role of domestic courts has been dispensed with in favour of the possibility to seek annulment on the international plane. In non-ICSID cases domestic courts have generally exercised appropriate restraint in their supervisory role. The enthusiasm of several ICSID ad hoc committees to exercise their power to annul awards has led to the paradoxical situation that the chances of obtaining an award that will withstand challenge is now higher outside the ICSID system than within.

Sometimes domestic courts have attempted to obstruct investment arbitration. This is done by denying the jurisdiction of international tribunals as well as enjoining arbitrators or parties from participating in proceedings. These abusive and illegal tactics typically serve the short term interests of the respective forum States. Investment tribunals have resisted these attempts and have insisted on the exercise of their proper functions.

The most difficult questions have arisen with the delimitation of the respective roles of domestic courts and investment tribunals. Despite the abolition, in principle, of the requirement to exhaust local remedies, insistence by tribunals that claimants first go to domestic courts is a recurrent feature. A number of compromise solutions have appeared in practice. They include a “reasonable attempt” in domestic courts or a requirement to seek justice in domestic courts for a certain period of time. None of these have turned out to be successful. The old rule was abandoned consciously and for good reasons. Investment tribunals were conceived not as a review mechanism but as a substitute for domestic courts in the protection of foreign investments. Precipitate use of investment arbitration is not a threat to the system. The considerable cost of launching and conducting international investment arbitration will make a prospective claimant think twice before taking this course of action.

Most investment disputes involve claims for breach of an investment treaty and for breach of contract or of some other entitlement under domestic law. Investment tribunals have reacted to contractual forum selection clauses that point to domestic courts by introducing the distinction between treaty claims and contract claims. Originally launched as a defensive doctrine to protect the jurisdiction of international tribunals, this distinction has become ubiquitous and is now frequently used to curtail the role of tribunals. It is often assumed that a tribunal established on the basis of a treaty has
jurisdiction only over disputes concerning alleged violations of that treaty. But many jurisdictional clauses in investment treaties cover investment disputes in general terms without limiting the competence of tribunals to particular causes of action. Where this is the case the tribunal’s jurisdiction extends to all types of claims including contract claims.

The separate treatment of contract claims and treaty claims leads to situations where the claimant may be compelled to pursue part of its claim through national courts and another part through international arbitration. This has undesirable consequences. The need to dissect cases into contract claims and treaty claims to be dealt with by separate fora requires claim splitting and has the potential of leading to parallel proceedings and conflicting decisions. This is uneconomical and contrary to the goal of reaching a final and comprehensive resolution of disputes.