Interaction of International Tribunals and Domestic Courts in Investment Law

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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

[1] See *M.N. Shaw*, International Law, 6th ed., 148-157, 166-179.

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, 436, 448, 454-455.

[3] For an overview of the involvement of domestic courts in commercial arbitration see *J.D.M. Lew*, Does National Court Involvement Undermine the International Arbitration Process?, 23 ICSID Review—FILJ 260-299 (2008).

no need to exhaust local remedies.[4] This principle applies in ICSID as well as in non-ICSID arbitration.[5] Article 26 of the ICSID Convention[6] makes it clear that a State may make the exhaustion of local remedies a condition of consent to arbitration.[7] 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.[8] 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[9] and non-ICSID Tribunals[10] have

[4] See esp. *Helnan* v. *Egypt*, Decision on Annulment, 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."

[6] Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965, 575 UNTS 159 (1966); 4 ILM 532 (1965).

[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."

[8] See BIT between Romania and Sri Lanka of 9 February 1981, Article 7.

[9] *Amco* v. *Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 509, para. 63; *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 369 at para. 39; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240, at paras. 13.1-13.6; *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, 13 ICSID Reports 105, para. 80; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312, paras. 69, 70; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 150-153; Award, 30 June 2009, paras. 174-184.

[10] *CME* v. *Czech Republic*, Final Award, 14 March 2003, 9 ICSID Reports 264, para. 412; *Yaung Chi Oo* v. *Myanmar*, Award, 31 March 2003, 42 ILM 540 (2003), para. 40; *Nycomb* v. *Latvia*, Award, 16 December 2003, 11 ICSID Reports 158, sec. 2.4; *Rosinvest* v. *Russian Federation*, Award on Jurisdiction, October 2007, para. 153.

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.[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.[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".[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.[14]

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

[11] For more detail see *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).

[12] *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, para. 28; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, 12 ICSID Reports 174, para. 104; *Gas Natural SDG, S.A.* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, 14 ICSID Reports 284, para. 30.

[13] *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, 13 ICSID Reports 272, para. 224.

[14] *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, paras. 54-64; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, 12 ICSID Reports 174, paras. 32-110; *Gas Natural SDG, S.A.* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, 14 ICSID Reports 284, paras. 24-49; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 52-66; *National Grid PCL* v. *Argentina*, Decision on Jurisdiction, 20 June 2006, paras.

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.[15] 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.[16] Some but not all of these cases involved the question whether a denial of justice had occurred.[17]

In *Generation Ukraine* v. *Ukraine*, the Claimant complained of an indirect expropriation.[18] 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.[19]

80-93; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.* v. *Argentina and AWG Group Ltd.* v. *Argentina*, Decision on Jurisdiction, 3 August 2006, paras. 52-68. But see: *Wintershall* v. *Argentina*, Award, 8 December 2008, paras. 158-197.

[15] For detailed discussion see: *U. Kriebaum*, Local Remedies and the Standards for the Protection of Foreign Investment, *in*: International Investment Law for the 21st Century (*C. Binder, U. Kriebaum, A. Renisch* & S. *Wittich* eds., 2009) 417-462; *O. Spiermann*, Premature Treaty Claims, *loc. cit.*, 463-489.

[16] *Feldman* v. *Mexico*, Award, 16 December 2002, 7 ICSID Reports 341, paras. 114 and 134; *Loewen* v. *U.S.A.*, Award, 26 June 2003, 7 ICSID Reports 442, para. 168; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 121; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 150-153; *Parkerings* v. *Lithuania*, Award, 11 September 2007, paras. 316-320, 344, 360, 361, 449, 453, 454; *Metalpar* v. *Argentina*, Award, 6 June 2008, paras. 144-146, 181, 214-217.

[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.

[18] *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240, paras. 20.30, 20.33.

[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]

[20] *Waste Management* v. *Mexico II*, Award, 30 April 2004, 11 ICSID Reports 362, para. 116.

[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.[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.[23] In a number of cases ICSID tribunals have actually issued provisional measures enjoining parties from pursuing related claims in domestic courts.[24]

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

> ... 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.[25]

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

[23] *Holiday Inns* v. *Morocco*, see *Lalive, P.*, The First 'World Bank' Arbitration (*Holiday Inns* v. *Morocco*)—Some Legal Problems, 51 BYIL 123, 160 (1980) reproduced in 1 ICSID Reports 645, 681; *Benvenuti & Bonfant* v. *Congo*, Award, 15 August 1980,1 ICSID Reports 335, paras. 1.12-1.14; *LETCO* v. *Liberia*, Award, 31 March 1986, 2 ICSID Reports 356, 378; *Autopista* v. *Venezuela*, Award, 23 September 2003, 10 ICSID Reports 309, paras. 200-208; *GAMI* v. *Mexico*, 15 November 2004, 13 ICSID Reports 147, paras. 39-43; *National Grid* v. *Argentina*, Award, 3 November 2008, paras. 29-30.

[24] *MINE* v. *Guinea*, Award, 6 January 1988, 4 ICSID Reports 69; *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335, para. 9; *SGS* v. *Pakistan*, Procedural Order No. 2, 16 October 2002, 8 ICSID Reports 388; *Zhinvali* v. *Georgia*, Award, 24 January 2003, 10 ICSID Reports 6, para. 45; *Tokios Tokelės* v. *Ukraine*, Procedural Order No. 1, 1 July 2003, 11 ICSID Reports 310. See also *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, 8 ICSID Reports 226, paras. 21-31.

[25] *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.[26] 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.[27]

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

[26] For more detailed treatment see C. *Schreuer*, Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 The Journal of World Investment & Trade 231, 239 (2004); *J. Lew/G. Sacerdoti/P. Turner/ M. Kantor*, The 'Fork in the Road' Revisited, *in*: Investment Treaty Law—Current Issues Vol. 1 (BIICL ed.) 173-186 (2006); *C. Liebscher*, Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues, *in*: International Investment Law for the 21st Century (*C. Binder, U. Kriebaum, A. Renisch* & S. *Wittich* eds., 2009) 105, 108-115.

[27] See Article 26(3)(b)(i) of the ECT. See *E. Gaillard*, How does the so-called "fork-in-the-road" provision in Article 26(3)(b)(i) of the Energy Charter Treaty work?, *in*: Investment Protection and The Energy Charter Treaty (*G. Coop* & *C. Ribeiro* eds., 2008) 221-228.

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

[28] *Olguín* v. *Paraguay*, Decision on Jurisdiction, 8 August 2000, 6 ICSID Reports 156, paras. 20-23, 30; *Vivendi* v. *Argentina*, Award, 21 November 2000, 5 ICSID Reports 299, paras. 40, 42, 53-55, 81; *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, paras. 36, 38, 42, 55, 113; *Genin* v. *Estonia*, Award, 25 June 2001, 6 ICSID Reports 241, paras. 47, 58, 321, 333; *Middle East Cement* v. *Egypt*, Award, 12 April 2002, 7 ICSID Reports 178, paras. 71, 72; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494, paras. 77-82; *Champion Trading* v. *Egypt*, Decision on Jurisdiction, 21 October 2003, 10 ICSID Reports 400, para. 3.4.3.; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, 10 ICSID Reports 416, paras. 37-41, 86-92; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273, paras. 95-98; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, 11 ICSID Reports 414, paras. 75, 76; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 116, 127; *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, para. 5; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 155-157; *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, 13 ICSID Reports 105, paras. 58 et seq., 82-84; *Occidental* v. *Ecuador*, Award, 1 July 2004, 12 ICSID Reports 59, paras. 37 a), 38-63; *MCI* v. *Ecuador*, Award, 31 July 2007, paras. 36-38, 171-191; *Desert Line Projects* v. *Yemen*, Award, 6 February 2008, paras. 124-138; *Chevron & Texaco* v. *Ecuador*, Interim Award, 1 December 2008, paras. 198, 200, 207; *Toto* v. *Lebanon*, Decision on Jurisdiction, 11 September 2009, paras. 203-217. But see *Pantechniki* v. *Albania*, Award, 30 July 2009, paras. 53-67.

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.[29] 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.[30]

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.[31]

[29] See also *O. Spiermann*, Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties, 20 Arbitration International 179 (2004).

[30] *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux)* v. *Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, paras. 95, 96, 101, 103.

[31] See *C. Schreuer, C.*, Investment Treaty Arbitration and Jurisdiction Over Contract Claims—the *Vivendi I* Case Considered, *in*: International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (*Weiler, T.* ed.) 281-323 (2005); *C. Lichtenstein/A. Sinclair/A. Escobar/B. Cremades*, Contractual Claims, Courts, and Bilateral

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]

Investment Treaties, *in*: Investment Treaty Law—Current Issues Vol. 1 (BIICL ed.) 199-214 (2006); *J.J. van Haersolte-van Ho./A.K. Hoffmann*, The Relationship Between International Tribunals and Domestic Courts *in*: The Oxford Handbook of International Investment Law; (*P. Muchlinski/F. Ortino/C. Schreuer* eds.) 962-1007 (2008).

[32] *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494, paras. 70-76; *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406, paras. 43-74, 147-173; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, 10 ICSID Reports 416, paras. 26, 79; *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, 13 ICSID Reports 105, paras. 50-70; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273; para. 91; *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, paras. 113-128, 130-148; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, 11 ICSID Reports 414, paras. 58-62; *Enron* v. *Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, 11 ICSID Reports 295, paras. 23-24, 47-51; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, 12 ICSID Reports 174, paras. 174-183; *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, 14 ICSID Reports 306, paras. 92-96; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, paras. 219, 258, 286-289; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312, paras. 90-99; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, paras. 105-119; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 116-128; *Eureko* v. *Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335, paras. 92-114; *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, paras. 94-123; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 139-167; *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 41-45; *National Grid* v. *Argentina*, Decision on Jurisdiction, 20 June 2006, para. 167-170; *Inceysa* v. *El Salvador*, Award, 2 August 2006, paras. 43, 212-217; *Fraport* v. *Philippines*, Award, 16 August 2007, paras. 388-391; *Vivendi* v. *Argentina*, Resubmitted Case: Award, 20 August 2007, paras. 7.3.1.-7.3.11.

[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 & 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.[34]

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.[35] 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.[36]

Decision on Jurisdiction, 21 March 2007, paras. 139-142; *Parkerings* v. *Lithuania*, Award, 11 September 2007, paras. 257, 260-266, 289, 317, 345; *BG Group* v. *Argentina*, Final Award, 24 December 2007, paras. 177-185; *Helnan* v. *Egypt*, Award, 3 July 2008, paras. 102, 107; *Biwater Gauff* v. *Tanzania*, Award, 24 July 2008, paras. 468-475; *Rumeli* v. *Kazakhstan*, Award, 29 July 2008, para. 330; *Bayindir* v. *Pakistan*, Award, 27 August 2009, paras. 133-139, 197, 367-375; *Toto* v. *Lebanon*, Decision on Jurisdiction, 11 September 2009, paras. 95-130; *Burlington Resources* v. *Ecuador*, Decision on Jurisdiction, 2 June 2010, paras. 76-81; *Helnan* v. *Egypt*, Decision on Annulment, 14 June 2010, paras. 58-66.

[34] See also *S.M. Schwebel*, 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).

[35] 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."

[36] 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.[37] But the question whether domestic courts are permitted to order such measures in the context of investment arbitration, especially ICSID arbitration, is somewhat controversial.[38]

Article 47 of the ICSID Convention provides for provisional measures by the tribunal to preserve the respective rights of the parties.[39] 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.[40]

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.[41] A

[37] See Article 23(2) of the 1998 ICC Rules of Arbitration, 36 ILM 1606, 1613 (1997); Article 26 of the 2010 UNCITRAL Arbitration Rules; Article 9 of the 1985 UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302, 1304 (1985). See also *Toope, S.J.*, Mixed International Arbitration 190-196 (1990); *Brower, Ch. N., Tupman, W.M.*, Court-Ordered Provisional Measures under the New York Convention, 80 AJIL 24 (1986).

[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.

[40] For comprehensive treatment of this question see *Brower, Ch. N./Goodman, R.E.M.*, Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings, 6 ICSID Review—FILJ 431 (1991); *L. Collins*, Provisional and Protective Measures in International Litigation, 234 RC 98 (1992-III); *P.D. Friedland*, Provisional Measures and ICSID Arbitration, 2 Arbitration International 335 (1986); *P.D. Friedland*, ICSID and Court-Ordered Provisional Remedies: An Update, 4 Arbitration International 161 (1988); *B. P. Marchais*, ICSID Tribunals and Provisional Measures—Introductory Note to Decisions of the Tribunals of Antwerp and Geneva in MINE v. Guinea, 1 ICSID Review—FILJ 372 (1986); *B.P. Marchais*, Mesures provisoires et autonomie du système d'arbitrage CIRDI., 14 Droit et Pratique du Commerce International 275 (1988); *A.R. Parra,* The Practices and Experience of ICSID, *in:* Conservatory and Provisional Measures in International Arbitration (ICC Publication No. 519) 37 (1993); *I.F.I. Shihata/ A.R. Parra*, The Experience of the International Centre for Settlement of Investment Disputes, 14 ICSID Review—FILJ 299, 322 *et seq.* (1999).

[41] *Holiday Inns* v. *Morocco*, Decision on Provisional Measures, 2 July 1972. Unpublished. See *P. Lalive*, The First 'World Bank' Arbitration (*Holiday Inns* v.

1984 amendment to the ICSID Arbitration Rules has however clarified the situation and the controversy seems to have disappeared. Under the rule as amended[42] provisional 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.[43] Similarly, the Additional Facility Rules provide that a party may apply to a competent judicial authority for interim or conservatory measures.[44]

B. Enforcement of International Awards by Domestic Courts

At the enforcement stage, domestic courts play a potentially important role in investment arbitration.[45] 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.[46] 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."

[45] See *A. Reinisch*, Enforcement of Investment Awards, *in*: Arbitration under International Investment Agreements (*K. Yannaca-Small* ed., 2010) 671-697.

[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

[47] See: Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention: http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm

[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."

[49] *Benvenuti & Bonfant* v. *Congo*, Tribunal de grande instance, Paris, Order, 13 January 1981, 1 ICSID Reports 369; 108 Journal du Droit International 365/6 (1981); Cour d'appel, Paris, 26 June 1981, 1 ICSID Reports 369, 371; 108 Journal du Droit International 843, 845 (1981); *Benvenuti & Bonfant* v. *Banque Commerciale Congolaise*, Cour de cassation, 21 July 1987, 1 ICSID Reports 373; 115 Journal du Droit International 108 (1988); *SOABI* v. *Senegal*, Cour d'appel, Paris, 5 December 1989, 2 ICSID Reports 337; 117 Journal du Droit International 141 (1990); Cour de cassation, 11 June 1991, 2 ICSID Reports 341; 118 Journal du Droit International 1005 (1991); *LETCO* v. *Liberia*, United States District Court, Southern District of New York, Order, 5 September 1986, 2 ICSID Reports 384; Judgment, 12 December 1986, 2 ICSID Reports 387/8; United States District Court, District of Columbia, 16 April 1987, 2 ICSID Reports 390; *AIG Capital Partners Inc. and Another* v. *Republic of Kazakhstan (National Bank of Kazakhstan Intervening)*, High Court, Queen's Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118.

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.[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.[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.[52] *Ad hoc* Committees charged with deciding requests for annulment under the ICSID Convention have clearly rejected Argentina's theory.[53]

[50] 330 UNTS 38; 7 ILM 1046 (1968).

[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."

[52] See *S.A. Alexandrov*, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, *in*: International Investment Law for the 21st Century (*C. Binder, U. Kriebaum, A. Reinisch, S. Wittich* eds.) 322 (2009).

[53] *Enron* v. *Argentina*, Decision on the Request for Continued Stay of Enforcement, 7 October 2008; *Compañiá 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.[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.[55] Similarly the UNCITRAL Arbitration Rules[56] and the Additional Facility Rules[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*.[58] ICSID tribunals have held in a number of cases that a national authority does not have the power to determine their competence.[59]

In *Inceysa* v. *El Salvador* the legality of the investment was a condition of the Tribunal's jurisdiction.[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

position had been inaccurately characterized by Argentina: Letter from United States Department of State to Ms. Claudia Frutos-Peterson, Secretary of the *Ad Hoc* Committee in *Siemens* v. *Argentina*, May 1, 2008, *available at* http://ita.law.uvic.ca/documents/Siemens-USsubmission.pdf

[54] Generally see *E. Gaillard* (ed.), Anti-Suit Injunctions in International Arbitration (2005).

[55] Article 41(1) of the ICSID Convention: "(1) The Tribunal shall be the judge of its own competence."

[56] UNCITRAL Arbitration Rules as revised in 2010, Article 23(1).

[57] Arbitration (Additional Facility) Rules, Article 45(1).

[58] See also *Attorney-General* v. *Mobil Oil NZ Ltd.*, High Court, Wellington, 1 July 1987, 4 ICSID Reports 117, at p. 128.

[59] *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131, para. 60; *Soufraki* v. *UAE*, Award, 7 July 2004, 12 ICSID Reports 158, paras. 55, 68; *Soufraki* v. *UAE*, Decision on Annulment, 5 June 2007, paras. 59, 78.

[60] *Inceysa* v. *El Salvador*, Award, 2 August 2006, para. 209.

investment's legality and would not submit to any decision of a domestic court on this point.[61]

In particular, an international tribunal will not submit to an attempt by a domestic court to curtail or negate its jurisdiction.[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.[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:

> [A]lthough 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.[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.[65]

[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.

[62] *Himpurna* v. *Indonesia*, Interim Award, 26 September 1999, Final Award, 16 October 1999, Yearbook Commercial Arbitration XXV, 109, 186 (2000). See also *S.M. Schwebel*, Injunction of Arbitral proceedings And Truncation Of The Tribunal, 18 Mealey's International Arbitration Report #4, April 2003; *Salini* v. *Ethiopia*, Award, 7 December 2001, 21 ASA Bulletin 1/2003, p. 82.

[63] *SGS* v. *Pakistan*, Judgment, Supreme Court of Pakistan, 3 July 2002, 8 ICSID Reports 356.

[64] *SGS* v. *Pakistan*, Procedural Order No. 2, 16 October 2002, 8 ICSID Reports 388.

[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[66] and that a violation of investors' rights may occur as a consequence of the actions of domestic courts.[67] The classical case would be a denial of justice which is well recognized under customary international law.[68] 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.[69]

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.

[67] See *A. Bjorklund*, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims, 45 Virginia Journal of International Law 809 (2005). *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 160-162, 165.

[68] *J. Paulsson*, Denial of Justice in International Law (2005).

[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.[70] The Tribunal in *Jan de Nul* v. *Egypt* held that "the fair and equitable treatment standard encompasses the notion of denial of justice."[71]

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

An uncompensated expropriation can be the result of an act of the national judiciary and may lead to State responsibility.[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.[75] This may include the possibility to appeal to a domestic court.[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.[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.

[70] *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt*, Award, 12 April 2002, 7 ICSID Reports 178, para. 143; *Loewen* v. *United States of America*, Award, 26 June 2003, 7 ICSID Reports 442, paras. 119-137; *Waste Management* v. *Mexico*, Award, 30 April 2004, 11 ICSID Reports 362, paras. 118-132; *Petrobart* v. *Kyrgyz Republic*, Award, 29 March 2005, 13 ICSID Reports 387, sec. VIII. 8.

[71] *Jan de Nul* v. *Egypt*, Award, 6 November 2008, para. 188.

[72] See *C. Schreuer*, Full Protection and Security, Journal of International Dispute Settlement, Vol. 1, No. 2 (2010).

[73] *Elettronica Sicula SpA (ELSI) (United States of America* v. *Italy)*, ICJ Reports 1989, p. 15, para. 109; *Československá Obchodní Banka A.S.* v. *The Slovak Republic*, Award, 29 December 2004, 13 ICSID Reports 181, para. 170; *CME* v. *Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121, para 613; *Azurix Corp.* v. *The Argentine Republic*, Award, 14 July 2006, 14 ICSID Reports 374, paras. 406, 408; *Siemens* v. *Argentina*, Award, 6 February 2007, 14 ICSID Reports 518, para. 303. For a contrary position see: *Suez, Sociedad General de Aguas de Barcelona and InterAgua Servicios Integrales del Agua* v. *Argentina*, Decision on Liability, 30 July 2010, paras. 152-173.

[74] *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 129-133; Award, 30 June 2009, paras. 120-190.

[75] See e.g. Article 6(1)(d) of the United States Model BIT of 2004.

[76] See Article 5(3) of the BIT between Austria and Bosnia-Herzegovina of 2000.

[77] *Saipem* v. *Bangladesh*, Award, 30 June 2009, paras. 25-51, 120-191; *ATA* v. *Jordan*, Award, 18 May 2010, paras. 30, 33, 35, 36, 46, 50, 121-128.

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.[78] 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]

[78] For a detailed survey see *K. Hobér* and *N. Eliasson*, Review of Investment Treaty Awards by Municipal Courts, *in*: Arbitration under International Investment Agreements (*K. Yannaca-Small* ed., 2010) 635-669. See also *E. Gaillard* (ed.), The Review of International Arbitral Awards (2010).

[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.[80] 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[81] 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.[82]

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

Czech Republic, Judicial Review, Sweden, Svea Court of Appeal, 26 August 2005, 13 ICSID Reports 96; *Petrobart Ltd.* v. *Kyrgyz Republic*, Judicial Review, Sweden, Svea Court of Appeal, 13 April 2006, 13 ICSID Reports 369; *Kyrgyz Republic* v. *Petrobart Ltd.*, Judicial Review, Sweden, Svea Court of Appeal, 19 January 2007, 13 ICSID Reports 480; *Czech Republic* v. *European Media Ventures*, England, High Court, Queen's Bench Division, 5 December 2007; *Argentina* v. *National Grid*, Order, US District Court DC, 7 June 2010; *Argentina* v. *BG Group*, Memorandum Opinion, US District Court DC, 7 June 2010.

[80] *United Mexican States* v. *Metalclad*, Canada, Supreme Court of British Columbia, 2 May 2001, 2001 BCSC 664, 1529, 5 ICSID Reports 236, 6 ICSID Reports 52; *United Mexican States* v. *Feldman Karpa*, Ontario Superior Court of Justice, 3 December 2003, 8 ICSID Reports 500; Ontario Court of Appeal, 11 January 2005, 9 ICSID Reports 508; *Attorney-General of Canada* v. *S.D. Myers*, Judicial Review, Federal Court of Canada, 13 January 2004, 8 ICSID Reports 194; *Raymond L. Loewen* v. *United States*, US District Court for the District of Columbia, 31 October 2005, 10 ICSID Reports 448.

[81] *Metalclad* v. *Mexico*, Award, 30 August 2000, 5 ICSID Reports 212.

[82] *United Mexican States* v. *Metalclad*, Canada, Supreme Court of British Columbia, 2 May 2001, 2001 BCSC 664, 1529, 5 ICSID Reports 236, 6 ICSID Reports 52.

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.