4. THE LEGAL EFFECTS OF SPECIFIC JUDICIAL DETERMINATIONS

The present chapter looks into the concrete consequences that domestic judicial pronouncements may have in subsequent proceedings before international investment tribunals, because they either relate to the particular investor or its investment. The primary purpose is to establish what normative effects, if any, investment tribunals have been prepared to concede to such pronouncements when these appeared to be of relevance to the points of law and/or fact that they were required to decide. To that end, the chapter inquires, not only into whether investment tribunals have considered themselves bound by domestic judicial pronouncements, but – looking beyond the pure question of bindingness – examines also the factors that seemed to have generally affected the tribunals propensity to accept determinations made by domestic judicial organs without wishing to revisit them. Bearing in mind the difficulties pertaining to the application of the principle of *res judicata* in the context of the domestic/international divide,[1] the intention is to establish the extent to which domestic judicial pronouncements may operate at least in the form of issue preclusion (*i.e.*, as preventing a specific issue to be re-litigated before an investment tribunal).[2]

The chapter begins by taking stock of those circumstances in which investment tribunals decided to ignore existing judicial pronouncements, and those in which they accorded, or were prepared to accord them some weight (4.1.). Thereafter, it explores the arguments advanced by investment tribunals in justifying their refusal to accept the binding effects of domestic judicial determinations (4.2.); or conversely, arguments explaining their propensity to accept such determinations (4.3.). Finally, the chapter attempts to single out certain factors that seemed to have had a bearing on the tribunal's acceptance of specific judicial determinations aside from purely legal considerations as to the binding effects of such determinations (4.4.).

4.1. Relevance of the Context? Mapping the Circumstances in which Weight was (not) Accorded to Domestic Judicial Pronouncements

With a view to determining the extent to which the acceptance of domestic judicial pronouncements may be context-dependent, the chapter begins by mapping the circumstances in which investment tribunals decided to ignore existing judicial pronouncements, and by disaggregating them from those in which they accorded, or were prepared to accord them some weight in deciding the issues before them. For ease of exposition, a distinction will be made between cases where domestic judicial pronouncements were primarily relevant on account of findings of law, and those where domestic judicial processes were primarily of factual relevance. Both categories are understood here broadly, however. In relation to points of law, domestic judgments could namely have been relevant on account of the application of domestic law to the situation of the particular investment/investor, but equally due to specific interpretations of points of domestic law that had previously been made more generally with regard to the measure that was impugned by the investor. On the other hand, domestic judgments could have been of factual relevance because they themselves constituted a relevant fact, because they provided for certain findings of fact that were relevant to the international claim, or because they otherwise

[1] See *supra* 1.4.2.

[2] The potential of domestic judgments operating in the form of claim preclusion, instead, will more closely be studied in Part III.

attested to the conduct of the parties that possibly had a bearing in the proceedings before the investment tribunal.

4.1.1. Domestic Court's Findings of Domestic Law

Where points of domestic law were at issue in arbitration proceedings, investment tribunals generally differed in the extent to which they were prepared to accept domestic courts' pronouncements on those points. As the following sections will demonstrate, from a comparative perspective, arbitrators have probably had the greatest misgivings about accepting pronouncements that seemed to put into doubt the existence or scope of their adjudicatory powers. Where such pronouncements had a bearing on the merits of the claims that were pending before them, in contrast, the arbitrators approach towards them has somewhat varied.

4.1.1.1. Judicial Pronouncements Relevant to Determining the Existence or Scope of Tribunal's Jurisdiction

There are essentially two types of situations where domestic law can have a bearing on the existence or scope of the tribunal's adjudicatory powers: those where such law is directly applicable as the law governing the arbitration agreement, and those where such law finds indirect application by virtue of *renvoi*. In both types of situations, investment tribunals expressed great resistance towards courts' findings of law that, if given effect, would have impinged upon the existence or scope of their adjudicatory powers.

The tribunals' reluctance in this respect can be observed in many of the cases where their jurisdiction was based on domestic foreign investment codes and those instruments happened to already have been the subject of domestic judicial interpretations. Thus, in *Mobil v. Venezuela* (2010) and several other arbitrations brought against Venezuela pursuant to its Law on the Promotion and Protection of Investments, investment tribunals steadfastly refused to take into account a prior decision of Venezuela's Supreme Court, in which the said law had been interpreted as not providing the requisite consent to arbitration within the meaning of Article 25 of the ICSID Convention.[3] In *Petrobart v. Kyrgyz Republic* (2003), the Tribunal similarly left aside judgments of the Bishkek City Court which the disputing parties invoked with a view to demonstrating or disproving that Claimant qualified as a foreign investor and made an investment within the meaning of the Kyrgyz Foreign Investment Law, which the Claimant relied on as the jurisdictional basis in the UNCITRAL Arbitration that it had brought against the Kyrgyz Republic.[4]

A similar reluctance could also be observed in relation to other jurisdictional challenges where domestic law had to be considered by virtue of *renvoi*, such as where the investment's legality, the existence of a protected property right, or the investor's nationality had been put into question. Most unwavering in this respect has probably been the tribunals' stance towards prior judicial findings or determinations which either the claimants or the respondents have invoked

[3] See Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana De PetróLeos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana De PetróLeos, Inc v Bolivarian Republic of Venezuela (Decision of Jurisdiction) (ICSID Case No ARB/07/27, 10 June 2010); CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela (Decision on Jurisdiction (ICSID Case No ARB/08/15, 30 December 2010); Brandes Investment Partners, LP v Bolivarian Republic of Venezuela (Award) (ICSID Case No ARB/08/3, 2 August 2011); Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, et al v The Bolivarian Republic of Venezuela (Decision on Jurisdiction) (ICSID Case No ARB/10/5, 8 February 2013); OPIC Karimum Corporation v The Bolivarian Republic of Venezuela (Award) (ICSID Case No ARB/10/14, 28 May 2013); ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela (Decision on Jurisdiction and Merits) (ICSID Case No ARB/07/30, 3 September 2013); and Highbury International AVV and Ramstein Trading Inc v Bolivarian Republic of Venezuela (Award) (ICSID Case No ARB/11/1, 26 September 2013).

[4] *Petrobart Limited v Kyrgyz Republic (Award)* (13 February 2003) Published in 13 ICSID Rep 337 (2008), section 5.3.3.2., 40-41.

with a view to proving or disproving the legality of a particular investment. Thus, in *Inceysa v. El Salvador* (2006), the first case where jurisdiction has actually been declined on account of the illegality of the underlying investment, the Tribunal made clear that it will not accept, without more, the pronouncements of El Salvador's Supreme Court of Justice which Claimant invoked to prove the validity and legality of the bidding process through which it obtained the relevant concession.[5] In a similar way, the Tribunal in *Fraport v. Philippines* (2007) refused to give weight to the outcome of domestic criminal proceedings in determining whether the Claimant had structured its investment in a way that violated Philippine legislation prohibiting foreign investors from controlling local utilities companies, in spite of the fact that those domestic proceedings actually concerned alleged violations of the same legislation.[6] And neither did the Tribunal in *Ares v. Georgia* (2008) accept the eventual invalidation of the investor's share purchase agreement by Georgian courts as necessarily conclusive of the question whether the acquisition of Claimants' investment had been effected in accordance with Georgian law.[7] The fact that it was the investor who invoked a prior domestic judgment to prove the legality of its investment, or that it was the host State who relied on such a judgment in proving the illegality of an investment, did not seem to make much of a difference in these cases.

Furthermore, in several other cases where questions of domestic law had to be considered on account of *renvoi*, tribunals expressed themselves not inclined, as a matter of principle, to obediently accept prior domestic judicial determinations. In relation to the issue of nationality, for example, the Tribunals in *Soufraki v. UAE* (2004), *Siag and Vecchi v. Egypt* (2007), and *Pey Casado v. Chile* (2008) all rejected, in more or less similar terms, the possibility that the decisions of domestic authorities would be binding on them.[8] Similarly, in a situation where the possession of proprietary rights was disputed, the Tribunal in *Emmis v. Hungary* (2014) took the view that decisions of municipal courts arising directly out of the same set of facts would not be necessarily dispositive of the question before an international tribunal.[9]

This is not to say that there were no cases where investment tribunals, in the context of some jurisdictional challenges, were nonetheless prepared to accord weight to prior pronouncements of domestic courts or other contractually-designated fora. For example, in *Invesmart v. Czech Republic* (2009), where the investor was claimed never to have acquired beneficial ownership of the shares in a Czech banking group as a result of its alleged failure to fulfil commitments that it agreed to in the share purchase agreements, the Tribunal relied on three Czech court decisions – each confirming the share purchase agreements as valid and the claimant's obligations thereunder as enforceable – in concluding that Claimant did appear to have become the legal owner of the shares, and thus possessed an investment qualifying for protection under the applicable BIT.[10] And in *Saluka v. Czech Republic* (2006), the Tribunal had no hesitation to accept prior determinations made in the context of domestic contractual arbitration proceedings when pronouncing itself on the legality of the purchase of shares representing the protected investment in that case. In a few other cases, furthermore, investment tribunals seemed

[5] Inceysa Vallisoletana SL v Republic of El Salvador (Award) (ICSID Case No ARB/03/26, 2 August 2006), [212]-[18].

[6] Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines (Award) (ICSID Case No ARB/03/25, 16 August 2007) [357]-[92].

[7] *Ares International Srl and MetalGeo Srl v Georgia (Award)* (ICSID Case No ARB/05/23, 28 February 2008) [5.4.13]-[5.4.38].

[8] Soufraki v The United Arab Emirates (Award) (ICSID Case No ARB/02/7, 7 July 2004) 55; Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Jurisdiction) (ICSID Case No ARB /05/15, 11 April 2007) [150]; Victor Pey Casado and President Allende Foundation v Republic of Chile (Award) (ICSID Case No ARB/98/2, 8 May 2008) [319].

[9] *Emmis v Hungary (Award)* (ICSID Case No ARB/12/2, 16 April 2014) [176].

[10] *Invesmart v Czech Republic (Award)* (UNCITRAL, 26 June 2009) [182], [192]-[193].

prepared to accept domestic judicial pronouncements on points of domestic law, had these eventually been made,[11] or at the least left such possibility open.[12]

4.1.1.2. Judicial Pronouncements Relevant to the Determining the Merits of the Claim

A less clear picture emerges with respect to situations where domestic law issues were relevant to the merits of the claims before investment tribunals. On the one hand, it is possible to submit that, in circumstances where prior judgments involving the investor and/or its investment were relevant in view of specific pronouncements on points of domestic law (i.e., in that they furnished certain interpretations of the applicable rules of domestic law), investment tribunals have largely accepted such pronouncements. In *Feldman v. Mexico* (2002), for example, the Tribunal expressed no reservations as to the pronouncements of Mexico's Supreme Court in an *Amparo* action brought by Claimant's subsidiary with regard to the Mexican Law relating to the excise tax on products and services, and in fact relied on them in determining whether the subsidiary was entitled to tax rebates on exported cigarettes.[13] Nor was the Tribunal in *Unglaube v. Costa Rica* (2012) willing to set aside or otherwise ignore certain interpretations of the National Park Law that Costa Rica's Supreme Court had advanced in prior proceedings involving the investor, in spite of the fact that such interpretations were criticized for creating uncertainty regarding the legal status of Claimants' properties.[14] And on the level of principle, other tribunals, too, expressed their willingness to give weight to domestic judicial determinations on certain points of law, were that necessary to determining issues before them.[15]

A greater divergence of approaches can be observed, however, in cases where the domestic judicial pronouncements in question concerned, not so much specific points of domestic law, but the propriety as such of the conduct of host State authorities. In some cases, investment tribunals completely ignored issues previously decided by domestic courts and determined for themselves the propriety of the host State's conduct. In *AMCO v. Indonesia* (1984), for example, the Tribunal flatly rejected the proposition that it was bound to follow the findings that courts of Jakarta had made in a contract-related suit brought against Amco's local subsidiary, in the context of which the courts also found that Amco's subsidiary breached its investment application and license, and other regulations issued by the Foreign Investment Board. The

[11] See eg *Generation Ukraine v Ukraine (Award)* (ICSID Case No ARB/00/9, 16 September 2003) [9.1]-[9.3] (while the validity of Claimant's shareholding of an Ukrainian corporate vehicle was challenged on the ground that the company's registration was formally defective due to its foundation agreement being improperly signed, the Tribunal concluded that, since under Ukrainian law a legal entity's formal state registration could only be annulled by decision of a competent Ukrainian court, in the absence of such decision, the existence of Claimant's corporate vehicle had to be accepted as effective); or *Alpha Projektholding v Ukraine Alpha (Award)* (ICSID Case No ARB/07/16, 8 November 2010) [294]-[295] (in response to Respondent's challenge that Claimant purportedly failed to re-register certain investments, the Tribunal placed emphasis on the fact that Respondent had not produced any court or administrative decision demonstrating the impropriety of the registration documents that were filed by the Claimant, and hence the illegality of the investment).

[12] See eg *TSA Spectrum v Argentina (Award)* (ICSID Case No ARB/05/5, 19 December 2008) [16]-[18], and [175]-[76] (The Tribunal explaining that, in the absence of other jurisdictional hurdles that otherwise led to the dismissal of the claim in that case, it would have considered joining the assessment of the investment's legality to the merits of the case, given that at the time of the arbitration, the domestic criminal investigation into the alleged irregularities in the bidding process through which Claimant obtained its concession contract were still ongoing. The Tribunal thus suggested that it might have drawn on domestic judicial proceedings had these ended in convictions.)

[13] *Marvin Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002), [119]-[122].

[14] *Marion Unglaube v Republic of Costa Rica (Award)* (ICSID Case No ARB/08/1, 16 May 2012) 251-53.

[15] See eg *Emilio Agustín Maffezini v The Kingdom of Spain (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/97/7, 25 January 2000) [82], expressing the view that 'a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental, […] it is to be given considerable weight'.

Tribunal proceeded to consider for itself the question of the legality of the license revocation.[16] Similarly, in determining whether certain amendments to the law on health insurance companies amounted to an act of expropriation, the Tribunal in *EURAM v. Slovak Republic* (2012) did not consider itself formally bound by the judgment of Slovakia's Constitutional Court that had previously found those amendments to be unconstitutional, and which the Claimant therefore maintained to have already amounted to a finding that its investment was the subject of an unlawful expropriation.[17]

Greater variance can then be found in the treatment of prior domestic pronouncements or determinations in relation to matters that were the subject of contractual arrangements between the investor and the host State or its authorities. In cases such as *Wena v. Egypt* (2000),[18] *Biwater Gauff v. Tanzania* (2008),[19] *Chevron v. Ecuador* (2010),[20] or *Malicorp v. Egypt* (2011),[21] or *EDF/SAUR v. Argentina* (2012),[22] for example, investment tribunals entirely ignored the findings of contractually-designated fora or competent courts with respect to contractual issues, or matters relating thereto, when deciding treaty claims arising out of the relevant contractual relationship. In *Helnan v. Egypt* (2008), *MMEA v. Niger* (2013), or *Vigotop v. Hungary* (2014), in contrast, tribunals did consider and take into account such findings when deciding on the respective treaty claims.[23]

Finally, investment tribunals have been most receptive of prior judicial findings when these pertained to the existence of particular contractual (and other domestic law) rights. In *Azinian v. Mexico* (1999), the termination of Claimants' concession contract was thus not considered to amount to an expropriation given that three levels of Mexican courts determined that the contract was invalidated in accordance with Mexican law.[24] In *Liman v. Kazakhstan* (2010), the claims under the umbrella clause could not be upheld since Claimant could not validly invoke rights from a license contract after the Kazakh courts had lawfully invalidated a previous transfer of the License from another entity to the Claimant.[25] Nor could the umbrella clause claims be upheld with respect to alleged breaches of the Kazakh Foreign Investment laws, insofar as the Kazakh courts had already validly decided on the application of those laws.[26] Similarly, in *Bosh v. Ukraine* (2012) and *Swisslion v. Macedonia* (2012), the claims under the umbrella clause failed in

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[16] *Amco Asia Corporation and others v Republic of Indonesia (Award)* (ICSID Case No ARB/81/1, 20 November 1984) [132]-[139], [141]. This can be contrasted with the Tribunal's approach to the interlocutory decrees issued by the courts of Jakarta that granted permission to the local contractual partner to manage the hotel pending the final outcome of the domestic proceedings, which were actually considered by the Tribunal with a view to establish whether they could have the effect of retroactively legitimizing an otherwise illegal seizure of the hotel (see [173]-[176]).

[17] European American Investment Bank AG (EURAM) v Slovak Republic (Award on Jurisdiction) (UNCITRAL, 22 October 2012) [389ff].

[18] *Wena Hotels Ltd v Arab Republic of Egypt (Award)* (ICSID Case No ARB/98/4, 8 December 2000), [60]-[62].

[19] *Biwater Gauff v Tanzania (Award)* (ICSID Case No ARB/05/22, 24 July 2008) [471]-[473].

[20] Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits) (UNCITRAL, PCA Case No 34877, 30 March 2010), [376], [377].

[21] *Malicorp v Egypt (Award)* (ICSID Case No ARB/08/18, 7 February 2011) [103], [130].

[22] *EDF/SAUR v. Argentina (Award)* (ICSID Case No ARB/03/23, 11 June 2012) [1130]-[1136].

[23] Helnan International Hotels A/S v Arab Republic of Egypt (Award) (ICSID Case No ARB/05/19, 3 July 2008), [108]-[125], [150]ff; AHS Niger and Menzies Middle East and Africa SA v Republic of Niger (Award) ICSID Case No ARB/11/11, 15 July 2013) [118]-[127]; Vigotop Ltd v Hungary (Award) (ICSID Case No ARB/11/22, 1 October 2014) [509], [534]ff.

[24] Azinian, Davitian and Baca v The United Mexican States (Award) (ICSID Case No ARB(AF)/97/2, 1 November 1999) [96]-[97].

[25] Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan (Award) (ICSID Case No ARB/07/14, 22 June 2010) [442]-[443].

[26] Ibid., [450].

circumstances where the relevant contractual rights were validly terminated by domestic courts.[27] In *Arif v. Moldova* (2013), the claims for expropriation and violations of the umbrella clause both failed insofar as the relevant contracts had been irrevocably annulled by the whole of the Moldovan judicial system.[28]

4.1.2. Domestic Courts' Findings of Fact

From a general perspective, investment tribunals have had fewer misgivings about taking account of domestic judgments from purely a factual perspective. In this respect, domestic judgments were capable of having a factual bearing on the international proceedings in three ways: the judgment as such constituted a relevant fact; the courts' pronouncements on facts were relevant to the international claim; or the conduct of the parties in the domestic litigation had a bearing on the proceedings before the investment tribunal.

4.1.2.1. Judgments as Relevant Facts

In several cases, the *judgments as such* were treated as a relevant fact. The tribunals' attitude in this respect has somewhat varied. In *Luchetti v. Peru* (2005/2007), for instance, the ICSID Tribunal and subsequently the Annulment Committee expressed strong reservations as to whether the fact that a Peruvian judgment obtained *res judicata* effect under Peruvian law necessarily implied that such judgment actually resolved a dispute between the investor and the local municipality.[29] In contrast, in *East Kalimantan v. Kaltim Prima Coal* (2009), the Tribunal was prepared to accept that a judgment of the Jakarta District Court could have amounted in an implied designation of the Province of East Kalimantan as a constituent subdivision of Indonesia entitled to appear before the ICSID Centre in accordance with Article 25 of the ICSID Convention.[30]

In other cases, it was the *factual situation resulting from a particular judgment* that was of relevance to the Tribunal. In *CME v. Czech Republic* (2001), for instance, the outcome of domestic civil law court proceedings was taken as an illustration that the changes imposed on Claimant's investment structure by the Czech media regulatory body led to unacceptable legal and commercial risks, thus violating the standards imposed by the applicable BIT.[31] Then again in other cases, it was the *attitude of other host State's authorities towards a domestic judgment* that was taken into account in deciding an international claim. In *PSEG v. Turkey* (2007), for instance, the Tribunal put emphasis on the fact that, on the one hand, Turkey's Constitutional Court upheld the Claimants' contractually acquired rights as lawful, while on the other hand, the Ministry of Energy and Natural Resources simply ignored them, in concluding that the inconsistent conduct on the part of various Turkish organs breached the standard of fair and equitable treatment.[32] In *Siag v. Egypt* (2009), on the other hand, the fact that the Ministerial resolution effecting the formal transfer of ownership of the investors' land was subsequently quashed by Egypt's administrative courts was reason for the Tribunal to conclude that the expropriation had not followed proper

[27] Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award) (ICSID Case No ARB/08/11, 25 October 2012) [258]-[259]; and Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia (Award) (ICSID Case No ARB/09/16, 6 July 2012) [265]-[275], and [323]-[325].

[28] Mr Franck Charles Arif v Republic of Moldova (Award) (ICSID Case No ARB/11/23, 8 April 2013) [398].

[29] Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru (Award) (ICSID Case No ARB/03/4, 7 February 2005) [50]-[56]; Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru (Decision on Annulment and Dissenting Opinion) (ICSID Case No ARB/03/4, 5 September 2007) [87]-[88].

[30] East Kalimantan v. Kaltim Prima Coal (Award on Jurisdiction) (ICSID Case No ARB/07/3, 28 December 2009), 196-198.

[31] *CME v Czech Republic (Partial Award)* (UNCITRAL, 13 September 2001) [532].

[32] PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey (Award) (ICSID Case No ARB/02/5, 19 January 2007) [249].

legal procedures.[33] Furthermore, the conclusions arrived at in those proceedings by the Egypt's Supreme Administrative Court supported the view that Claimants had not been afforded due process.[34] Both determinations were relevant to the Tribunal's conclusion that Respondent failed to meet the cumulative conditions required for lawful expropriation under the applicable BIT.

4.1.2.2. Judicial Findings of Fact

In several cases, investment tribunals have proceeded to accept particular *findings of fact* that domestic courts had made in domestic judicial procedures. Thus, certain findings of fact have often been relied upon to determining whether the conduct of other state organs was reasonable or otherwise justified (as opposed to the narrower question whether it was legal as such). In *Tecmed v. Mexico* (2003), the fact that the Mexican courts have not identified any social crisis was relevant to the conclusion that the refusal to renew an operating permit could not have been justified as being a legitimate response to an emergency situation.[35] In *Rompetrol v. Romania* (2013), where the question arose whether intelligence services violated investment treaty provisions by intercepting Claimant's telephone conversations, the Tribunal relied on the "authoritative determination" by the Romanian Supreme Court which previously found that such interceptions could not have been justified by national security. Yet, the findings by the same Court that Claimant's business activities had not been affected by such interceptions at the same time led the Tribunal to conclude that they did not breach the BIT.[36] Similarly, in *Khan Resources v. Mongolia* (2015), the Tribunal relied in its inquiry into the legality of the invalidation of Claimants' licenses on certain findings of fact made by Mongolian administrative courts before which claimants had previously challenged the invalidation of their licenses.[37]

In some cases, the relevant findings of fact were those made by courts of third-states and investment tribunals likewise expressed no reservations from taking these into account. In *Rumeli v. Kazakhstan* (2008), for instance, the Tribunal did not deem itself in any way precluded from considering the findings of fact made by the United States District Court in a judgment rendered against the Turkish family that previously controlled the Claimant companies and from which the Respondent sought to draw several inferences in its attempt to demonstrate that Claimants' investments in Kazakhstan were fraudulent or illegal as such. While Claimants disputed the legal value of a judicial decision delivered in a foreign state for an arbitral tribunal dealing with claims under international law, the Tribunal dismissed those findings solely for lack of relevance.[38] The Tribunal in *Niko Resources v. Bangladesh* (2013), conversely, was actually able to draw on domestic criminal proceedings conducted against Claimant both in its home state, Canada, and the host State. It was, in fact, pursuant to Claimant's conviction in Canadian courts, rendered on the basis of the latter's guilty plea, that the Tribunal found corruption had taken place, although it was also on the same basis, as well as on the basis of exculpatory findings of Bangladeshi courts that the Tribunal concluded that the acts of corruption had no influence in the conclusion or the content of the contracts that Claimant concluded with Bangladeshi state entities, which also led it to reject the jurisdictional challenge pertaining to the investment's illegality.[39]

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[33] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (Award) (ICSID Case No. ARB/05/15, 1 June 2009), [436-437].

[34] ibid [442-443].

[35] *Tecmed v The United Mexican States (Final Award)* (ICSID Case No ARB(AF)/00/2, 29 May 2003), 147.

[36] *Rompetrol v Romania (Award)* (ICSID Case No ARB/06/3, 6 May 2013) 256-261.

[37] See *Khan Resources v Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) [338], [315], [337], and [355], respectively.

[38] *Rumeli Telekom AS v Kazakhstan (Award)* (ICSID Case No ARB/05/16, 29 July 2008) [172], [228]-[230], [320].

[39] *Niko Resources v Bangladesh (Decision on Jurisdiction)* (ICSID Case No ARB/10/18, 19 August 2013), [423]-[429].

4.1.2.3. Conduct of Parties in Domestic Litigation

Finally, in some of the cases, domestic judicial proceedings were relevant to the extent that they furnished factual evidence as to the *conduct of the litigating parties*, particularly where particular factual details of such conduct were recorded in the domestic judgment.

In some cases, domestic judgments recorded certain statements that pertained to issues of domestic law that were pending before the tribunals. In *Opic v. Venezuela* (2013), the Tribunal examined whether the submissions made by Venezuela's Attorney General in proceedings before the Supreme Court could be understood as suggesting that the relevant domestic statute provided for consent to the jurisdiction of the ICSID Centre. The submissions, which the Tribunal considered together with several other statements of State officials, were eventually not found to be materially relevant to the question before the Tribunal.[40] In *Khan Resources* (2015), in contrast, the Tribunal could instead rely on the arguments advanced by certain state agencies in proceedings before domestic administrative courts, as well as the general attitude adopted by these agencies in relation to the final judicial outcome, when determining the legality of the invalidation of Claimants' licenses.[41]

In other cases, the parties' conduct in domestic litigation was considered relevant, and thus examined, with a view to determining whether their inconsistent attitude might have given rise to estoppel. In *Invesmart v. Czech Republic* (2009), the Tribunal was not willing to attach consequences to the fact that the Claimant allegedly adopted fundamentally inconsistent positions in the Czech court proceedings and in the treaty arbitration as to whether its acquisition of the shareholding was valid and thus capable of constituting a protected investment. The reason was apparently in the fact that the local court proceedings involved third persons who were not parties to the arbitration.[42] Neither did the Tribunal in *East Kalimantan v. Kaltim Prima Coal* (2009) accept the argument of the Respondents being estopped from objecting to the jurisdiction of the ICSID tribunal because of the position they took in the proceedings before the Central Jakarta District Court. The Tribunal considered that the Respondents' statements as to whether the Province had the capacity to act independently of the central government and whether it was bound by the contractual arbitration clause were not entirely clear and unambiguous. Nor could Claimants prove that they occurred damage by relying on those statements.[43] The findings in *Invesmart* and *East Kalimantan* can be contrasted with those in *Middle East Cement Shipping v. Egypt* (2002), however, where the Tribunal held that the Respondent was "barred" from disputing the Claimant's ownership of a vessel under the BIT, after the Respondent's authorities, including the Suez Court, treated the Claimant as the vessel's owner in domestic judicial proceedings.[44]

4.1.3. Is the Context thus Relevant?

The preceding analysis of the practice presents a rather mixed picture as to the acceptance on the part of investment tribunals of domestic judicial determinations. One could, perhaps, tentatively conclude that investment tribunals have been least prepared to take account of domestic judicial pronouncements where these have put to doubt the existence or scope of their adjudicatory powers. One could also conclude that tribunals have actually had less misgivings about accepting

[40] Opic Karimum Corp v The Bolivarian Republic of Venezuela (Award) (ICSID Case No ARB/10/14, 28 May 2013), [132]-[133].

[41] See *Khan Resources* (n 37) [338], [315], [337], and [355], respectively.

[42] *Invesmart v Czech Republic* (n 10), [191]-[192].

[43] *East Kalimantan v Kaltim Prima Coal* (n 30) [203]-[206], [212]-[215].

[44] Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt (Award) (ICSID Case No ARB/99/6, 12 April 2002) [135].

judicial findings of fact, than they had about findings of law. This begs the question as to what is there that makes investment tribunals follow specific judicial determinations – apart from the sheer question of their relevance – and ignore others. Before delving into the factors that seemed to have influenced the reception of judicial decision on the part of tribunals, the following two sections intend to demonstrate that investment tribunals have held conflicting views as to whether they were bound to follow domestic judicial pronouncements on points that are relevant to the issues in the arbitration proceedings – at least, in the sense of some *legal obligation* that would compel them to do so.

4.2. Arguments for Denying Effect to Domestic Judicial Determinations

A large number of investment tribunals rejected the idea that they would be formally required to follow the pronouncements or determinations of domestic courts and advanced to that effect a diversity of legal arguments. Some of those arguments appeared to be premised, directly or indirectly, on the principle of supremacy of international law (4.2.1.). Others appeared to be building on the separation between the domestic and the international legal orders and the resulting qualitative differences between international and domestic adjudicatory bodies (4.2.2.). Again others were enveloped in more technical narratives, such as where reference has been made to specific powers or obligations (4.2.3.), or where the formal conditions governing the application of *res judicata* have been relied upon (4.2.4.). The different types of arguments were frequently used in conjunction with one another, in addition to other argumentative techniques that had the effect of demoting the role of domestic law from a primary to a secondary one, and which therefore warrant separate consideration (4.2.5.).

4.2.1. Arguments based on, or building on the Idea of Supremacy of International Law

Some of the arguments advanced in favour of not according *res judicata* effects to domestic judicial pronouncements appeared to have been postulated on the principle of supremacy of international law, or otherwise grounded on some of the ideas underpinning the principle.

4.2.1.1. Superiority of International Adjudicatory Bodies over Domestic Judicial Organs

In some cases, the justification advanced was one in the form of categorical claims to hierarchical superiority that international adjudicatory bodies traditionally advance in relation to domestic judicial organs.[45] Such arguments were employed in relation to questions of both jurisdiction and liability. In *East Kalimantan v. Pt Kaltim Prima Coal et al.* (2009), where consent to the jurisdiction of the ICSID Centre was included in a contract governed by Indonesian law, with the consequence that the latter might thus have been applicable to determining the scope of such consent, the Tribunal took the principled view that "decisions of national courts have no *res judicata* effect on international arbitral tribunals".[46] In *Amco v. Indonesia* (1984), the Tribunal took the view that, in determining the legality of Respondent's conduct, it was not bound to follow the result of domestic judicial proceedings involving Amco's Indonesian subsidiary on the ground that "no matter how the legal position of a party is described in a national judgment, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court."[47] The decision not to grant legal effect to domestic judgments was further justified in that case by the importance of safeguarding the effectiveness of

[45] cf *supra* 1.4.1.2.

[46] *East Kalimantan v PT Kaltim Prima Coal* (n 30), 169.

[47] *Amco v Indonesia* (n 16), 177.

international arbitration as a dispute settlement mechanism. According to the *Amco* Tribunal, "[o]ne 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" and "[i]f a national judgment was binding on an international tribunal such a procedure could be rendered meaningless."[48]

4.2.1.2. Preventing Abuse of Domestic Law and the Principle Against Self-Judging

Most often, however, it was by reference to the principles underlying the claim of supremacy of international law that no *res judicata* effect was recognized in relation to domestic judicial pronouncements: the principle that the State cannot validly invoke the provisions of its domestic law to justify the legality of its conduct under international law, and the general principle against self-judging (*nemo judex in causa sua*). Just as defences grounded in domestic law are generally irrelevant in the context of international legal proceedings,[49] so have domestic court judgments been generally considered incapable of having the effect of precluding an investment tribunal from exercising its international jurisdiction over the investment dispute and from determining the responsibility of the State under international law. In practice, though, investment tribunals most often expressed concerns about the possibility of the domestic judicial process being subverted with a view to strip an international tribunal of its competence to consider a claim. A typical illustration is the award in *Inceysa v. El Salvador* (2006), where the Tribunal refused to give effect to two decisions of El Salvador's Supreme Court of Justice on the ground that "[t]he determination of the legality of the investment cannot be left up to the Courts of the host State, because this would give the State the possibility to redefine the scope and content of its own consent to the jurisdiction of the Centre unilaterally and at its complete discretion."[50] In the view of the Tribunal, any resolutions or decisions made by the State parties to the BIT concerning the legality or illegality of the investment were thus "not valid or important" for deciding whether or not the Tribunal was competent to hear the dispute.[51] The principle enunciated in *Inceysa* was subsequently relied upon in other cases. Referring to *Inceysa*, the Tribunal in *Fraport v. Philippines* (2007) held that, for the purpose of assessing the legality of the Claimant's investment, the "holdings of municipal legal institutions cannot be binding with respect to matters properly within the jurisdiction of this Tribunal".[52] Interestingly, the *Fraport* Tribunal even went as far as suggesting that it was "doubtful whether the Philippines could have lawfully undertaken an action which usurped a matter within the jurisdiction of the Tribunal".[53] In *Ares v. Georgia* (2008), the arbitrators likewise quoted *Inceysa* in support for their proposition that, while they were "free to take into consideration" the Georgian courts' analyses of the issues pertaining to whether the investment was validly acquired, they were "not bound by any other determination that may have been made as to the 'legality' of Claimants' investments."[54]

Similarly formulated arguments can be found in other cases where domestic judgments impinged, or could have the potential to impinge, the existence and scope of the tribunals' adjudicatory powers. The language has differed, but the logic has remained the same. In *Soufraki v.*

[48] ibid.

[49] cf ARSIWA, art 4; or VCLT, art 27.

[50] *Inceysa* (n 5), [213].

[51] ibid [210].

[52] *Fraport I* (n 6), [391].

[53] ibid [389]. This statement was obviously a far-fetched one. Criminal proceedings legitimately pursued by the host State's authorities can hardly be seen an usurpation of an investment tribunal's jurisdiction. For criticism of the award on this point, see G Bottini, 'Legality of Investments under ICSID Jurisprudence' in M Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010), 303.

[54] *Ares v Georgia (Award)* (n 7) [5.4.13]-[5.4.14].

UAE (2007), for example, an ICSID Annulment Committee confirmed the propriety of the initial Tribunal assumption of a power to make an independent determination of the investor's nationality by reference to the "general principle that a State does not have the last word when a question is raised before an international tribunal concerning the interpretation of its national law, *when it comes to a question on which the jurisdiction of the Tribunal depends*."[55] In *Luchetti v. Peru* (2007), on the other hand, a variation of the same argument has been applied in relation to judicial findings of fact. In considering whether the Tribunal failed to exercise its jurisdiction by failing to give proper weight to Peruvian judgments that were claimed to have conclusively resolved the dispute between the investor and the local municipality, the ICSID Annulment Committee considered that "it cannot be left to each individual State to create, through its own rules of *res judicata*, obstacles to international adjudication."[56]

The same type of arguments were equally deployed in the context where existing domestic judicial pronouncements were of relevance to determining the liability of the respondent State. In *Maffezini v. Spain* (2002), where the question arose as to the possible attribution of the acts of a regional development agency to the Respondent State, the view was taken that "a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental […] is not necessarily binding on an international arbitral tribunal."[57] In support of this proposition, reference was made to the principle enunciated in Article 4 ARSIWA that a characterization of an act as internationally wrongful cannot be affected by the characterization of the same act as lawful by internal law. In the same line, other tribunals took the position that internal law, though relevant to the analysis whether the conduct of an entity is to be attributed to the State, ultimately cannot determinative of that State's responsibility under international law.[58]

4.2.2. Arguments Based on Categorical Distinctions between International and Domestic Law and the Resulting Differences between International and Domestic Adjudicatory Bodies

Some investment tribunals relied, instead, on the dualist distinctions between the domestic and international legal order, and the ensuing difference in the nature and function of international adjudicatory bodies when compared to their domestic counterparts. Unlike the supremacy argument which seems to have frequently been premised on the assumption that the domestic judicial process could be subverted with a view to stripping an international tribunal of its competence to consider a claim and avoiding the state to incur responsibility, the arguments based on the separateness of legal orders have not necessarily originated in bias towards domestic courts. Indeed, though sometimes invoked precisely as a reason that justified the disregarding of particular domestic judicial pronouncements, the same type of arguments have also been considered a reason for investment tribunals to actually follow domestic pronouncements – an issue which I further explore in 4.3.1. Among the pronouncements of investment tribunals, one can find two variations on the separateness argument. In some cases, greater weight was given to the different nature of investment arbitration – as a *mechanism* – when compared to adjudication by domestic courts; in others, greater emphasis was placed instead on the distinction between the domestic and the international *legal orders* as such.

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[55] Hussein Nuaman Soufraki v The United Arab Emirates (Decision of the Ad Hoc Committee on the Application for Annulment) (ICSID Case No ARB/02/7, 5 June 2007) [59]; emphasis in the original.

[56] *Luchetti v Peru (Decision on Annulment)* (ICSID Case No ARB/03/4, 5 September 2007) [87].

[57] *Maffezini v Spain (Jurisdiction)* (ICSID Case No ARB/97/7, 25 January 2000) [82].

[58] cf F-W Oil Interests, Inc v The Republic of Trinidad and Tobago (Award) (ICSID Case No ARB/01/14, 3 March 2006), [200]; InterTrade Holding GmbH v The Czech Republic (Final Award) (UNCITRAL, PCA Case No 2009-12, 29 May 2012), [165].

4.2.2.1. The Argument on the "Separate and Distinct" Dispute Settlement Arrangements

An early example where the separateness argument was used as reason to ignore the findings of the contractually-designated forum can be found in the annulment decision in *Wena Hotels v. Egypt* (2000). The case arose out of the seizure by the Egyptian state-owned hotel company of two hotels that were the subject of separate lease agreements, which had been entered into with that company by the Claimant. The latter commenced two separate contractual arbitrations in Cairo on the basis of the lease agreements. The local arbitral tribunals in both cases awarded Wena compensation for damages, but also ordered it to surrender the hotel to the Egyptian state hotel company due to its own breaches of the lease agreement.[59] Wena subsequently commenced treaty-based arbitration against Egypt, in which an ICSID Tribunal decided on the merits of Wena's treaty claims, without taking any account of the findings of the contractual arbitral fora. This eventually became one of the grounds on which Egypt sought annulment of the award. The ICSID Annulment Committee, however, found no manifest failure on the part of the Tribunal to apply the law in the fact that this only took account of Egypt's obligations under the treaty, without considering the underlying contractual relationship. Drawing a distinction between the leases, which were deemed to concern questions that were "by definition of a commercial nature", and the Treaty, which concerned questions that were "essentially of a governmental nature", the Committee concluded that, while Wena and the state company agreed to a particular contract, the applicable law and the dispute settlement arrangement "in respect of one kind of subject", it was also apparent that Wena could invoke the treaty "for the purpose of a different kind of dispute" and that the treaty had "a different and separate dispute settlement arrangement" with potentially a different choice of law provision.[60] The Committee noted that there was a connection between the leases and the treaty, since the former were designated to operate under the protection of the latter. But this was simply a condition precedent to the operation of the treaty and did "not involve an amalgamation of different legal instruments and dispute settlement arrangements"; rather, the "private and public functions of these various instruments are thus kept separate and distinct."[61]

In a similar way, it was by reference to the "special protection" available under the investment treaty that the Tribunal in *Malicorp v. Egypt* (2011) sought to justify its decision not to defer to the findings previously made by a local commercial arbitral tribunal, which was deciding in the contractual action that arose out of the purportedly unjustified termination of Claimant's airport concession contract. Though conceding that the local award had the authority of *res judicata* in relation to the contract claims and thus "prohibits a party from reintroducing a new action that is similar on all points",[62] the Tribunal decided not to base its ruling on the findings made in that award.[63] The Respondent's firm opposition to the local arbitration and its attempts to have the award set aside in Egyptian state courts raised in the eye of the Tribunal a degree of "uncertainty" that "justifies the Arbitral Tribunal in verifying, as a matter ancillary to the guarantees offered by the Agreement, that, even if that award were to be set aside, the conclusions arrived at by this Arbitral Tribunal would be no different from those of the CRCICA Arbitral Tribunal."[64] The local commercial award could thus be ignored because investment arbitration was a "special method" provided for by the treaty to protect against contractual

[59] *Wena Hotels Ltd v Arab Republic of Egypt (Award)* (n 18), [60]-[62].

[60] Wena Hotels Ltd. v. Arab Republic of Egypt (Decision of the Ad Hoc Committee on the Application for Annulment) (ICSID Case No. ARB/98/4, 5 February 2002), [31].

[61] Ibid, [35].

[62] *Malicorp Limited v The Arab Republic of Egypt (Award)* (ICSID Case No ARB/08/18, 7 February 2011), [103(b)].

[63] 130.

[64] 130. cf 103(d) (repeating that the 'degree of uncertainty concerning the outcome of the commercial procedure' made it 'acceptable' for the party claiming to have been injured to use the remedies afforded by the investment treaty).

breaches that could not be resolved by using the "ordinary procedure" in the form of commercial arbitration or the local courts.[65]

4.2.2.2. The Separatenes of Legal Orders Argument

Some investment tribunals maintained instead that it was because of the separate existence of the domestic and the international legal orders that domestic judicial decisions could not produce normative effects in the international legal sphere. Domestic courts' judgments remained contained within the domestic legal order, and the international tribunal was at liberty to take or not take cognizance of them.[66] An exponent of this approach is the Annulment Decision in *Luchetti* (2007), where the view was taken that "[w]hile an international judgment which is *res judicata* will in principle constitute a legal obstacle to a new examination of the same matter, *res judicata* at national level produces its legal effects at national level and will in international judicial proceedings not be more than a factual element."[67] In a similar way, the Tribunal in *Vigotop v. Hungary* (2014) concluded that, though the relevant domestic judicial decision had "*res judicata* effect as a matter of Hungarian law", it did not have such effect "on the international plane" and therefore did not bind it.[68]

4.2.3. Reliance on Specific Powers, Duties, or (the Absence of) Obligations

Apart from the more principled arguments premised on purported hierarchical relationships or on qualitative distinctions between international and domestic courts and the different legal orders within which each of these are operating, tribunals have not infrequently relied on *specific powers* that purportedly permitted them to ignore domestic judicial determinations, or that were even deemed to require from them to leave such determinations aside. Such powers have most often been found in specific provisions of jurisdiction-conferring instruments, such as the ICSID Convention; occasionally, however, they were also deemed to implicitly pertain to them by virtue of their nature of adjudicatory bodies.[69] In some cases, instead, tribunals referred to the absence of *specific obligations* that would demand from them to follow the findings of domestic courts on a particular matter.

4.2.3.1. Kompetenz-Kompetenz principle

Where the particular determination emanating from the domestic courts was such as to possibly have a bearing on the existence or scope of their adjudicatory powers, investment tribunals most often relied on the power that is expressly conferred to them under most arbitration rules to be *judge of their own competence* (i.e. the *Kompetenz-Kompetenz* principle). A typical example in this respect is the award in *Petrobart v. Kyrgyz Republic* (2003), where the Tribunal established pursuant to the Kyrgyz Law of Foreign Investment did not consider itself bound by prior determinations by Kyrgyz courts finding Claimant not to have made a qualifying investment within the meaning of that law, on the ground that Section 2 of the Swedish Arbitration Act (as the *lex loci arbitri* in that case) and Article 21 of the UNCITRAL Rules gave it the power to determine its own jurisdiction.[70] In a similar way, a great deal of ICSID Tribunals relied on the power granted to

[65] 103(c).

[66] cf also *EDF/Saur v Argentina (Award)* (n 22), [1130], refraining from taking a position whether domestic judicial decisions on purely contractual matters would preclude subsequent adjudication of the same contractual claims by international tribunals.

[67] *Luchetti v Peru (Decision on Annulment)* (n 56), [87].

[68] *Vigotop v Hungary* (n 23), 509.

[69] On inherent powers of adjudicatory bodies, see further C Brown, *A Common Law of International Adjudication* (OUP 2007) 55-81.

[70] *Petrobart v Kyrgyz Republic* (n 4), 39.

them in Article 41(1) of the ICSID Convention to be judge of their own competence. Illustrative in this respect are several cases that have been commenced against Venezuela on the basis of its Foreign Investment Law. While the latter was claimed to contain a standing offer to arbitrate disputes before the ICSID Centre, the Supreme Court of Venezuela already pronounced itself to the effect that no such consent had effectively been expressed in that statute. That Supreme Court's decision, however, has by and large been ignored by investment tribunals. Referring to the power granted to them under Article 41(1) of the ICSID Convention, most tribunals took the view that interpretations given to domestic law by State organs, including domestic courts, were "not determinative" of and could "not control" their competence.[71] The same line of argumentation was not only followed in other ICSID cases where consent to arbitrate was sought in domestic statutes,[72] but also in many cases where domestic judgments had a bearing on issues where *renvoi* is made to domestic law, such as in relation to the legality of an investment or the nationality of an investor. In *Inceysa*, for example, the absence of an obligation to defer to the findings of El Salvador's Supreme Court was further sustained on the basis of Article 41(1) of the ICSID Convention. Referring to the latter, the Tribunal concluded that "as the legality of the investment is a premise for this Tribunal's jurisdiction, the determination of such legality can only be made by the tribunal hearing the case".[73]

It is interesting to note that many investment tribunals interpreted Article 41(1) of the ICSID Convention not only as granting them *freedom* to depart from conclusions reached by domestic judicial and other authorities, but construed it as a *positive obligation* that required them to decide the particular issue for itself. In this sense, the *Inceysa* Tribunal considered that the principle expressed in Article 41(1) of the ICSID Convention "imperatively obligates" it to decide the issue of its competence.[74] In the same vein, the Tribunal in *Soufraki v. UAE* (2004) held that it would "decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question", arguing that "[w]here, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue."[75] The tribunals in *Siag and Vecchi v. Egypt* (2007) in *Pey Casado v. Chile* (2008) subsequently endorsed the principle formulated in the *Soufraki* award.[76] Expressly referring to Article 41 of the ICSID Convention, the *Siag* Tribunal considered that it "must determine the nationality of the Claimants."[77] The *Pey Casado* Tribunal, instead, attempted to additionally justify its broad power of appreciation with respect to the content and effects of domestic nationality laws, by considering such powers to be consistent with the spirit of the ICSID Convention and Article 25(2)(a) thereof.[78]

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[71] See *Mobil* (n 3), [74]; *Cemex* (n 3), [69]; *Brandes* (n 3), [99] (not itself quoting art 41(1), but referring to the argument to this effect advanced by the *Cemex* Tribunal); *Tidewater* (n 3), [74] and [107]; *Opic* (n 3), [63]; *ConocoPhillips* (n 3), [227]; *Highbury* (n 3), [157-58].

[72] See eg *Pacific Rim v El Salvador (*Decision on the Respondent's Jurisdictional Objections*)* (ICSID Case No ARB/09/12, 1 June 2012*),* [5.30].

[73] *Inceysa* (n 5) [209].

[74] *Soufraki* (n 8) 148.

[75] ibid [55]; cf [21] where the tribunal refers to art 41(1) of the ICSID Convention.

[76] Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Jurisdiction) (ICSID Case No ARB/05/15, 11 April 2007), [150-153]; Pey Casado v Republic of Chile (n 8), 319.

[77] Siag & Vecchi v Egypt, ibid 153.

[78] *Pey Casado* (n 8), [319]-[322]. The Tribunal noted that during the *travaux préparatoires* of the ICSID Convention reference was made to the possibility that an investment tribunal would have to deal appropriately with cases where a host State would use its nationality laws in an abusive manner, such as in the case when it imposes its nationality upon a foreign investor for the purpose of withdrawing its consent.

4.2.3.2. Rules Pertaining to the Appreciation of Evidence

Whereas the *Kompetenz-Kompetenz* principle has been usefully applied in situations where the existence or scope of the tribunals' adjudicatory powers was at issue, a different kind of argument had to be resorted to where particular determinations emanating from the domestic courts were of such nature as to being of concern to questions of merits. Another reason for denying *res judicata* effects to domestic judicial pronouncements was thus found in the power – sometimes considered a duty – of investment tribunals to make an *autonomous appreciation of evidence presented to them*. An early example of such an approach can be found in the jurisdictional award in *SPP v. Egypt* (1988). In the circumstances of that case, the Claimant – which entered with Egypt into a project to develop an international tourist complex at the Pyramids Oasis in Egypt – previously obtained an ICC award in its favor in a contractual arbitration that it had brought against the Egyptian General Organization for Tourism and Hotels and Egypt (EGOTH). As that award was later annulled by French courts on jurisdictional grounds, the Claimant brought the same matter before an ICSID Tribunal on the basis of an Egyptian Law containing an ICSID arbitration provision. In the ICSID proceedings, Claimant requested the Tribunal to adopt and incorporate as its own the pertinent findings of fact made by the ICC tribunal, which would include findings relevant to the interpretation and application of the contracts that Claimant had entered into with Egypt and EGOTH. The ICSID Tribunal, however, refused to accede to such request, finding it "unacceptable, both in principle and under the Centre's Arbitration Rules."[79] As to the former, the arbitrators considered that an approach resulting in the Tribunal abdicating its fact-finding function and adopting as its own the findings of another tribunal would be "hardly consistent with the basic function of evidence in the judicial process, which is to enable the tribunal to determine the truth concerning the conflicting claims of the parties before it."[80] As to the latter, the Tribunal noted that Rule 47(1) of the ICSID Arbitration Rules expressly required that the award be in writing and contain a statement of the facts as found by the Tribunal. These reasons justified the Tribunal to make its own determination of the facts necessary to render the award.[81]

The same approach was later adopted by the ICSID Tribunal in *Biwater Gauff v. Tanzania* (2008). In the circumstances of that case, the question arose whether, in taking consideration of facts concerning the contractual relationship between Claimants' investment vehicle and the Water and Sewerage Authority of Dar Es Salaam, the Tribunal was in any way bound by an UNCITRAL Award that had been rendered by a commercial arbitral tribunal established pursuant to the contracts, which purportedly resolved the contractual disputes between the contractual partners. The Tribunal ultimately decided not to accord deference to the UNCITRAL award, preferring to make its own determinations on all matters of fact and law. The argument went as follows. First, the Tribunal considered that since it "can only discharge its mandate by considering issues relevant to the contractual relationship, it obviously has jurisdiction to do so."[82] Second, the Tribunal was of the opinion that "on a reasonable construction" of Article 47 of the ICSID Arbitration Rules – which provides in the relevant part that the award shall contain, among other elements, "a statement of the facts as found by the tribunal"[83] – it was obliged to make its own finding of facts. Referring particularly to the *SPP* decision, the Tribunal explained that adopting the finding of facts made by the UNCITRAL tribunal would be "inconsistent with

[79] *SPP v Egypt (Decision on Jurisdiction)* (ICSID Case No ARB/84/3, 14 April 1988) [73].

[80] ibid.

[81] ibid 74-75.

[82] *Biwater Gauff v Tanzania (Award)* (n 19), 471.

[83] ibid 47(1)(g).

the basic function of evidence in the judicial process, which is to enable the tribunal itself, as part of its own mandate, to determine the truth of the conflicting claims of the parties before it."[84]

The power to make an autonomous appreciation of evidence was sometimes considered to be an *inherent power* that necessarily belongs to an investment tribunal in view of its adjudicatory functions, as opposed to a power that is *expressly granted* to them in the relevant jurisdictional instrument. This was the approach of the ICSID Annulment Committee in *Fraport v. Philippines* (2010), which thus considered the decision of the Philippine Prosecutor not necessarily to be dispositive of the question whether Fraport's investment was made in accordance with domestic law on the ground that an investment tribunal "retains the ultimate power to judge the probative value of evidence placed before it."[85] The Committee did not attempt to trace this particular power back to a specific provision in the ICSID Convention or the Rules of Arbitration, but apparently considered it to be inherent to any investment tribunal were this to perform efficiently its adjudicatory functions. In a similar way, the Tribunal in *Emmis v. Hungary* (2014) invoked the "independent power to judge the probative value of evidence placed before it, including evidence of municipal law" when holding that "decisions of municipal courts arising directly out of the same set of facts" would not be "necessarily dispositive" of the question whether Claimant possessed a contractual right relating to the grant of a new radio broadcasting licence, and thus a covered investment.[86]

4.2.3.3. Absence of Specific Obligations

Finally, instead of relying on specific powers or duties, some investment tribunals simply found that there was no *specific obligation* requiring them to recognize the *res judicata* effects of domestic judicial pronouncements. In *CSOB v. Slovak Republic* (2000), for example, the Tribunal advanced the general proposition that "[t]he ICSID Convention does not require an ICSID tribunal to accept the binding effect of national court decisions", referring expressly to the exclusive remedy rule laid down in Article 26 of the ICSID Convention.[87] In the circumstances of that case, however, the argument was not raised in relation to existing domestic judicial pronouncements, but with respect to the question whether it was for the Tribunal or for the national courts to determine the amount of damages for contractual breach. The argument was thus directed at any prospective judicial pronouncements. In *Chevron/Texpet v. Ecuador (Lago Agrio)* (2015), on the other hand, the same type of argument was raised in relation to existing pronouncements. In the circumstances of that case, the Ecuadorian courts deciding a domestic environmental claim involving the investor already pronounced themselves on the nature of the claims pleaded by the plaintiffs in the domestic suits. In deciding on whether or not such claims were barred under certain settlement agreements, the treaty Tribunal held that it was "not strictly bound to follow their result or reasoning as a matter of international law".[88]

In some cases, the same argument was developed by reference to domestic legal provisions. In *Petrobart v. Kyrgyz Republic* (2003), the Tribunal thus held that the judgments of Kyrgyz courts would not be binding on it because, in accordance with Swedish law (as the *lex loci arbitri* in that case), foreign court judgments were binding on arbitral tribunals seated in Sweden

[84] ibid 473.

[85] Fraport v Philippines (Decision on the Application for Annulment) (ICSID Case No ARB/03/25, 23 December 2010) [242].

[86] *Emmis v Hungary* (n 9), 176. The Tribunal invoked elsewhere power expressly granted to it under art 41(1) ICSID to be judge of its own competence – cf. 132.

[87] Ceskoslovenska Obchodni Banka, AS v The Slovak Republic (Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction) (ICSID Case No ARB/97/4, 1 December 2000) [35].

[88] Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Decision on Track 1B) (UNCITRAL, PCA Case No 2009-23, 12 March 2015) [140].

only if capable of being recognized and enforced in the Swedish legal order, which – in the absence of explicit statutory or treaty support – was not the case in relation to judgments emanating from the Kyrgyz Republic.[89] Though practice is scant on this issue, one would expect that arguments based on the absence or presence of an obligation to give effect to domestic judicial pronouncements are more likely to be considered by investment tribunals that cannot otherwise rely on the traditional supremacy argument, such as non-ICSID tribunals whose jurisdiction is based on a particular contract or domestic law provision. The possibility of ignoring in such cases particular judicial pronouncements will entirely depend on the *lex loci arbitri* and the applicable arbitral rules (as, in fact, giving effect to domestic decisions might sometimes be required as a matter of public policy).

4.2.4. Arguments Pertaining to Identity of Actions in the Formal Sense

Finally, the last set of the arguments that have sometimes been brought up by investment tribunals to deny domestic judgments *res judicata* effect on issues of domestic law[90] were those pertaining to the absence of the requisite parity of the parties, causes of action, and/or applicable legal standards. In *Inceysa*, for example, the Tribunal additionally rejected the idea that the Supreme Court's judgments could have disposed of the legality question on the ground that, "from the viewpoint of strict procedural theory", the basic requisites of *res judicata* – namely, the identity of the parties and that of the claims – were not met in the circumstances of the case.[91] Following *Inceysa*, the *Fraport I* Tribunal for the same reason refused to accord *res judicata* effects to the findings of the Philippine Public Prosecutor which were relevant to determining the investment's legality in that case.[92] In *EDF/SAUR v. Argentina* (2012), the Tribunal proceeded to ignore several decisions that had previously been rendered by Argentinean courts on matters relating to Claimant's concession on account of the fact that parity was not satisfied on all three accounts: the disputing parties, the causes of action, and the applicable legal standards in domestic proceedings were different.[93] In the view of the Tribunal, it was "generally accepted that an identity requirement must be satisfied in order for a tribunal to take into account the decisions of national courts."[94] But even the failure to satisfy the identity requirements only on one account were sufficient reason for not according *res judicata* to domestic judgments. In *EURAM v. Slovakia* (2012), where the Slovak Constitutional Court had already determined the illegality of the impugned measure, the doctrine of *res judicata* was held to have no application, since neither the Claimant nor its subsidiary, was party to the proceedings before the Constitutional Court.[95] All in all, however, the non-fulfilment of the formal requirements of *res judicata* was not frequently used as an argument justifying declining to give effect to domestic judicial decisions. Furthermore, where actually used, the argument was usually invoked as an ancillary ground.

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[89] *Petrobart v Kyrgyz Republic* (n 4) 38-41.

[90] The focus here is on issue preclusion in relation to questions of domestic law, not the possibility of preclusion of the treaty claim as such. This latter aspect will more extensively be considered in Part III. Admittedly, however, some investment tribunals had the tendency to consider both aspects of preclusion in discussing the possibility that domestic determinations be granted *res judicata* effects. See eg *Helnan v Egypt* (n 23), [125]-[126] (noting that a decision by a national court or a private tribunal cannot be opposed as *res judicata* to the admissibility of the treaty claim); or *Teco Guatemala v Guatemala (Award)* (ICSID Case No ARB/10/23, 19 December 2013) [475] (rejecting the possibility that domestic judgments could have preclusive effects on issues of international law to be determined by the Tribunal).

[91] *Inceysa* (n 5), [214]-[217].

[92] *Fraport I* (n 6), [390].

[93] *EDF/SAUR v Argentina* (n 22), [1130]-[1136].

[94] ibid [1132].

[95] *EURAM v Slovak Republic* (n 17), [394].

4.2.5. Supporting Argumentation

The above-described arguments have often been employed in combination with various argumentative techniques that had the effect of relegating the role of domestic law to a secondary one and reinstating international law as the primary law to be applied to determine the issue before the tribunal. Such techniques serve an important purpose: to the extent that a particular issue could be decided by reference to international law, and not solely by domestic law, domestic judicial decisions ceased to enjoy epistemic superiority vis-à-vis the international tribunal and could thus be neglected also from a practical point of view.

One of the areas where such argumentative techniques have successfully been applied are the rules applicable to the interpretation of domestic statutes containing unilateral offers to arbitrate disputes with investors. In the early jurisprudence, different approaches were taken with respect to the standards applicable to interpreting such domestic instruments. To the extent that the question of the applicable rules of interpretation was actually addressed,[96] investment tribunals have taken the view that such offers were to be interpreted either exclusively by reference to international law,[97] by reference to primarily domestic law,[98] or by way of concurrent application of both domestic and international law.[99] Since the decision in *Mobil v. Venezuela*, however, the view has increasingly gained support that offers to arbitrate included in domestic legislation are to be interpreted in accordance with the rules of international law applicable to interpreting unilateral declarations – thus, neither in accordance with domestic rules of statutory interpretation, nor in accordance with the general rules of treaty interpretation – but in accordance with the *sui generis* standard demanding that such declarations be interpreted "in a natural and reasonable way" and having "due regard to the intention of the State concerned".[100] Though municipal law remained relevant to determine the existence and validity of the instrument in which the declaration was embodied,[101] and potentially to clarify the intention of the State making the declaration,[102] the question whether a particular statement constitutes consent to arbitration has thus been treated as one of international law. This has had obvious advantages: by holding that such offers to arbitrate, albeit expressed in domestic legal instruments, are not governed exclusively by domestic law, investment tribunals were not required to bow to particular findings of domestic courts on points of domestic law, nor were they compelled to rely on domestic jurisprudence in ascertaining the relevant rules of statutory interpretation.

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[96] In many cases where domestic legislation was invoked as jurisdictional basis, the relevant text was so clear that tribunals did not need to take a position on the rules of interpretation to be applied. See eg *Tradex Hellas SA v Republic of Albania (Decision on Jurisdiction)* (ICSID Case No ARB/94/2, 24 December 1996) [79]; *Inceysa* (n 5), 332; *Rumeli Telekom AS v Kazakhstan (Award)* (n 38), [333]-[335]; *Biwater Gauff (Tanzania) Ltd v Tanzania* (n 19), [329].

[97] *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/97/4, 24 May 1999) [35], [36] and [46] ('the question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law; it is governed by international law as set out in article 25(1) of the ICSID Convention').

[98] *Zhinvali Development Ltd v Republic of Georgia (Award)* (ICSID Case No ARB/00/1, 24 January 2003) [339]-[340] ('the Tribunal must follow that national law guidance, but always subject to ultimate governance by international law')

[99] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt (Decision on Objections to Jurisdiction)* (ICSID Case No ARB/84/3, 14 April 1988) [61] (the Tribunal applying 'general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations').

[100] *Mobil* (n 3), [85]; subsequently followed in *Cemex* (n 3), [79]. This standard of interpretation is inspired by the practice of the ICJ in interpreting unilateral declarations of compulsory jurisdiction under art 36(2) of the ICJ Statute. cf *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 454 [49].

[101] *Tidewater* (n 3), [102(6)] and [103].

[102] *Mobil* (n 3), [96].

A comparatively similar strategy has occasionally been used in the context of contract-based investment arbitrations, though the argumentative technique used for that purpose has been a different one. Since contractual dispute settlement clauses are synallagmatic in type and already contain a perfected agreement to arbitrate, such clauses cannot be compared to unilateral obligations. Instead, reliance has been made on the principle of separability of the arbitration agreement which not only presupposes that the agreement to arbitrate is independent from the contract in which it is embodied, but also that such agreement need not necessarily be governed by the same law as the contract itself.[103] Accordingly, even where the underlying contract is governed by domestic law, the principle of separability of the arbitration agreement permits investment tribunals to assume that the agreement to arbitrate is governed by international law. Since the question of consent to arbitrate needs not be determined in such cases exclusively by domestic law, there is again no need to bow to particular findings of domestic courts on points of domestic law. Illustrative in this respect is the award in *Kalimantan* (2009), where the Tribunal invoked the principle of autonomy of the arbitration agreement in asserting that it will apply international law to determine whether the ICSID Centre had jurisdiction over the dispute, and not solely Indonesian law as the law applicable to the contract containing arbitration clause.[104]

An altogether different strategy was to reintroduce international law as the primary applicable law with respect to issues where *renvoi* would otherwise have to be made to domestic law by exploiting domestic constitutional arrangements regulating the reception of international law into the domestic legal order. An example where such technique has successfully been applied is the *Inceysa* award. In determining the legality of Claimant's investment, the Tribunal in that case did not inquire whether the investment had been made in conformity with specific Salvadorian laws, but whether it complied with the BIT as such – given that by virtue of Article 144 of the Salvadorian Constitution, the BIT also constituted the law of El Salvador. Admitting, however, that the BIT lacked substantive rules that would be relevant to such analysis, the Tribunal determined the legality of Inceysa's investment in light of the generally recognized rules and principles of international law, which it was entitled to apply pursuant to the choice-of-law clause in the BIT – the principle of good faith, the principle *nemo auditor propiam turpitudinem allegans*, the principle prohibiting unjust enrichment, and the principles forming part of international public policy.[105] This clever construction of the legality test permitted the tribunal to avoid direct application of the domestic law of El Salvador, with regard to which Salvadorian courts would otherwise enjoy epistemic superiority.

Another argumentative technique that had the effect of demoting the role of domestic law to one of secondary importance was, instead, to treat issues of domestic law as mere facts of which an international tribunal might – or might not – take cognizance. Variations of this argumentative technique can be found in several awards. For example, notwithstanding the relevance of internal law in determining the status of a State organ,[106] the Tribunal in *Mafezzini* took the view that whether or not an entity was to be regarded as an organ of the State was "a question of fact and law to be determined under the applicable principles of international law".[107] In *Luchetti*, the view was taken that a judgment which is *res judicata* at the national level "will in international judicial proceedings not be more than a factual element."[108] Likewise, in *Biwater Gauff*, the pronouncements

[103] Generally on the principle, see ML Moses, The Principles and Practice of International Commercial Arbitration (CUP 2008) 18.

[104] *Kalimantan* (n 30), [163]-[168].

[105] *Inceysa* (n 5), [218]-[229], [234], [240], [245], [253].

[106] cf art 4(2) ARSIWA 'An organ includes any person or entity which has that status in accordance with the internal law of the State.'

[107] *Maffezini* (n 57), [82].

[108] *Luchetti* (n 67), [87].

of the contractual forum were treated merely as potential evidence of facts, which the Tribunal could possibly ignore, given that it considered itself bound to make its own findings of fact.[109] In the end, by relegating questions of domestic law to maters of purely factual significance, tribunals were thus once more in the position to ignore the pronouncements of the domestic courts which would otherwise enjoy epistemic superiority on issues of domestic law.

In addition to employing the argumentative techniques just described, investment tribunals have had the habit of resorting to what one could call "strategies of confinement": advancing explanations that made possible the parallel-coexistence of different findings on the same points of domestic law. One such strategy was simply by factually distinguishing the domestic judicial pronouncements that may be at variance with the tribunal's own findings on domestic law issues. In *Ares v. Georgia* (2008), where the question arose whether the invalidation by Georgia's courts of a share purchase agreement necessarily signified that the investment had been made illegally, the Tribunal for example held that the invalidation, even though having retroactive effect, only occurred a year after the purchase agreement had been made.[110] In view of the arbitrators in that case, the Tribunal's finding that the original acquisition of the shareholdings was in substantial accordance with Georgian law could therefore "happily co-exist" with the conclusions arrived at by the domestic courts half a year later the transaction was not in accordance with such law.[111]

Quite commonly, however, tribunals exploited the distinction between the domestic and the international legal orders in such a way that the supremacy that is habitually accorded to domestic judicial organs in relation to questions of domestic law was only recognized in relation to the domestic legal order, but not on the international plane. The prime example of such an argumentative technique can be found in the decision of the ICSID Annulment Committee in *Soufraki*, where the emphasis was put on the "notable difference between the *granting* of nationality on the national level – which is a *constitutive* act – and the *recognition* of nationality on the international level – which is a *declaratory* act".[112] The consequence of this distinction was that, in verifying whether nationality had been granted in accordance with the national law requirements, international investment tribunals would not be encroaching upon the competences of domestic courts – since they would not be deciding as to whether an investor possessed a particular nationality (for, as the Committee opined, "an international tribunal cannot decide that a nationality granted by a State does not exist in the national legal order in which it has been created"), but only determining whether such nationality can be recognized on the international level (a right which, according to the Committee, an international tribunal undoubtedly had if it was "to determine the existence of the treaty-required nationality as a jurisdictional requirement by reference to the laws of the State whose nationality is claimed").[113] However, given this fundamental difference between the constitutive and the declaratory acts, the epistemic superiority that domestic courts otherwise enjoyed with respect to questions of nationality would not need to be recognized on the international plane to the same degree as it needs to be recognized within the national legal order; for, "[r]espect for States' sovereignty approaches its limits when it comes to recognizing a nationality *in the international realm*".[114] In a similar way, the *Biwater Gauff* Tribunal relied on the distinction between treaty and contract claims to conclude that any findings it would make with respect to the contract would solely have effect

[109] *Biwater Gauff* (n 19), 470-72; cf 474 confirming, for the avoidance of doubt, that it has solely 'taken into consideration facts concerning the contractual relationship'.

[110] *Ares v Georgia* (n 7), [5.4.33]-[5.4.39].

[111] ibid [5.4.38].

[112] *Soufraki* (n 55), [55].

[113] ibid [60]; emphasis in the original.

[114] ibid [60]; emphasis in the original.

as between Claimant and the Respondent State in the context of the treaty claims, and would not be binding as between the parties to contract in the context of their separate contract dispute.[115] Ultimately, the strategy of confinement, too, had the effect of justifying the Tribunal's ignorance of the pronouncements made by the contractual forum.

The different argumentative techniques have in common that they enabled investment tribunals to shift back their enquiry from one solely focused on questions of domestic law, to one focused on questions of international law where domestic law merely played a subordinate role – and thus furnished additional justifications for investment tribunals not being required to follow domestic judicial pronouncements.

4.2.6. Policy Rationale(s) Against Granting Legal Effects to Domestic Pronouncements

As noted in 1.4.2.1., the idea that domestic judicial pronouncements cannot have *res judicata* effects on international adjudicatory bodies is one well engrained in the thinking of international lawyers, and as such also continues to be replicated in the specific context of investment arbitration.[116] The historical foundations of this idea lie in the old conception of domestic courts and international adjudicatory bodies being creatures of different legal orders, applying different bodies of law, and operating independently from one another. In the context of investment arbitration, however, such conception becomes difficult to sustain, at the very least because investment tribunals are frequently called upon to concurrently apply both domestic and international law. Moreover, in circumstances where international law itself requires the application of domestic law as a condition for an international norm to apply, the argument of how "international law trumps domestic law" itself loses much of its justificatory strength.[117]

One can probably find a more convincing rationale for not recognizing preclusive effects of local judgments on points of domestic law in the fact that such judgments potentially originate from organs that are not in themselves independent from the State itself.[118] In other words, there is always the danger that domestic courts' pronouncements are self-serving, produced with a view to frustrating the conduct of an investment arbitration, or else avoiding the State's responsibility under international law. It is debatable, however, whether denying such pronouncements *a priori* normative force is really the proper way to conceiving an appropriate relationship between investment tribunals and domestic courts, particularly in light of the latter's superior knowledge

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[115] *Biwater Gauff* (n 19), 471.

[116] See eg A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 95 ('Relevant decisions of national courts should be taken into consiteration, as instances of interpretation and application of the domestic law, but cannot bind a treaty tribunal.').

[117] See J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24(3) Arbitration International 351, at 351, noting the perpetual tensions in the field of investment law between 'the proposition that a host state cannot rely on its own law as a justification for failing to comply with its international obligations, including those obligations arising under treaties for the protection of foreign investment' and 'the proposition that an investment is, in the very first place and by definition, a transaction occurring in the host state and governed by its laws.' On this point, see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment), [2008] ICJ Rep. 177, [124] finding Article 27 VCLT, pursuant to which '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty', not applicalbe to situations where a State is applying rules of domestic law according to the terms of the international obligation itself.

[118] But see WS Dodge, 'National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA' (2000) 23 Hastings Int'l & Comp. L. Rev. 357, 381-382, who considers the issue of bias to be less relevant to the question of whether domestic courts' judgments should be accorded *res judicata* effects, given that in investor-State arbitration, the investor remains essentially free not to bring a suit in domestic courts. In his view, the reason why such judgments should not be accorded preclusive effects, instead, is that this could deter foreign investors from first seeking resolution of their disputes in domestic courts. This line of argument, however, seems to overlook the fact that the foreign investor can not only act as claimant in domestic proceedings, but may also appear as respondent.

of domestic law and their greater legitimacy when it comes to the interpretation and application of that law. A more convincing solution is rather to accord domestic judgments preclusive effects – though subject to the condition that such judgments are unimpeachable from the perspective of international standards pertaining to the administration of justice and international law in general.[119] Indeed, one may argue that precisely because investment tribunals are vested with the power to review the propriety of domestic judicial conduct from the perspective of international standards (a matter which is extensively discussed in Part II of the present study), they should otherwise recognize *res judicata* effects in the absence of improper conduct on the part of domestic courts.[120] The more so in view of the general obligation on the part of international adjudicatory bodies to apply domestic law as interpreted by domestic judicial authorities – a point on which I further expand in chapter 5.

4.3. Arguments supporting Acceptance of Domestic Judicial Pronouncements

It would be wrong to conclude, however, that investment tribunals uniformly discarded the possibility of being bound by domestic judicial pronouncements. On the contrary, in a not insignificant number of cases, tribunals considered themselves under a duty to follow domestic judicial pronouncements insofar as *questions of domestic law* were concerned. The logic that was seemingly followed in such cases was that, precisely because domestic courts have primacy within the domestic legal order, international tribunals have to respect their determinations in relation to matters concerning the interpretation or application of domestic law. The precise legal argumentation varied. Some investment tribunals were prepared to formally recognize in relation to domestic judicial determinations the effect of *res judicata* on points of domestic law (4.3.1.). Others simply considered that they had to accept the courts' determinations on such points (4.3.2.). Then again others accepted the binding nature of prior judicial determination as a matter of (collateral) estoppel (4.3.3.).

4.3.1. *Res Judicata* on Points of Domestic Law

The leading precedent of a decision originating in the domestic legal order being formally accorded the effect of *res judicata* in the context of an investment arbitration is the award in *Helnan v. Egypt* (2008). In the circumstances of that case, the question arose as to the effect of a local commercial award that had previously been rendered in a contractual arbitration between the Claimant and the Egyptian General Company for Tourism and Hotels – which was final and binding as a matter of Egyptian law – on the arbitration that Claimant subsequently commenced against Egypt pursuant to the pertinent investment treaty. Though concluding that the commercial award could not be opposed to the admissibility of the Claimant's treaty claims, the ICSID Tribunal nonetheless found it could not disregard the principle of *res judicata* and thus review *de novo* the facts pertaining to contractual issues. In the Tribunal's view: "When it is found

[119] For a similar approach, see S Farnham, 'Claim Suspension and Issue Preclusion in Multiparty Investment Disputes: The Need for Autonomous, International Principles' in IA Laird (ed), *Investment treaty arbitration and international law*, vol. 7 (JurisNet, 2014), 203-232, at 216, 223, arguing in favour of giving preclusive effect to factual findings of a prior contract adjudication, but on the condition that the investor does not suffer material prejudice where the local forum is incapable of providing adequate relief, where it fails to meet minimum due process standards, or where there is a significant risk that its decision will not be enforced.

[120] This would appear to be also in accordance with the practice of the International Court of Justice. See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits, Judgment)* [2010] ICJ Rep 639 [70] ('The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts […]. Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.').

by an international tribunal that the holding of the local award was determined strictly by considerations pertaining to contractual issues, it will not be appropriate for an international tribunal to replace the decision of the local court on a contractual issue subject to local law. Instead, *res judicata* will apply…".[121]

The Tribunal recalled that, in accordance with the traditional view, no *res judicata* effect was to attach to a decision of a municipal court so far as an international jurisdiction is concerned. Contrary to conventional arguments, however, this was not because of any hierarchical superiority purportedly enjoyed by international tribunals over national courts, but merely on account of the differences in the causes of action pursued before each forum, with the necessary consequence that each forum therefore performs its duties in different legal orders.[122] In the view of the Tribunal, this had two important consequences. On the one hand, a domestic judicial decision could not directly affect the competence of the international tribunal to decide a claim grounded in international law, in the absence of strict identity of parties, subject matter, and causes of actions. On the other hand, however, such tribunal "*must* accept the *res judicata* effect of a decision made by a national court within the legal order where it belongs."[123] For a domestic pronouncement to generate preclusive effects in this way, it was thereby irrelevant that the parties to the domestic proceedings and the parties to the treaty-based arbitration were not strictly the same. (Indeed, in the circumstances of the *Helnan* case, the Claimant in the local arbitration was an Egyptian state instrumentality, while Helnan appeared there as Respondent and Counterclaimant). In the view of the Tribunal, it was "not without some contradiction" that Helnan relied on the separate legal personality of the state instrumentality for the sole purpose of denying the alleged *res judicata* effect of the local award, while at the same time maintaining that the instrumentality's conduct was attributable to the Egyptian State.[124] Having said this, the Tribunal made equally clear that the preclusive effect thus generated by the local award on points of domestic law was not absolute, but applied "as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice."[125] Therefore, having found no inadequacies in the conduct of local arbitral proceedings, in the award itself, or in its enforcement, the Tribunal accepted the findings made in the local arbitral award, particularly the fact that neither Claimant nor EGOTH were actually found to have breached the hotel management contract and that the cause of the contract termination lay in the impossibility of the contract to be performed, rather than in the downgrading of the hotel on the side of Egyptian authorities, which was at the origin of Claimant's treaty claim against Egypt.[126]

The *Helnan* Tribunal's approach was not unprecedented. Already in *Saluka v. Czech Republic* (2006), the Tribunal was prepared to accept determinations previously made in the context of related domestic proceedings in deciding whether Claimant's investment had been legally made. At issue in that sense was particularly the legality of certain transactions which enabled Saluka's predecessor in rights to acquire and then sell on the shareholding of two valuable Czech breweries. The treaty Tribunal saw "no reason to dissent from" the decision rendered in a local commercial arbitration which confirmed the validity of those transactions, given that those matters were considered by the parties to be *res judicata* as a matter of Czech

[121] *Helnan v Egypt* (n 23), [108].
[122] ibid [124].
[123] ibid [125] and cf [143].
[124] Ibid [127].
[125] ibid [106].
[126] ibid [150], [163]-[68].

law.[127] The same kind of argument was previously also employed by arbitrator Bernardo Cremades when he dissented from the majority's decision in the *Fraport* award (2007) on the ground that Claimant could not be deemed to have structured its investment in contravention of the Philippine Anti-Dummy legislation that otherwise prohibited foreigners to control Philippine public utility companies, in circumstances where the Philippine Supreme Court had actually annulled the concession pertaining to the operation of the airport terminal in which Claimant had held an interest and where such annulment was thus *res judicata* under Philippine law.[128]

4.3.2. Acceptance of, and Defference to, Domestic Courts' Decisions

Rather than articulating the issue in formal terms of *res judicata*, many investment tribunals simply *accepted* domestic judicial pronouncements as effective in relation to matters of domestic law that had to be determined. In *Liman v. Kazakhstan* (2010), the Tribunal thus held that it had to "accept" the judgments of Kazakh courts which resulted in the invalidation of Claimant's license contract and on that ground also rejected the claim under the umbrella clause insofar as Claimant could not validly invoke any contractual rights.[129] Similarly, the Tribunal in *Hassan Awdi v. Romania* (2015), explicitly quoted *Helnan* for the proposition that it will "accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings" and thus recognized that the Claimant had been validly deprived of its right to be granted concession as a result of a Constitutional Court's decision repealing the law regulating such concessions.[130] A similar practice has been followed in many other cases where claims of alleged expropriations[131] or violations of the umbrella clause[132] were flatly dismissed on the ground that they were premised on rights that had effectively been extinguished by means of judicial decisions.

Other tribunals justified their acceptance of prior judicial determinations by reference to the need of according *deference* to domestic courts on points of domestic law. In *Gami v. Mexico* (2004), the Tribunal held it would "defer" to domestic judicial pronouncements as "an authoritative expression of national law" – though, only insofar as the "licitness of expropriation as a matter of Mexican law" was concerned.[133] In *Unglaube v. Costa Rica* (2012), the Tribunal considered that, had it been necessary to undertake an interpretation of the domestic legislation in question, it "would, without hesitation, have found that, under the Constitution and laws of Costa Rica, it is the Attorney General and the Supreme Court who are empowered to give authoritative and final interpretation of the law" and that therefore, it was "not appropriate for this Tribunal to substitute an opinion of its own or make any finding of liability unless the Attorney General and the Court are found to have acted in a manner which is arbitrary,

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[127] Saluka v Czech Republic (Partial Award) (UNCITRAL, 17 March 2006) [216].

[128] *Fraport I* (n 6), Dissenting Opinion of Mr. Bernardo M Cremades, [26]. Admittedly, Cremades' argument on this point was somewhat inconsistent: on the one hand, he argued that the Tribunal was 'not bound by a decision of a Philippine court'; on the other hand, he maintained that the res judicata nature of the annulment under Philippine law 'must be accepted' by the Tribunal. But the implications were clear: the Tribunal was expected to recognize the legal effects of the Supreme Court's judgment as a matter of Philippine law since 'its own judgment on Philippine law must be premised on Philippine law itself.' ibid.

[129] *Liman Caspian Oil BV v Republic of Kazakhstan* (n 25), [442]-[443].

[130] *Hassan Awdi v Romania (Award)* (ICSID Case No ARB/10/13, 2 March 2015)[326]-[327].

[131] See eg *Azinian v The United Mexican State* (n 24) [100]; *Arif v Moldova* (n 28) [415]-[417]. cf also *Hassan Awdi v Romania* ibid [325]-[328], confirming the principle though rejecting the expropriation claim already on the ground that the extinguished right was not in itself capable of being considered an investment.

[132] See eg *Bosh International and B&P v Ukraine* (n 27) [258]-[259] and [276]-[286]; *Swisslion v Macedonia* (n 27) [265]-[275], and [323]-[325]; or *Arif v Moldova* (n 28) [398].

[133] Gami Investments, Inc v The Government of the United Mexican States (Final Award) (UNCITRAL, 15 November 2004) [41].

discriminatory or otherwise shocking to the conscience".[134] In a similar way, the Tribunal in *Teco v. Guatemala* (2013) took the view that, even though the decisions of the Guatemalan courts that had been rendered in cases involving the Claimant's subsidiary could not be "determinative" of the Tribunal's assessment of the application of international law to the facts of the case, the Tribunal "may have to defer" to them when particular aspects of the dispute were subject to Guatemalan law and the judgments decided some of the questions in dispute concerning the interpretation of the Guatemalan regulatory framework.[135]

4.3.3. Doctrine of Collateral Estoppel

Finally, in a handful of cases, investment tribunals accepted prior domestic determinations on grounds of estoppel. In *Desert Line Projects v. Yemen* (2008), an ICSID Tribunal thus accepted as binding contractual matters decided in a prior domestic contractual arbitration, on the ground that Respondent – having illegitimately pressured the Claimant to accept a settlement agreement and thereby suspending the debate about the validity of the local arbitral award, and having caused the Claimant to alter its position in fundamental ways to its detriment – was subsequently "estopped from seeking to achieve the same effects" by again attempting to contest the validity of the local arbitral award.[136] But while in *Desert Line Projects*, the application of estoppel was still tightly bound with the peculiar circumstances of that case, in *Grynberg v. Grenada* (2010) the principle was latter applied as a matter of general proposition. Facing the question whether it was bound by the findings of a prior ICSID Tribunal with respect to contractual claims and counter-claims decided in relation to the same parties,[137] the *Grynberg* Tribunal thus specifically invoked the doctrine of "collateral estoppel" – a doctrine which it considered "well established as a general principle of law applicable in the international courts and tribunals such as this one" – to conclude that the contractual award was binding upon it.[138] Thereby, the Tribunal took also the principled view that, "[e]ven when the contractual forum is not an ICSID Tribunal, BIT tribunals do not reopen the municipal law decisions of competent fora, absent a denial of justice."[139]

The idea that investment tribunals can be bound by defences of estoppel based on a prior domestic judgment was later endorsed in *Ampal-American v. Egypt* (2017).[140] There, however, the doctrine was further extended to situations going beyond the strict identity of parties. In the *Desert Line* case, the question of party identity did not directly arise, as the claimant and respondent in the domestic and international proceedings were the same. Nor was it directly an issue in the *Grynberg* case, where the claimant in the prior domestic arbitration was an investment vehicle wholly-owned by the claimant in the subsequent treaty proceedings. In *Ampal-American*, in contrast, the question of issue preclusion arose in circumstances where the claimants in the treaty arbitration were merely one of the shareholders in the investment vehicle involved in the local contractual arbitration, which was furthermore conducted with Egyptian State instrumentalities, but not Egypt itself. In the view of the *Ampal-American* Tribunal, however, the doctrine of *res judicata* was not only applicable to the parties to the prior decision, but also to "those persons

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[134] *Unglaube v Republic of Costa Rica (Award)* (n 14), [253].

[135] *Teco v Guatemala* (n 90) [474], [483]. In the circumstances of that case, it was particularly the decisions of the Constitutional Court of Guatemala that have been considered to 'have consequences on the findings that the Arbitral Tribunal will have to make under Guatemalan law'[475].

[136] Desert Line Projects LLC v. The Republic of Yemen (Award) (ICSID Case No. ARB/05/17, 6 February 2008) [208].

[137] cf *RSM Production Corporation v Grenada (Award)* (ICSID Case No ARB/05/14, 13 March 2009).

[138] Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Company v Grenada (Award) (ICSID Case No ARB/10/6, 10 December 2010) [7.1.2].

[139] ibid [7.1.11], [7.1.14]. In support of this statement, the Tribunal referred to the reasoning in the *Helnan* award, which it considered "persuasive and applicable" in the circumstances of the case.

[140] Ampal-American Israel Corporation and others v. Arab Republic of Egypt (Decision on Liability and Heads of Loss) (ICSID Case No. ARB/12/11, 21 February 2017) [266].

who are in privity of interest with them" – for, insofar as "in the context of investment arbitration, a shareholder is entitled to pursue a claim for investments that are indirectly held through a corporation, it must also be subject to defences that would be available against the corporation, including the defences of estoppel based on a prior judgment."[141] Having established that Claimants in the treaty proceedings were thus in privity of interest with the claimant in the domestic proceedings, and that the conduct of the Egyptian State instrumentalities was attributable to Egypt, the ICSID Tribunal ultimately concluded that the domestic forum's findings on contractual issues relevant to the treaty claims had a *res judicata* effect between the parties in the treaty proceedings.[142]

The doctrine of (collateral) estoppel has thus provided an alternative basis for treating prior domestic pronouncements on contractual matters or other issues of domestic law as binding insofar as such matters are relevant to the subsequent treaty claims.[143] Apart from its formal endorsements in recent jurisprudence, the doctrine finds also broader resonance in the practice of investment tribunals. As noted in 4.1.2.3., several of them have been willing to consider whether inconsistencies in the parties' conduct before the domestic and the international forum could have given rise to estoppel, and at least in one case, a Tribunal found the Respondent to be "barred" from disputing a point of domestic law where it accepted such point in previous domestic proceedings.[144]

4.3.4. Policy Rationales in Favour of Granting Legal Effects to Domestic Pronouncements

The more recent proclivity of some investment tribunals to treat prior domestic pronouncements as capable of producing normative effects, though welcomed by some,[145] has not been met without reservations. According to Wehland, if a treaty tribunal were bound by a domestic judicial decision rendered in parallel proceedings (even if only as a matter of domestic law), the protective scope of the applicable treaty would supposedly be "significantly curtailed".[146] In the same vein, Spierman posits that, if the view advanced in *Helnan* were to be applied generally, it had "the potential to crumble the competence of ICSID tribunals without any real support in international law".[147] Surely, from the standpoint of investment tribunals, such concerns are understandable, as treating domestic judicial pronouncements as preclusive directly challenges their claim to adjudicatory authority. Yet, much also depends on what one understands under the notion of *res judicata*. As noted in 1.4.2.1., the principle deems not be considered an absolute one. In the international context especially, the concept of *res judicata* ought not revolve around the question of reviewability of a prior pronouncement, but should solely turn on the question of the acceptance thereof.[148] As noted in 4.2.6., this acceptance can certainly be conditioned on such pronouncement's validity.

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[141] ibid.

[142] ibid, [268]-[270].

[143] This, in itself, is not surprising as in many domestic legal systems, estoppel-related doctrines are frequently resorted to as a way to overcome the strict conditions otherwise attaching to the principle of *res judicata*. Se V Lowe, 'Res judicata and the Rule of Law in International Arbitration', (1996) 8 African Journal of International and Comparative Law 38, 41ff.

[144] *Middle East Cement* (n 44), [135].

[145] See eg CT Kotuby and JA Egerton-Vernon, 'The Adoption by International Tribunals of a Substantive/Transactional Approach to *Res Judicata* – A New Paradigm in International Dispute Resolution?'(2015) 30 ICSID Review 486.

[146] H Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes' (2016) 31 ICSID Review 576, at 584.

[147] O Spiermann, 'Premature Treaty Claims', in C Binder et al. (ed), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 463-489, at 478 fn 72.

[148] But see thus H Wehland, *The coordination of multiple proceedings in investment treaty arbitration* (OUP, 2013), 147-153, to whom the question of *res judicata* seems primarily to relate to the question of reviewability.

At the same time, one must also not be oblivious to broader policy considerations. Namely, prior domestic proceedings may frequently have been caused by the same event that precipitated subsequent investment arbitration and that the aim of both actions may be to resolve substantially the same grievance. Especially if the investor has initiated both proceedings, the policy grounds that usually underpin the application of the doctrine of *res judicata* – viz., the importance of avoiding inconsistent and contradictory decisions, the preventing of double recovery and double jeopardy, and the minimizing of economically undesirable duplication of proceedings[149] – are hence equally relevant in the relation between domestic courts and investment tribunals. Among these, the demand for legal certainty is perhaps the most pressing of all. As a previously seized domestic forum may have already dealt with the same or similar factual and legal issues, and as that forum may in fact have been better positioned to make particular findings of fact[150] and/or possesses better knowledge of applicable law (as the case usually is with domestic courts' understanding of domestic law), the general principle that the law should be applied consistently provides a cogent reason why a subsequently seized investment tribunal should endeavor to provide full effect to prior findings of domestic fora.[151] Failure to do so is likely to undermine the rule of law and in the long run further threaten the legitimacy of investor-State arbitration.[152]

Against this backdrop, it is then certainly comforting that at least some investment tribunals have been willing to accord legal effect to prior domestic pronouncements, by either applying the principle of *res judicata* pursuant to a less strict test than one requiring perfect identity of actions, or else by resorting to doctrines such as that of deference, estoppel and the like. Indeed, one may not only wonder whether a strict application of the triple identity test is actually appropriate in the context of international arbitration,[153] but also how a formalistic approach to this issues can be reconciled with other practices in investment arbitration, where the lack of strict identity has generally not been deemed a barrier to adjudication: such as when it came to extending the benefits of an ICSID arbitration clause to parties not expressly named in the arbitration agreement,[154] to granting standing to shareholders to claim for reflective losses,[155] or to attributing the conduct of statal entities and instrumentalities to the State more generally. Unless, of course, one accepts that formalism must be selectively applied to all issues that would be

[149] See generally 'ILA Final Report on Res Judicata and Arbitration' reproduced in (2009) 25(1) Arbitration International 67. See also A Reinisch, 'The Issues raised by Parallel Proceedings and Possible Solutions' in M Waibel, et al (eds), *The backlash against investment arbitration: perceptions and reality* (Kluwer, 2010), 113-126, 115.

[150] See Bottini (n 53), 312-313, submitting that investment tribunals should accord great weight to decisions of local judges, especially if they are criminal judges, which are generally better equipped to handle domestic corruption cases, and further suggesting that investment tribunals and domestic courts engage in a process of cross-fertilization that can be useful for *inter alia* gathering evidence to prove illegal acts.

[151] See further M Stanivuković, 'Investment arbitration: effects of an arbitral award rendered in a related contractual dispute' (2014) 4 Yearbook on International Arbitration 150.

[152] See Farnham (n 119), 207.

[153] See especially A Sheppard, 'Res Judicata and Estoppel' in BM Cremades Sanz-Pastor and JDM Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration* (Kluwer, 2005), 219–242, at 233, arguing that in international arbitration, where there is little or no opportunity to join a third party, or have another tribunal stay its proceedings to await the outcome of another arbitration, applying a strict test – which puts form over substance and ignores the underlying realities – can easily cause injustice. See also Farnham (n 119), 213, seeing the most important argument against the application of a strict identity of parties test in the fact that, unlike in domestic legal systems, in treaty based investment arbitrations even minority shareholders have standing to bring claims with respect to contracts to which they are not party.

[154] See eg Holiday Inns S.A. and others v. Morocco (Decision on Jurisdiction) (ICSID Case No. ARB/72/1, 12 May 1974); Amco v Indonesia (n 16) [24]ff; or Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (Award) (ICSID Case No ARB/81/2, 21 October 1983).

[155] See eg CMS Gas Transmission Company v Argentine Republic (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/8, 17 July 2003), [65]; or Azurix Corp v Argentine Republic (Decision on Jurisdiction) (ICSID Case No ARB/01/12, 8 December 2003) [73]-[74].

capable of undermining the investment tribunals' adjudicatory authority – a premise, on which many arbitral awards were seemingly building upon.

4.4. Factors Affecting Reception of Specific Judicial Determinations on the Part of Investment Tribunals

Still, practice may often deviate from formal pronouncements on normativity. Notwithstanding the fact that a great number of investment tribunals thus refused to be bound by domestic judicial findings or pronouncements, at the end of the day, many of them were nonetheless inclined to give weight to such findings and pronouncements in the process of adjudicating the treaty claims. Why did, for example, the *Vigotop* Tribunal, after holding that it would decide the issues of domestic law "in its own right" and in "light of the evidence before it", in the end nonetheless decide to follow the Supreme Court's findings in relation to the validity of a particular contract?[156] The following part attempts to single out some of the factors that could potentially explain the propensity of tribunals to give or not to give weight to particular judicial decisions (4.4.1.). Thereafter, some observations will be made about the standards of review applied by investment tribunals to the scrutiny of domestic decisions (4.4.2.).

4.4.1. Factors Determining the Evidentiary Value of Judicial Determinations

There has been a habit of treating domestic judgments as evidence in the generic sense. In the view of the *Amco* Tribunal, for example, "judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal."[157] Similarly, the *Petrobart* Tribunal, considered such judgments as "evidence in the arbitration in question".[158] Seen in this light, the main factor determining the reception of domestic pronouncements would therefore seem to be their *relevance* to the domestic legal issues on which decision is required. Yet, this obviously fails to explain why particular judgments have sometimes been ignored in circumstances where these were clearly relevant. Rather, three factors appear to be capable of explaining the propensity of investment tribunals to follow domestic judicial determinations: the epistemic superiority of domestic courts, the circumstances in which the particular judgment has been invoked, and the quality of the judgment as such.

4.4.1.1. Domestic Courts' Expertise in Domestic Law

Some investment tribunals acknowledged that an important reason why it was appropriate to follow specific determination of a domestic court lay in the potential *epistemic superiority* of domestic judgments. Such superiority has frequently been recognized in relation to *questions of domestic law*. According to the *Chevron/Texpet (Lago Agrio)* Tribunal, "[a]s a practical matter, without more, the considered judgments of any municipal court applying its own municipal law, especially an appellate court, are (absent special circumstances) the best evidence of the content and application of that law to the same or similar situations."[159] In a similar way, the *Vigotop* Tribunal felt it appropriate to give "due consideration" to a Supreme Court judgment because the latter was evidence of Hungarian law.[160] In some cases, however, investment tribunals seemed prepared to recognize domestic courts superiority also when it came to determining *questions of fact*.

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[156] *Vigotop v Hungary* (n 23), [509], [535].

[157] *Amco v Indonesia* (n 16), 177.

[158] *Petrobart v Kyrgyz Republic* (n 4), 41 (observing that 'a judgment rendered by a foreign court of law may well become relevant as evidence in the arbitration in question').

[159] *Chevron (Track 1B)* (n 88), [140].

[160] *Vigotop v Hungary* (n 23), 509; *Chevron (Track 1B)* (n 88), [140]; *Teco Guatemala v Guatemala* (n 90).

The relatively greater capacity of domestic courts to determine facts relevant to establishing bribery or corruption would seem to explain, for example, the willingness of the tribunals in *Telsim, Nico Resources,* or *TSA* to consider or even take into account domestic judgments in determining the legality of a particular investment. It would also explain the propensity of the tribunals in *Tecmed* or *Rompetrol* to rely on domestic judgments as evidence on questions of public concern or national security.

4.4.1.2. Attitude of the Litigating Parties towards the Judgment

An obvious factor explaining the reception of judgments on the part of investment tribunals is also the *context* in which the particular judgment has been invoked, and particularly the *acceptance of the judgment on the part of the litigating parties*. As attested to by the awards in *Feldman, PSEG,* or *SIAG,* it appears that tribunals will have little incentive to ignore a domestic judgment where none of the litigating parties opposes it. In contrast, as suggested by the awards in *Inceysa, Fraport, Biwater/Gauff*, *Malicorp*, or *Chevron*, tribunals might be more inclined to ignore a particular judgment when one of the litigating parties will contest it. As further shown by the award in *Saluka*, where a litigating party will accept in earlier proceedings a judgment to be binding, it will be difficult to contest the same judgment in proceedings before the investment tribunal. The acceptance of a particular judicial determination on the part of investment tribunals appears, on the other hand, to be less contingent on which of the litigating parties will be relying on it. Admittedly, one could be tempted to argue that investment tribunals will have greater reservations about judgments that are favorable to the Respondent State, given that such judgments stem from one of the State's own organs.[161] In practice, however, investment tribunals have refused with equal frequency to give weight to domestic judgments that appeared favourable to the Claimant,[162] and conversely, to accept judgments that were clearly favorable to the Respondent's position.[163]

4.4.1.3. Quality of the Domestic Judgment

The third factor that seems to have been of influence on the tribunals' propensity to take account of particular judicial determinations is the *quality of a particular judgment*. At the more basic level, a determinative factor in this respect will be the *validity* of the decision as such. In *SPP*, for example, a key reason for the findings of fact previously reached in a domestic commercial arbitration procedure was certainly the fact that the prior award had later been annulled by domestic courts.[164] Another factor will likely be the absence of any signs of *bias* on the part of the judicial body taking the decision. For example, in a number of arbitrations brought against Venezuela pursuant to its Foreign Investment Law, investment tribunals seem to have systematically ignored a decision of Venezuela's Supreme Court that had previously interpreted that law as not providing for the necessary consent to ICSID jurisdiction precisely because that decision was claimed to be politically tainted.[165] The question of possible bias would furthermore seem to explain why investment tribunals in cases such as *Niko Resources* or *Telsim* seemed to have had less

[161] See eg *Amco Asia Corporation and others v Republic of Indonesia* (n 16), *Mobil* (n 3) (and other cases brought against Venezuela pursuant to its foreign investment law), *Petrobart v Kyrgyz Republic* (n 4), *Luchetti* (n 67).

[162] Most notably in *Inceysa* (n 5), *Fraport I* (n 6).

[163] Vigotop v Hungary (n 23); Azinian v The United Mexican State (n 24); Liman Caspian Oil BV v Republic of Kazakhstan (n 25); Bosh International and B&P v Ukraine (n 27); Arif v Republic of Moldova (n 28); Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia (n 27).

[164] See also *Helnan v Egypt* (n 23), [163], suggesting that the effects of a prior domestic commercial award could be ignored only where 'it would be established that the rendering of the Award was made in breach of the Treaty, or general international law'.

[165] *Tidewater* (n 3), [31].

reservations about accepting judgments that stemmed from courts other than those of the Respondent State.

The quality of the judgment, however, has increasingly come to be understood in the sense of the *propriety of a particular decision from the perspective of international standards applicable to the administration of justice*. Already early in the practice of international adjudicatory bodies, the principle had found recognition that domestic courts' pronouncements will lack effect on the international plane where such pronouncements are tainted by denial of justice.[166] This same proposition has eventually been endorsed – both as a matter of principle and as a matter of fact – in the practice of investment tribunals. At the level of general proposition, investment tribunals thus frequently expressed themselves in favour of denying binding effect to domestic judgments that violate international law.[167] In accordance with the oft-repeated observations of the *Helnan* Tribunal, domestic judicial determinations have to be accepted "as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice."[168] Or as the *Grynberg* Tribunal put it, "BIT tribunals do not reopen the municipal law decisions of competent fora, *absent a denial of justice*."[169]

This "no deficiencies"-approach resonates with the practice of a great deal of investment tribunals that were prepared to accept domestic judicial determinations precisely because the domestic judicial process had been found to be in conformity with international standards of administration of justice. This was not only the case where the domestic judicial pronouncements in question formed the very object of the treaty claims – such as in relation to claims of judicial expropriation,[170] claims premised on court-attributed breaches of the umbrella clause[171] – which

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[166] See eg F Wharton, *A digest of the international law of the United States*, vol 2 (1886), sec 238, p 671 ('The defense of *res adjudicata* does not apply to cases where the judgment set up is in violation of international law.'); or Dissenting Opinion of Commissioner Nielsen in *Teodoro García and MA Garza (United Mexican States) v United States of America* (IV UNRIAA 119, 3 December 1926) 126 ('I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. *Possibly there may be an exception to this general rule in a case where it can be shown that a decision of a court results in a denial of justice*; that is, when a decision reveals an obviously fraudulent or erroneous interpretation or application of the local law.').

[167] *Feldman v Mexico* (n 13) [140] ('this Tribunal is not bound by a decision of a local court if that decision violates international law'); or *Waste Management, Inc v United Mexican States (I)* (ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet of 8 May 2000) [51] ('to the extent that the local remedies were unavailing, as in the present case, the NAFTA claimant's basis of claim against the contesting government would again be reduced by application of the *res judicata* of the unfavorable local result unless, and to the extent that, such unfavorable local result were to be considered itself as an international denial of justice.')

[168] *Helnan v Egypt* (n 23), 106.

[169] *Grynberg v Grenada* (n 138), [7.1.11], [7.1.14].

[170] *Arif v Republic of Moldova* (n 28), [415]-[417] (rejecting the claim that the judicial annulment of Claimant's concession amounted to expropriation *inter alia* on the ground that the Moldovan courts have not acted in denial of justice); or *Hassan Awdi v Romania* (n 131), [325]-[328] (considering that the repealing of a law by Romania's Constitutional Court would not have amounted to an expropriation in the absence of a denial of justice; referring specifically to *Helnan*'s 'no deficiencies'-test, [327]).

[171] See eg *Liman Caspian Oil BV v Republic of Kazakhstan* (n 25) [442]-[443] (accepting the result of domestic judicial proceedings on the ground that the Kazakh courts did not violate international law); or *Bosh International, Inc and B&P v Ukraine* (n 27), [258]-[259] and [276]-[286] (rejecting the claim under the umbrella clause since the contract had been validly terminated through Ukrainian court proceedings, which on their part did not violate any treaty standards); *Swisslion DOO Skopje . The Former Yugoslav Republic of Macedonia* (n 27) [265]-[275], and [323]-[325] (summarily disposing of the claim under the umbrella clause since the relevant contract was validly terminated by Macedonian courts, which on their part did not act contrary to international law in their treatment of the legal proceedings before them, or otherwise committed a denial of justice); *Arif v Republic of Moldova* (n 28), [398] (finding the claim under the umbrella clause inadmissible, inasmuch as the relevant contracts had been irrevocably annulled by the whole of the Moldovan judicial system and the Tribunal was persuaded that there had been no denial of justice towards the investor). For similar views, see also *SGS v Philippines (Decision of the Triubunal on Objections to Jurisdiction)* (ICSID Case No ARB/02/6, Dissenting Opinion of

were rejected by investment tribunals precisely because of the fact that the impugned judicial conduct conformed with international standards. Also in other situations where domestic judicial pronouncements were relevant to the treaty claims – in that they confirmed the domestic legal validity of certain measures,[172] or purportedly affected the stability of the domestic legal framework[173] – such pronouncements were accepted insofar as no impropriety had been found on the part of the courts. Indeed, even on the occasion where domestic judicial pronouncements were relevant to matters pertaining to the tribunal's jurisdiction, the tendency was expressed towards accepting such pronouncements "[a]bsent good cause for disregarding them", such cause potentially presenting itself if the pronouncements had been made in "blatant violation" of domestic law.[174]

The very same principle underpins arbitral decisions where domestic judicial determinations were, conversely, ignored precisely because the propriety of the judicial process, or that of the decisions themselves, was put into question. Most illustrative is perhaps the Interim Award in *Chevron/Texpet v. Ecuador (Lago Agrio)* (2015), where the Tribunal refused to accept the Ecuadorean courts' pronouncements on a point of domestic law relevant to the Claimant's treaty claim, inasmuch as the claim was premised on the purportedly wrongful adjudication on the part of Ecuadorian courts of Claimants' liability for environmental damage. The Tribunal considered that, in normal circumstances, it would have wished "to be guided" by Ecuadorian courts as regards relevant issues of Ecuadorian law; however, in the exceptional circumstances where Claimants alleged multiple denials of justice at the hands of the Respondent's Courts, the Tribunal considered it was "precluded" from adopting a deferential approach.[175] But already in the earlier award in *Chevron/Texpet v. Ecuador* (2010), no account was taken of, nor consideration given to domestic Ecuadorean judgments relating to Claimant's contractual claims, precisely because those judgments had been rendered after delays that were found to be so unreasonable as to amount to a violation of the applicable BIT.[176]

Interestingly, the "no deficiencies"-approach was even followed in cases where the propriety of the domestic judicial process was not even put into question. In *Vigotop*, for example, the Tribunal – in spite of its initially proclaimed intention to determine the domestic law issues for itself – eventually based its conclusions on a Supreme Court's decision, after it had itself found no evidence of any procedural unfairness in the conduct of the legal proceedings before

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Professor Crivellaro of 29 January 2004) [12], expressing the view that the claims which were otherwise found inadmissible under the umbrella clause could only return to the treaty tribunal in case of a denial of justice by the Philippine courts, which were the applicable contractual forum, for 'they cannot certainly return in case of a wrong judgment in the merits; we are not a Court of Appeal in respect of domestic courts.'

[172] See *Azinian v The United Mexican State* (n 24), 96-99, where Mexican judgments confirming the invalidation of Claimant's concession were accepted on the ground that, in circumstances where the Mexican law governing the validity of public service concessions was not in itself expropriatory, a governmental authority could 'not be faulted for acting in a manner validated by its courts' unless the conduct of such courts were 'disavowed at the international level'.

[173] See eg *Unglaube* (n 14), 251-253, rejecting a claim for violation of fair and equitable treatment premised on a purportedly *contra legem* interpretation of a domestic statute, on the ground that it was 'not appropriate for this Tribunal to substitute an opinion of its own or make any finding of liability unless the Attorney General and the Court are found to have acted in a manner which is arbitrary, discriminatory or otherwise shocking to the conscience.'

[174] See *Ares v Georgia* (n 7), 5.4.26-5.4.28, where the Tribunal, though having rejected the possibility of being bound by determinations made by the Georgian judiciary, nonetheless held that, '[a]bsent good cause for disregarding them, we see no principled reason why this Tribunal ought not to look carefully at the conclusions of the Georgian courts […] to assist us in reaching our own conclusions.'

[175] *Chevron (Track 1B)* (n 88), [140]-[142].

[176] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Partial Award on the Merits)* (UNCITRAL, PCA Case No 34877, 30 March 2010) [377]. Respondent relied on some of them with a view to proving that Claimants' contractual claims would have failed See eg [436] or [465].

the Hungarian courts.[177] Conversely, the decisions of the tribunals in *Luchetti, Biwater Gauff* and *Malicorp* not to give weight to prior determinations by local courts or contractually-designated adjudicatory fora can be compellingly explained by deficiencies in the local adjudicatory process. In *Luchetti,* for example, the Tribunal's decision not to attribute significance to Peruvian judgments seemed to have been motivated by Respondent's own allegations that those judgments had been attained under "corrupt and egregious circumstances".[178] In *Biwater Gauff*, it was Claimant's complaints about irregularities which allegedly occurred in the local arbitral procedure that most likely weighed in to the Tribunal's decision eventually to ignore the local commercial award in its entirety.[179] In *Malicorp*, instead, it was the Respondent's opposition to the validity of the contractual dispute settlement procedure leading to the local commercial award that seemingly prompted the ICSID Tribunal to re-examine the latter's conclusions.[180]

The making of the propriety of the domestic adjudicatory process into a key element controlling the reception of domestic judicial pronouncements on the part of investment tribunals has arguably the advantage of moving the discussion away from doctrinal inquiries as to the possibility of domestic judicial decisions having *res judicata* effects on the international legal plane, into a more pragmatic, circumstances-specific treatment of each judicial precedent. Not only does such approach enable tribunals to avoid taking stances on difficult doctrinal questions, but importantly, also accords greater respect to domestic judicial organs which, at the end of the day, still enjoy epistemic superiority on questions relating to the interpretation and/or application of domestic law. In this regard, the "no-deficiencies" approach also aligns in a better way with international tribunal's general duty to construct domestic law in accordance with domestic judicial authorities – a matter that will more extensively be discussed in chapter 5. Finally, practice suggests that the "no deficiencies" approach can easily be fitted into a variety of claims. Not only has such approach been followed in relation to claims that were wholly or partly predicated on alleged judicial misconduct;[181] as attested to by the *Helnan* and *Vigotop* awards, it can equally been applied in circumstances where the particular judicial conduct is not otherwise part of the cause of action.[182] Where, on the other hand, the tribunal's competence to undertake such an inquiry is put to question, the investment tribunals are still at liberty to simply ignore domestic judicial pronouncements – just as in the *Malicorp* and *Biwater Gauff* cases, where tribunals also refrained from actually making any pronouncements as to the propriety of the domestic adjudicatory process.[183] In light of this practice, it is perhaps not surprising that the idea of the reception of particular domestic pronouncements being contingent upon the quality of domestic decision-making processes has also been gaining support in academic writings.[184]

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[177] *Vigotop v Hungary* (n 23), [510].

[178] *Luchetti* (n 67), [37].

[179] *Biwater Gauff* (n 19), 466-477.

[180] *Malicorp (Award)* (n 21), 103(d); cf 44-60.

[181] cf Liman Caspian Oil BV v Republic of Kazakhstan (n 25), Arif v Republic of Moldova (n 28), Hassan Awdi, Bosh International and B&P v Ukraine (n 27), Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia (n 27), *Chevron (Track 1B)* (n 88) and *Chevron (Contractual Claims)* (n 176).

[182] *Helnan v Egypt* (n 23), *Vigotop v Hungary* (n 23).

[183] *Biwater Gauff* (n 19), *Malicorp (Award)* (n 21). The Tribunal in *Malicorp* even explicitly noted that it was not for itself to rule on the validity of the commercial award – since in the circumstances of the case it had not been asked to do so, and since the Respondent could not, at any rate, be held liable for a decision made by an autonomous commercial arbitral tribunal. [103(d)]

[184] See C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2009), [3.81] (affirming that in the absence of any evidence that the findings of domestic law by national courts, tribunals, or regulatory bodies are tainted by some lack of due process, deference should be shown to those findings); or M Swarabowicz, 'Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System' (2017) 8(2) JIDS 280, at 301 (advancing the proposition that the preclusive effect of a local judgment be recognized, 'to the extent that it is procedurally unimpeachable and the local law does not oblige him [i.e. the court] to rule in favour of the host State.').

4.4.2. Standard of Review Applicable to the Scrutiny of Judicial Determinations

A final matter that needs to be considered is the standard of review that investment tribunals have applied to the scrutiny of domestic judicial pronouncements. As noted in the preceding sections, the standard has in many cases been a non-deferential one: tribunals proceeded to determine the relevant issue of domestic law for themselves, *de novo*, ignoring thereby any pronouncements that had previously been made in respect of that issue by domestic courts. However, where investment tribunals were prepared to accord weight to domestic judicial pronouncements, they did not subject them to a particularly heightened scrutiny.

Granted, the cases where domestic judicial pronouncements have been accorded *total deference* – in the sense, that they were applied as they were, without more – were rather exceptional ones. This might have been the case where a particular pronouncement was not subject of contention between litigating parties, [185] or else where the validity of such pronouncements was not put to question.[186] In most situations, the standard of review was a deferential one. First, investment tribunals have by and large rejected the idea of subjecting domestic judgments to a test of *correctness*. The most vocal objections in this respect were expressed the Tribunal in *Arif*, which did not wish to reconsider whether Moldovan courts correctly annulled Claimant's contract on the ground that it was "not a court of appeal of last resort" and that there was "no compelling reason that would justify a new legal analysis by this Tribunal regarding the invalidity of these agreements which has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system."[187] Second, and most notably, tribunals have frequently also refrained from subjecting domestic decisions to the less-intrusive test of *reasonableness*. Exceptions are the awards in *Vigotop*, where the Tribunal's acceptance of the domestic court's findings was actually premised on the fact the reasoning of that court was deemed "'credible' and persuasive under the circumstances",[188] and in *Malicorp*, where the Tribunal went as far as noting that the decision of the contractual arbitral forum to award damages did "not seem unreasonable", even if the Tribunal did not otherwise base its own conclusions on the said decision.[189] Apart from that, however, the greatest part of investment tribunals were satisfied with the least-intrusive *"no-deficiencies"* test. This implied that a domestic court's decision was accepted on its substance, as long as the process leading to it complied with the international standards applicable to the administration of justice.[190]

All in all, the approach of investment tribunals would generally seem to accord with the practice of other international adjudicatory bodies when reviewing domestic judicial pronouncements. On the one hand, it accords with that of the ICJ, which has had the inclination of accepting domestic judicial pronouncements when these were not disputed by either of the parties,[191] and in other situations subjecting them to the test of manifest incorrectness.[192] On the

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[185] See eg Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt (Award) (ICSID Case No ARB/05/15, 1 June 2009).

[186] See eg *Invesmart v Czech Republic* (n 10), 192-193. Accepting Czech courts' findings with respect to validity of a share purchase agreement to the extent it was not asked by the parties to rule on the question of validity.

[187] *Arif v Republic of Moldova* (n 28), [416].

[188] *Vigotop v Hungary* (n 23), 535.

[189] *Malicorp (Award)* (n 21), [143].

[190] See cases quoted *supra* in 4.4.1.3.

[191] See eg *Fisheries case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116 (18 December 1951), 134, and Dissenting Opinion of Sir Arnold McNair, [1951] ICJ Rep 158, at 181 ('But this Court, while bound by the interpretation given in the St. Just decision of Norwegian internal law, is in no way precluded from examining the international implications of that law'); and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177 (4 June 2008), 146 ('It is not for this Court to do other than accept the findings of the Paris Court of Appeal on this point.').

other hand, it would seem to accord with that of the ECtHR, which was prepared to subject domestic judicial pronouncements on points of domestic law to greater scrutiny in circumstances where domestic law needs to be considered by way of *renvoi* (as opposed to other circumstances where domestic role is merely relevant as a fact).[193]

The practice of investment tribunals also confirms that, as a standard of review, deference does not necessarily imply that domestic decisions may not be subject to intensive scrutiny. Illustrative in this respect is the *Feldman* award, where the issue arose as to whether a decision of Mexico's Supreme Court decided solely the question of Claimant's entitlement to a zero percent tax rate in relation to its tobacco reselling business, or whether it also decided the question of specific invoicing requirements that in practice prevented the Claimant from benefiting from that tax rate. After a careful scrutiny of the Supreme Court's decision, the ICSID Tribunal concluded the former was the case, basing itself not only on a textual reading of the judgment (in the view of the Tribunal, "a careful reading" of the decision revealed no mention of the statutory provision imposing the invoicing requirement[194]), but also on its teleological interpretation (the fact that the judgment might not have addressed or resolved the invoicing question did not render it meaningless, since the judgment still had considerable practical benefits in that it protected Claimant's entitlement to a favorable tax rate with respect to items whose export did not give rise to invoicing problems).[195]

4.5. Conclusions

The conclusions that one can tentatively draw from this examination of arbitral jurisprudence are the following. Investment tribunals have by and large been dismissive of the idea that they would be under a legal duty to follow the outcome of domestic court procedures, and specifically, to be formally bound by previous domestic judicial pronouncements on points of law and/or fact that were relevant to the issues in proceedings before them. In practice, tribunals have been the least inclined to accord the effect of *res judicata* to those domestic judicial pronouncements which purported to put into doubt the existence or scope of their own adjudicatory powers. This, in itself, is not surprising. As discussed in chapter 2, investor-State arbitration was intended to provide an alternative to domestic litigation. Accepting that domestic courts could affect the operation of investment tribunals would end up rendering investment arbitration an ineffective dispute settlement mechanism; indeed, it would go against such mechanism's *raison d'etre*.

What is interesting in this regard is that the failure to satisfy the formal requirements for *res judicata* – the identity of the parties, facts, causes of action – was rarely invoked as the main reason for declining effects to a domestic judgment. In justifying their decision not to follow or take account of domestic judicial pronouncements, investment tribunals more often provided other justifications. Many of them built on the argument of supremacy of international law, and the related arguments underpinning such supremacy – namely, the idea that a host State should not be permitted to (ab)use its domestic law to avoid its international responsibility, as well as the idea that a host State should not be sitting as judge in its own cause (the *nemo judex* principle). Another group of arguments were those pertaining to the dualist separation of legal orders. In the end, however, investment tribunals appeared most comfortable in simply invoking specific powers or duties bestowed upon or enjoyed by them, by virtue of their adjudicatory functions:

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[192] See *Ahmadou Sadio Diallo* (n 120), [70] (referring to the Court's power to ignore a domestic judgment 'where a State puts forward a manifestly incorrect interpretation of its domestic law').

[193] *Case of Kononov v Latvia (Judgment)* (ECtHR, Application no 36376/04, 24 July 2008) 198.

[194] *Feldman v Mexico* (n 13), 121.

[195] ibid 122.

the *kompetenz-kompetenz* principle entitling them to be judges of their own jurisdiction, and the duty to autonomously appreciate the evidence submitted to them.

These general inclinations notwithstanding, the examination of arbitral practice has also disclosed how some investment tribunals have nonetheless been prepared to recognize, under specific circumstances, the preclusive effect of domestic judicial decisions in relation to questions of domestic law that were relevant to the claims before them. Such acceptance of domestic pronouncements most frequently occurred in the context where the subject of prior judicial determinations were certain contractual issues on which the subsequent international claim was premised. The fact that investment tribunals were prepared in such cases to accept those pronouncements is, in itself, again not surprising. In circumstances where the investor has already had contractual issues determined by domestic courts, the possibility of those same issues being reconsidered by the investment tribunal would effectively turn the international procedure into a form of appellate review. But while the idea of foreclosing re-litigation of already settled issues is inherent to the doctrine of *res judicata*, investment tribunals rarely formulated their duty to follow domestic courts pronouncements on such contractual issues in terms of that doctrine. Many times, prior pronouncements were simply followed as a matter of practice, *de facto* giving rise to issue preclusion in the subsequent arbitration procedures.

What the examination of arbitral practice has finally revealed is that the extent to which investment tribunals will be prepared to defer to domestic judicial pronouncements will ultimately depend upon the quality of those pronouncements. Investment tribunals will more likely accept the outcome of those domestic judgments which emanate from independent, disinterested judicial decision-makers, and which are not tainted by deficiencies in procedure or substance. In other words, investment tribunals will likely accord deference to domestic judgments as long as the propriety of those judgments will not be put into question from the perspective of international law. As a matter of general policy, there are certainly good reasons for according deference to domestic courts under such specific conditions. Domestic courts will generally have better knowledge of domestic law than arbitrators on investment tribunals. They will usually be also better placed to make certain factual determinations that are relevant to the application of domestic legal rules. But the reasons for according deference are not only practical ones. As the following chapter will demonstrate, investment tribunals are not at freedom to entirely ignore the pronouncements of domestic courts on points of domestic law. On the contrary, they are also under a duty to interpret and apply that domestic law in accordance with the domestic jurisprudence.