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12. Final Conclusions and Reflections

Bringing this enquiry to an end, it is now necessary to revert to the essential premises of this study and re-state the three broad roles performed by domestic courts in investment arbitration. This shall provide the basis for some final reflections.

12.1. Domestic Courts as Partners

Though nowadays mostly established pursuant to dispute settlement provisions provided for in investment treaties and predominantly mandated to decide claims based on international law, investment arbitral tribunals are bound to decide disputes that are intrinsically linked to host States' domestic law. The domestic legal framework – comprising the host State's commercial, fiscal, labor, environmental, and other legislation – provides the principal parameters within which foreign investors operate. In fact, it is in the host States' law that the very proprietary rights and interests, which form the object of protection by investment treaties, are grounded in the first place. Not to mention a number of other important roles that domestic law more broadly continues to have in the context of investment arbitration – such as where it comes to determining the investors' nationality or that of the corporate vehicle through which they are investing, or when it comes to ascertaining the existence of an agreement to arbitrate. Despite the ascendance of international law as the primary benchmark through which the propriety of host States' dealings with foreign investors is now measured, domestic law remains relevant to a number of issues before investment tribunals – and thereby also domestic judicial organs, as interpreters of that law.

It was one of the premises of the present inquiry that, especially when it comes to the law-ascertainment process, it was possible to conceptualize domestic courts as partners to investment tribunals: as the bodies primarily entrusted with the interpretation and application of domestic law, domestic courts, through their pronouncements in concrete cases, are namely expected to be capable of assisting tribunals in determining points of law that are necessary to decide the cases before them. But as the inquiry eventually showed, such partner role was not accepted without some reluctance. Indeed, tribunals generally approached domestic courts with a certain duality. On the one hand, they frequently expressed reservations about *concrete* pronouncements previously made in domestic judicial proceedings involving the investor and/or its investment. Though occasionally prepared to formally accord such pronouncements preclusive effect in relation to matters that were relevant to the merits of a particular treaty claim, tribunals mostly refuted the idea of being legally bound by domestic judgments, especially where such judgments purported to put into doubt the existence or scope of their own adjudicatory powers. On the other hand, tribunals with equal frequency acknowledged the great utility of domestic jurisprudence in the law ascertainment process *in general* and in practice recurrently resorted to such jurisprudence in determining questions of domestic law that were relevant to determining issues pending before them. This duality, as the present inquiry explained, is but the necessary consequence of the fact that domestic judgments, as any other outcome of adjudication, generate effects at both the concrete and the abstract levels. Whilst less inclined to give deference to prior determinations made by domestic courts in deciding controversies involving the concrete foreign investor, tribunals had little trouble accepting the role of jurisprudence generally in the law-ascertainment and law-clarification at the abstract level.

Taking a step back, the inquiry further noted that, in spite of formal disclaimers regarding the purported lack of *res judicata* effects of domestic court pronouncements, investment tribunals

nonetheless accorded them weight in practice. Ultimately, what appeared determinative of whether or not deference will be given to prior judicial determinations was the quality of the latter. Regardless of whether the determinations in question were relevant because of concrete pronouncements *in casu*, or because of general pronouncements *in abstracto*, investment tribunals have been prone to accept them as long as they emanated from independent, disinterested judicial decision-makers, and were not tainted by deficiencies in procedure or substance – that is, as long as they were unimpeachable from the perspective of international standards. From the vantage point of investment tribunals, domestic courts were thus seen as partners in the law-ascertainment process, provided that their overall conduct did not turn them into suspects. This partner role manifested itself not only where the need arose to clarify ambiguous statutory provisions or to determine points of law not otherwise capable of being determined by simple application of statutory provisions, but also where domestic courts' findings of fact proved valuable to the matters before investment tribunals.

At the end of the day, there are many good reasons for according deference to domestic courts' judgments. Some of them are perhaps practical ones. As arbitrators sitting on investment tribunals are not chosen for their particular knowledge of domestic law (and in fact, the arbitrators' detachment from the host State is even considered the main advantage of investment arbitration), reverting to domestic courts' judgments may potentially substitute lacunae in the arbitrators' knowledge of domestic law. Furthermore, in view of their fact-finding powers, domestic courts may also be better placed to make particular factual determinations. But even as a matter of law, investment tribunals are not entirely free to ignore domestic courts' jurisprudence in determining points of domestic law that are essential to their decision. In being adjudicatory bodies applying a law originating from a legal order other than the one to which they owe their existence, tribunals are actually bound to consider the case law of domestic courts, for they are obliged to interpret and apply domestic law in such way as it would actually be applied in the domestic legal system. While this may not translate into an autonomous obligation to engage *proprio motu* in their own research of relevant case law, it does at the very least require from arbitrators to seek the views of the litigating parties as to any domestic jurisprudence that may be pertinent to the interpretation or application of domestic law before them.

12.2. Domestic Courts as Suspects

In adjudicating investment disputes, investment tribunals may need to revert to domestic courts for reasons other than those pertaining to ascertaining the content of the applicable law. As part of their judicial function, courts conclusively determine legal relationships between litigating parties, and in the exercise of that function, they not only have the capacity, but also the propensity to confirm, amend, or extinguish particular rights existing under domestic law. As those rights may themselves constitute protected assets under an investment treaty, or else be relevant to the operation of the investment, their judicial treatment may hence affect the interests of investors. In consequence, the conduct of domestic courts may itself become the object of scrutiny insofar as investment tribunals may have to assess the conformity of such conduct with the State's obligations under an applicable investment treaty and/or international law more generally.

Given the capacity of investment tribunals to review the propriety of the impugned judicial conduct from the perspective of international standards, the inquiry thus proceeded from the assumption that, in the particular context where their conduct will be perceived as injurious to the investor and/or its investment, domestic courts will be approached on the part of investment tribunals with a certain level of suspicion. A large part of the inquiry has thus been devoted to discussing the standards pursuant to which such "suspect" conduct of domestic courts has generally been scrutinized. The analysis of arbitral practice revealed in this respect a

twofold tendency. On the one hand, it demonstrated that it has been principally through the lens of the denial of justice concept that investment tribunals appraised the propriety of judicial action. Whilst firmly established as part of the minimum standard of treatment under customary international law, in the context of investment treaties, the prohibition of denial of justice was taken to be subsumed under the fair and equitable treatment standard, which could thus be violated on account of judicial misconduct. On the other hand, however, the discussion also pointed to the growing inclination of tribunals to review judicial conduct against other standards of treatment prescribed by investment treaties.

One need not look far to find the reason for this trend. Denial of justice has categorically proven difficult to establish, as attested to by the remarkable scarcity of cases where a host State had been found liable for having failed to accord fair and equitable treatment on account of inadequate administration of justice. As demonstrated in the analysis, this is not because investment tribunals have come to treat domestic courts with greater circumspection than other State organs, but because the test for establishing a denial of justice is considered to set a high threshold: only the gravest irregularities in domestic proceedings and only the most egregiously wrong judgments are deemed capable of engaging the responsibility of the State. Given the rather feeble prospects for successfully holding a State liable on the ground of denial of justice, it is therefore not surprising that investors have increasingly sought to rely on other standards of treatment prescribed by investment treaties in an attempt to obtaining redress for the injuries purportedly suffered at the hand of the host State judiciary.

But such attempts have not been without conceptual challenges. Investment treaties rarely, if ever contain concrete stipulations as to the treatment that the investor is entitled to receive at the hands of the judiciary. The extent to which a particular treaty standard is actually susceptible of being violated through the intermediary of the courts essentially depends on the nature of the obligation. The problem is not so much with treaty obligations that can possibly be construed as demanding particular judicial outcomes, but rather with those that could be taken to require judicial treatment of a particular kind. As many of the obligations currently found in investment treaties find their origins in obligations deemed to form part of the minimum standard of treatment under customary international law, the difficulty in this respect revolves essentially around the question as to how such treaty standards precisely relate to the concept of denial of justice – a concept which, as part of the minimum standard, provided the chief normative framework for assessing the propriety of judicial conduct. Perhaps not surprisingly, a number of investment tribunals found no reason to draw categorical distinctions between disparate treaty standards when these are applied to the administration of justice. The standards of fair and equitable treatment, of full protection and security, of non-impairment, and even the due process obligation that commonly conditions the legality of expropriations were hence oftentimes interpreted as all entailing the same fundamental obligation that demands from the State the provision of an adequate system of justice. But there has also been a tendency to construe treaty standards as being additive to the customary international law standard of denial of justice. This has not solely been the case with treaty clauses requiring the provision of "effective means of asserting claims and enforcing rights", which were considered to set out an independent treaty standard that in relation to the system of justice demands more than what is required under customary international law. But it has also been observable in the growing acceptance of the possibility that the fair and equitable treatment standard itself can be violated by courts in other ways than through denial of justice.

The question in this respect has not been solely about whether specific treaty standards could be taken to impose more exacting or demanding obligations upon the judiciary than the denial of justice standard, but perhaps even more about whether the violations of such standards could be procedurally easier to establish. In the context of denial of justice claims, judicial finality has namely been accepted as a substantive condition of claims, meaning that responsibility could

only be engaged once the judicial system as a whole has been tested. But such a judicial finality requirement has obviously not been sitting well with the system of investor-State arbitration where prior recourse to local remedies has generally been dispensed with as a condition for resorting to the international forum. Therefore, the prospect of measuring purportedly improper judicial treatment against disparate treaty standards – standards that are susceptible of being construed as imposing more onerous demands upon courts than merely an "adequate" administration of justice – is thus also a question of whether judicial finality can be avoided as a condition for establishing liability.

In its origins, the case for judicial finality has essentially been a case for preventing international treaty tribunals from sitting as regular courts of appeal from decisions emanating from domestic courts, and for preserving the integrity of the domestic legal system, without at the same time preventing treaty tribunals from ultimately exercising some form of external control. The tendency to construe treaty standards as imposing more rigorous demands from domestic adjudicatory processes than those flowing from the general duty of an adequate administration of justice is ultimately a tendency towards lesser deference being accorded to domestic courts. But it is also a tendency that decontextualizes the operation of the domestic courts from the local law that these are interpreting and applying in administering justice. This tendency is based on the presumption that the propriety of domestic adjudicatory processes can conclusively be determined without having to deal with domestic law at all. It is obvious that this presumption can be appealing to investment tribunals, composed as they are of arbitrators not necessarily familiar with the applicable domestic law. But it is certainly debatable as a practice.

12.3. Domestic Courts as Competitors

Investment arbitration may have become the preferred method for the settlement of investment disputes; in fact, as one that obviates the need for prior recourse to domestic courts. In many cases, however, the measures adversely affecting an investment and that usually form the predicate of claims before investment tribunals may equally be justiciable in host State courts. In many countries, the legality of decisions of public authorities and other acts involving the exercise of public power may for example be tested before specialized (administrative) courts. In some jurisdictions, the conduct of public authorities may be subject to constitutional challenges; in others, the possibility may exist to contest such conduct through tort actions. Leaving aside potential constitutional or statutory limitations preventing suits against State organs or governmental agencies, domestic courts may often themselves provide an avenue for redressing injuries suffered by the investor.

Underpinning the present inquiry was hence the proposition that domestic courts, to the extent that they may be in a position to claim adjudicatory authority over particular grievances incurred by investors, are capable of being perceived also as competitors to investment tribunals. What the inquiry demonstrated on this point is that, in response to such adjudicatory competition, investment tribunals had by and large the propensity of not treating domestic courts on terms of mutual equality. Whilst generally inclined to construe their own jurisdiction in such ways that allowed them to avoid formal jurisdictional overlap with domestic courts, arbitrators were largely predisposed towards solutions that allowed them nonetheless to assert adjudicatory authority over disputes involving the investor and the host State. In general, the path favoured was the one leading to arbitration, with no deference being accorded to domestic courts.

Such solutions would not have been possible was it not for the internationalization of investment protection standards, which enabled investment tribunals to emancipate themselves from the normative reach of domestic law, and thus from the adjudicatory scope of domestic courts. Indeed, the primary argumentative device employed by tribunals to assert authority over

investment disputes and to claim priority in their jurisdictional interactions with domestic courts turned out to be the conceptual distinction between the normative sources in which each claim was grounded. As adjudicatory bodies deriving their mandate from treaty instruments vesting them with the task of applying standards prescribed by international law, investment tribunals were capable of conceiving themselves as international organs operating at a different level than domestic courts. The fact that the courts could equally be competent to adjudicate upon disputes arising out of the same underlying facts could not affect the tribunals' own mandates, for courts, as organs of the host State, were presumed to apply standards provided for by domestic law, which are formally not the same as the international standards applied by the investment tribunals themselves. And insofar as each of them was thus taken to be applying different sources of law, investment tribunals were not perceived as encroaching upon the adjudicatory authority of domestic courts, or otherwise infringing upon the integrity of potentially applicable domestic adjudicatory procedures.

The investment tribunals' predisposition for solutions leading towards arbitration was so pervasive that most attempts at regulating interactions between investment tribunals and domestic courts – be it through treaty devices, be it through contractual stipulations – have largely been ineffective: investment tribunals persistently refused to abrogate their adjudicatory authority in favor of domestic courts. This predisposition was perhaps most pronounced in the interpretation and application of treaty provisions that actually envision a role to be played by domestic courts in the resolution of investment disputes – such as fork-in-the-road clauses or mandatory local litigation requirements. The former were mostly not given effect on the simple ground that claims based on domestic law considered by domestic courts could not prevent claims grounded in international law to be considered by investment tribunals. The latter, on the other hand, were frequently avoided as mandatory prior domestic litigation was either taken to be less favourable to investors than direct recourse to treaty arbitration or appeared futile in the circumstances of the case. Treaty stipulations notwithstanding, domestic courts were not thus perceived as adjudicators on par with investment tribunals. Informing the tribunals' approach to the interpretation and application of such treaty provisions was a fundamental distrust towards domestic courts and a disbelief in their ability to achieve a final disposition of investment disputes.

But also when it comes to the interpretation and application of contractual stipulations entered into between the investor and the host State, or the appreciation of the investors' conduct in relation to local litigation more generally, investment tribunals were not particularly prone to relinquishing their competence over a particular dispute in favour of domestic courts. Contractual forum selection clauses were thus by and large interpreted narrowly and not deemed capable of having a preclusive effect on the investment tribunals' own jurisdiction in the absence of contractual privity and perfect identity of subject matters. Absent very clear language to the contrary, contractual stipulations were thus not taken as being capable of giving rise to a renunciation of treaty procedures and the mere pursuit of prior local litigation was neither accepted as amounting to an implied waiver of treaty remedies, nor capable of giving rise to an estoppel. The right to the international remedy was not one to be renounced easily – indeed, it was often seen as a right that was not capable of being renounced at all. All in all, in the circumstances of adjudicatory competition, investment tribunals did not conceive of themselves as functional alternatives to domestic courts – they asserted themselves as the primary forum for the resolution of investment disputes.

12.4. The Rise of Arbitral Power over Domestic Courts – Final Reflections

Based on the findings of the present inquiry, it is now possible to extract some of the common themes and points of analysis, and reflect on what their implications are for the investment

arbitration practice. The intention is not so much to provide concrete proposals; rather, such reflection may have value in framing the path for reform of the system.

12.4.1. Between Authority and Competence: Who Ultimately Decides?

Informing the interactions between investment tribunals and domestic courts is, at the core, the question as to who has ultimately the authority o decide particular matters. This question, as the present author sees it, is not so much about which adjudicatory body is to decide specific claims. In that sense, the present inquiry does not problematize the existence of international investment tribunals' arbitral powers as such. Reviewing host States' conduct for violations of international obligations – obligations to which they themselves subscribed – is believed to be an appropriate function for investment tribunals; indeed, part of their very own mandate. Nor has it been the intention to question whether investment tribunals' proper role extends to the scrutiny of domestic judicial conduct. The purpose of investment arbitration may not be to directly correct injustices that transpire in domestic courts. But it certainly is its proper task to determine whether the conduct of host State organs, including judicial ones, conforms with international law. In submitting to arbitral review, states must be presumed to have intended to submit to arbitral review their action in all of its forms. Indeed, as some of the cases discussed in this dissertation amply demonstrated, there is certainly a need for an international mechanism that can ultimately check the power of domestic courts as well.

The more difficult issue is the finer one: who is ultimately to decide questions of applicable domestic law – questions which are normally and properly within the remit of domestic courts. This is not an issue that allows for simple answers. The problem is admittedly not unique to investment arbitration, but equally arises in other contexts of transnational interactions between different adjudicatory bodies, where one set of adjudicators may be called upon, or may be put in a position, to determine points of law on which they may not be particularly knowledgeable. In the context of investment arbitration, however, the problem is an exacerbated one. Not only because investment tribunals – in contrast to other international courts or tribunals – may actually have to apply domestic law, alongside international law. But especially because they may have to do so without the benefit of prior pronouncements on contentious points of domestic law by competent domestic courts, given that access to them is under most treaties not conditioned on prior recourse, let alone exhaustion of local remedies – a circumstance which again sets them apart from most other international courts and tribunals.

When the issue is one of applying domestic law, investment tribunals obviously venture into a field where their authority is not self-evident. This is not to say that investment tribunals are not capable, where required, to identify and apply the pertinent rules of domestic law.[1] Their authority to do so, however, is not unbound. Tribunals must obviously strive to discern the law as it is actually applied in the host State, and not settle on an account of domestic law that they deem preferable. The latter may be tempting, especially where parties in an arbitration submit conflicting expert reports on domestic law, each on the face of it equally convincing. It also follows that it is not for investment tribunals to conclusively decide contentious issues of domestic law. These are more properly within the remit of domestic courts, which possess greater knowledge and expertise, but also greater legitimacy to do so.[2] Especially where domestic

[1] Cf G Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' (2005) 21 Arbitration International 631.

[2] The present author thus disagrees with the proposition advanced by Paulsson that international courts and tribunals, including arguably investment tribunals, must have at least equally great authority as domestic courts to annul or disregard laws which violate domestic mandatory laws (and not merely violate international law). See J Paulsson, 'Unlawful Laws and the Authority of International Tribunals' (2008) 23 ICSID Review - Foreign Investment Law Journal 215, at 224; and id, *The Idea of arbitration* (OUP, 2013), 239.

legal problems have potential public implications, it is for domestic courts to address and settle them, by paying due regard to the interests of all relevant stakeholders. It is for investment tribunals, in turn, to ensure that domestic courts get the chance to do so, if necessarily by organizing arbitral proceedings in a way that makes it possible for domestic courts to make pronouncements on the issues in contention. In some circumstances, this may mean awaiting for the outcome of domestic proceedings.

When it comes to deciding questions of domestic law, it is therefore the opinion of the present author that investment tribunals must structurally accord deference to domestic courts. Not only as a matter of some discretionarily applied principle of comity,[3] but on principled grounds, accorded both for epistemic reasons and as a matter of proper allocation of authority.[4] Against this background, the present author does not find convincing the currently still prevailing reluctance on the part of investment tribunals to accept as conclusive prior domestic judicial determinations. Surely, domestic courts, in being closely tied to the state of which they are an organ, may not always be trusted to provide independent and impartial assessments of the state of the law, dispense justice with respect to the foreigner in a dispassionate way, or in general hold the respondent host State to the requirements of international law. But investment tribunals are also uniquely positioned to use international law to control and sanction domestic courts' abuses of domestic law, in the sense that they can determine whether particular judicial pronouncements have been rendered in compliance with international standards of procedural propriety and/or in accordance with the State's other obligations under international law. When these conditions have been satisfied, there is no reason why tribunals should not treat as authoritative – indeed, not take as conclusive – the points of law previously decided by domestic courts. The author therefore suggests that the deference (and authority) which should thus be accorded to domestic courts is not an absolute one, but one subject to the condition that those courts interpret and apply the law honestly and competently. The readiness of at least some tribunals to condition their acceptance of domestic judicial outcomes with the latter's compliance with international standards shows potential for such an approach.

12.4.2. Regulation, Co-Ordination: Return to the Local Remedies Rule?

The findings of the present study eventually prompt the question whether the relationship between investment tribunals and domestic courts need to be regulated differently than it is under the present regime.

It is difficult to imagine that, in its essence, investor-State arbitration would go away in the years to come. Surely, we may witness the establishment of one or more permanent institutions, perhaps even a standing multilateral investment court. Furthermore, it is likely that the current system of investment arbitration may undergo other significant reforms. However, as a *type of remedy* – namely, one that allows aggrieved foreign investors to bring claims against the host States of their investments in an international forum that operates outside the judicial system of that very same host State – investment arbitration is not likely to disappear. Its replacement would only be acceptable where another remedy is found that is deemed equivalent to, or at least approximately substitutable with, investment arbitration. Relegating investment disputes to the exclusive resolution by domestic courts does not appear a realistic option. One of the decisive advantages of investor-state arbitration over domestic judicial procedures is the fact that such arbitration operates independently from the domestic legal order of the host State, and is thus immune from any opportunistic behaviour that the latter may engage in with a view to avoiding liability. Unlike the operation of domestic courts, investment arbitration cannot be affected by

[3] Cf Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP 2007), 165ff.

[4] My understanding builds on P Daly, *A Theory of deference in Administrative Law: Basis, Application and Scope* (CUP 2012), 7ff.

measures introduced by the host State in the exercise of its sovereign powers (*puissance publique*), including opportunistic legislative changes of the domestic legal framework. Nor is it constrained by domestic constitutional and legislative limitations that may prevent domestic courts from reviewing impugned conduct of State authorities against internationally-prescribed standards,[5] or else from reviewing such conduct at all. Absent the ability to disimbed themselves from the domestic legal order, In the absence of this external positioning, the only way for domestic courts to offer a functional alternative to investor-State arbitration is in combination with State-to-State dispute settlement mechanisms – an alternative, however, which is generally seen as leading to the politicization of investment disputes and is unlikely to be implemented.

This is not to say that domestic judicial procedures cannot, in practice, operate as alternatives to international arbitration.[6] Indeed, in many respects, domestic procedures possess significant advantages over arbitral proceedings. Unlike investment tribunals, whose remedies are essentially limited to monetary awards, domestic courts actually have the power to annul impugned measures adopted by other State organs, to order injunctive or declaratory relief, and above all, the power to enforce compliance with their own orders. The present author therefore believes that their role in the resolution of investment disputes should not be neglected, but that their function be rather enhanced. But it is also true that foreign investors remain generally averse to local remedies for a number of more or less valid concerns related to the operation of the domestic legal system – be it because of a general discomfort with seemingly complicated foreign legal procedures, be it because of costly delays attributable to overburdened or idle courts, be it because of the risk of judicial bias or fear of arbitrary decisions rendered by incompetent judges. The challenge then is in recalibrating the relationship between domestic and international procedures in a way that allows for disputes to be dealt with at the most immediate level that is capable of resulting in their resolution, while at the same time retaining the ability to have recourse to an external adjudicatory body where domestic judicial organs are incapable or unwilling to adequately dispense justice. In other words, the task is to enhance investment arbitration's complementary character.

This is a task that requires rethinking a number of essential parameters under which investment arbitration has been operating. First, it entails reconsidering the scope of the treaties' dispute settlement provisions. By restricting such scope to claims concerning violations of the discrete standards of protection provided by the applicable treaty, one prevents investment tribunals from taking cognizance of claims relating to simple breaches of contract or breaches of specific domestic laws, reducing the potential of jurisdictional overlap with domestic courts. Second, it necessitates reconsidering the very terms of the standards of treatment prescribed. In formulating such standards less expansively and setting a higher threshold for establishing their violation (through the introduction of limitative or qualifying language, but also through the addition of explanatory and clarifying icatory provisions),[7] it is possible to discourage the use of investment arbitration as a mere alternative to domestic remedial processes. As claimants will want to make sure that their treaty claims have sufficient prospects of success, they may attempt perhaps more frequently recourse to local remedies instead. Third, and perhaps most importantly, it requires rethinking the conditions under which the international remedy is accessed. As the present inquiry demonstrated, two of the most commonly used treaty devices – fork-in-the-road

[5] On domestic courts' competence to adjudicate private treaty-based claims and their inadequacy for deciding investment disputes, see further M Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements', (2015) 18 Journal of International Economic Law 655, at 659ff.

[6] But see M Paparinskis, 'Investors' Remedies under EU Law and International Investment Law', (2016) 17 Journal of World Investment & Trade 919, suggesting that genuine comparisons on this point are difficult to make.

[7] See eg. Art 8.10 CETA, which limits the FET standard to a set of most egregious instances of misconduct; or Art 2.4(6) and (7) Singapore-EU IPA, which narrows the scope of the umbrella clause to adverse measures adopted by the host state in the exercise of governmental authority, preventing simple contractual breaches to serve as a predicate for claims.

clauses, and mandatory local litigation clauses – have proven rather poor-designed to effectively regulate the relationship between domestic courts and investment tribunals. Especially the former are rather objectionable as a regulatory device: by being potentially capable of foreclosing access to the international remedy, fork-in-the-road clauses create disincentives for investors to attempt even some degree of recourse to domestic courts.

Are there alternatives then? If the policy goal is only to prevent parallel proceedings, the no-u-turn clauses, as discussed in this dissertation, certainly provide an effective means of regulation. In not foreclosing access to arbitration in case prior resort has been made to domestic courts, such clauses at least incentivize investors to resolve disputes through domestic remedies. Another, though oft-neglected alternative is, of course, to demand the exhaustion of local remedies as a condition for accessing the international remedy. Admittedly, suggestions towards the re-introduction of the local remedies rule run the risk of being seen as heretic, given that one of the defining characteristics of investment arbitration has always been the very ability of foreign investors to avoid prior litigation in domestic courts.[8] But as some correctly point out, in current practice, investors do frequently pursue *both* domestic and international remedies already.[9] This notwithstanding, making recourse to domestic remedies compulsory is still frequently resisted on the ground that mandatory prior domestic litigation will end up increasing the duration and the costs of litigation.[10] But this argument rests on the presumption that domestic courts are inherently incapable of resolving disputes between the foreign investor and the host State, and that such disputes will necessarily persist even in the event of a positive outcome of domestic litigation. One may equally proceed, however, from the opposite assumption that mandatory recourse to local judicial remedies may actually decrease the costs of litigation, for where investment disputes are satisfactorily resolved by domestic courts, investors are less likely bring their claims to arbitration. In the end, the question turns on the extent to which one believes that investment disputes are capable of disposition by domestic courts, which is ultimately a question of trust.[11] Economically, the addition of an extra layer of proceedings may not add much to the overall costs of litigation, at least not when compared to the total costs of investment arbitration. And as a matter of legal principle, requiring recourse to domestic judicial remedies would certainly not be an unusual demand, given the wide prevalence of such requirement in the context of human rights courts. Indeed, to follow the practice of these courts, one could envision the requirement to depend on the mere prospect of success, or be otherwise dispensed with under less strict conditions than under the stringent obvious futility requirement currently adhered to by (some) investment tribunals.

Currently, the arguments still build on preconceptions of ineffectiveness, partiality, or incompetence of the domestic judiciary. This notwithstanding all investment made, or at least lip-

[8] See eg C Schreuer, 'Do We Need Investment Arbitration?' (2014) 11(1) TDM, at 10, suggesting that 'any reintroduction of a requirement to exhaust local remedies would be a retrograde step'.

[9] See eg S Puig, 'Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga' (2013) 5 Mexican Law Review 199, at 235 ff, demonstrating this on the example of sweeteners litigation in Mexico.

[10] See eg N Hachez and J Wouters, 'International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?' in F Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (2013), 417-449, at 441; Schreuer (n 8), at 5, 10; or C Tietje and F Baetens, 'The Impact of Investor-State Dispute Settlement (ISDS) in the TTIP' (2014), available at <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf>, at 95.

[11] For a powerful critique, see M Sattorova, 'Return to the Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law', (2012) 39 Legal Issues of Economic Integration 223, arguing how the waiver of local remedies was never intended to operate as part of a reciprocal bargain, but was meant to safeguard direct access to arbitration only for claimants from a certain category of States.

service paid to strengthening the rule of law, at all levels.[12] It may be time to start talking about the actual reliability of respondent host States' judicial systems and devise mechanisms that would allow domestic systems to demonstrate that they are capable of adequately adjudicating investment disputes.

12.4.3. Domestic Courts, Investment Arbitration, and the Rule of Law

A broader issue that this dissertation eventually unpacks is the fundamental question of the rule of law; specifically, the implications that the current dynamics between investment tribunals and domestic courts may have on the fostering of the rule of law, both domestically and internationally.

The question of the rule of law is, of course, inextricably bound up with the current regime of investment law. By providing a forum for the impartial adjudication of investment disputes – as an alternative to potentially arbitrary and unpredictable judicial decision-making by host States' courts, habitually perceived as structurally biased in favor of domestic interests – investment arbitration is, in its very essence, an attempt to compensate for the institutional deficiencies in the domestic rule of law.[13] Just as investment treaties – in protecting investors against potentially capricious changes of local laws and arbitrary conduct by local authorities – are nothing but attempts at offsetting internal governance problems through the provision of a stable and predictable external legal framework grounded in international law.[14] Indeed, it is these internal governance problems that frequently form the very predicate of treaty claims brought before investment tribunals.[15] So much so, that investment arbitration has arguably come to operate also as a mechanism for determining compliance with rule of law requirements, including by the domestic judiciary as such.[16]

That the investment regime can thus contribute to the strengthening of the *international* rule of law does not mean, however, that it is also conducive to improving the *domestic* rule of law in the States recipients of investments. Opposing perspectives have thus far emerged on this question in the broader scholarly discussions. On the one side of the debate, there are those suggesting that investment treaties – especially in enabling that investment disputes be removed from the jurisdiction of domestic courts – inhibit the development of domestic rule of law. According to this line of scholarship, the escape route provided by arbitration is claimed to reduce pressure for improvement and reform of domestic institutions, if not belittle its

[12] See eg 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', UN Doc A/RES/67/1 (30 November 2012).

[13] See TW Walde, 'The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases', (2005) 6 J. World Investment & Trade 183, at 190, explaining how the 'very *raison d'etre* of investment treaties and, in particular, of the innovation of direct investor arbitration against States is the perception, held for a long time and universally, that a foreign investor does not, and cannot be expected to have, confidence in the impartiality of domestic courts, in particular in countries with a recognized low quality of governance.'

[14] See S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2012), 1–2 and 146–7; and C Tan, 'Reviving the emperor's old clothes: The good governance agenda, development and international investment law,' in SW Schill (et al) (ed), *International Investment Law and Development: Bridging the Gap* (2005), 147-179, at 155-157.

[15] See eg CG Garcia, 'All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration,' (2004) 16 Fla. J. Int'l L. 301, at 326-333, discussing the different types of investment treaty claims that are generally apt to arise in an environment of weak rule of law and governance.

[16] See HE Kjos, 'Domestic Courts under Scrutiny: the Rule of Law as a Standard (of Deference) in Investor-State Arbitration' in M Kanetake and PA Nollkaemper, *The rule of law at the national and international levels: contestations and deference* (Hart, 2016), 353-382, at 357, suggesting that the tribunals' awards on the merits 'may also indicate whether the host state, through its courts, acted in accordance with the rule of law'.

significance.[17] Absent the necessity for engaging with the host State's legal system, investors have little incentive to demand better judicial performance. Domestic courts, on their part, by losing their business to arbitration, supposedly lack incentive to improve the quality of their decision-making, whereas governments, in being able to delegate dispute resolution to external sources, are held to lack enticement to invest in their own judiciaries.[18] This line of scholarship finds support in empirical studies disproving that the adoption of investment treaties would lead to higher domestic institutional quality and, in fact, suggesting that the presence of international arbitration might even undermine the quality of the local legal system.[19] They also find corroboration in individual case-studies demonstrating how investment arbitration, in obviating the need for creating independent courts, can assist illiberal regimes in maintaining restrictions on judicial independence or otherwise repress their judiciaries, and thus curtail the development of the domestic rule of law.[20]

On the other side of the debate, there are those suggesting that the foreign investment regime, in complementing weak domestic institutions, can nonetheless support and foster the development of domestic rule of law, including in domestic courts. This is said to occur in a variety of ways. First, in providing a model as to what an appropriate standard of governance may be, investment treaty standards are held to be capable of influencing domestic laws and practices within host States, including those of domestic courts, through different processes of diffusion or influence. This can occur indirectly, through expert guidance and reform proposal provided by international financing institutions, but also directly, as States respond with domestic reforms to concrete arbitral decisions.[21] Second, the existence of external treaty standards and of the possibility of their enforcement through investment arbitration is considered to generate important signaling effects. The prospect of property rights and contractual commitments being able to be effectively enforced through arbitration purportedly reduces the benefit that host State actors can expect from abusing domestic judicial procedures, in turn, reducing pressure on domestic judges to conform with governmental preferences, and thus enhancing the independence of the domestic judiciary.[22] Third, especially where investment treaties expressly empower domestic courts to resolve investment disputes, and limit the scope of arbitration to claims concerning treaty violations, they can give domestic courts an incentive to provide independent and impartial adjudication of the cases on their dockets.[23] This line of scholarship, though not directly supported by empirical studies, finds some limited support in anecdotal

[17] See eg M Halle and LE Peterson, 'Investment Provisions in Free Trade Agreements and Investment Treaties: Opportunities and Threats for Developing Countries' (2005), at 24, available at <https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/poverty/RBAP-PR-2005-Investment-Provisions.pdf>; or D Aguire, *The Human Right to Development in a Globalized World* (2008), 142-143.

[18] For an overview, see T Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 International Review of Law and Economics 107, at 119-121.

[19] See ibid, 118-122, where Ginsburg's own empirical study finds little evidence to support the proposition that investment treaties would foster domestic governance.

[20] MF Massoud, 'International Arbitration and Judicial Politics in Authoritarian States' (2014) 39(1) Law & Social Inquiry 1, presenting an insightful case study of Sudan.

[21] See B Kingsbury and SW Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) New York University Public Law and Legal Theory Working Papers 146, at 16-19, attributing such role especially to the FET standard, in view of the various components of the concept of the rule of law that it embodies.

[22] Wälde (n 13), 186-191, who also considers investment treaties to have 'a major role' in helping countries with under-developed governance to improve the quality of their governance system.

[23] SD Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,' (2006) 19 Pac. McGeorge Global Bus. & Dev. L.J. 337, 367-370, who sees the relationship between investment arbitration and court litigation as a 'symbiotic' one in promoting the rule of law.

evidence concerning instances of "compliance pull" before the adoption of investment treaties,[24] as well as in response to experiences with investment arbitration.[25] This evidence includes instances of investment treaties and arbitral awards having positively influenced domestic judicial decision-making in concrete cases.[26]

All in all, there remains much uncertainty as to the effects that investment treaties generally have on the development of the domestic rule of law. Suggestions that the investment regime actually benefits the domestic rule of law remain tenuous and unsupported by broader (empirical) studies.[27] But what is also clear is that the mechanisms of interaction between investment treaties and the rule of law are much more complex than the current strands of scholarship would seem to suggest. For one, investment arbitration and local judicial institutions do not operate as perfect substitutes. In view of its cost, investment arbitration frequently operates only as a mechanism of last resort, after the investor has already exhausted local remedies.[28] Furthermore, their degree of substitution may strongly depend on the particular treaty – on the type of disputes for which investment arbitration is provided (i.e. whether this is available only for treaty violations, or for all disputes concerning an investment), as well as on the procedural devices governing the relationship between international and domestic remedies (i.e. whether or not the treaty uses fork-in-the-road clauses, as opposed to the no-u-turn clauses or mandatory local litigation requirements). In the end, as some have suggested, the investment treaties' effects on domestic rule of law may well depend on the circumstances of each case.[29]

Based on the findings of this study, however, the present author remains skeptical about one thing: the overall prospects for the current system of investment arbitration, and the investment treaty regime in general, to influence domestic courts' conduct in a way that fosters the domestic rule of law. This is not so much because the author would have doubts as to whether the standards of treatment prescribed by investment treaties are normatively capable of exerting a positive influence on the conduct of domestic courts. It is true that some of the treaty standards (e.g., the "effective means" provision) remain vaguely articulated, and that other standards (e.g., the FET obligations) are sometimes inconsistently applied. It is also true that in many cases where court conduct was scrutinized against the standard of denial of justice, the arbitral awards may have been insufficiently reasoned. But at its very core, the standard of denial

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[24] See eg P Del Duca, 'The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization' (2003) 51 U.C.L.A. L. Rev. 35, explaining Mexico's legislative and constitutional reforms following the conclusion of the NAFTA, which had the aim of extending the general protections of the rule of law and increase the independence of the judiciary.

[25] See eg J Paulsson, 'Enclaves of Justice', (2007) University of Miami Legal Studies Research Paper No. 2010-29, at 12, reporting how Mexican officials, in the wake of NAFTA, have developed 'the salutary instinct of avoiding conduct which might be criticized in an international forum'.

[26] See eg Kingsbury and Schill (n 21), at 18, referring to the example of a Namibian court's reliance on the Germany-Namibia BIT in deciding a domestic dispute; or Puig (n 9), at 236, demonstrating how Mexican constitutional courts have used international law language and international tribunals' decisions in their own case law.

[27] M Sattorova, 'The Impact of Investment Treaty Law on Host State Behavior: Some Doctrinal, Empirical, and Interdisciplinary Insights' in Lalani, S, and Rodrigo Polanco, L (eds), *The Role of the State in Investor-State Arbitration* (Nijhoff, 2015), 162-186, at 174. This has not prevented commentators to claim that the treaty-imposed standards of treatment 'have begun to show spill-over effects on the internal systems of the countries concerned'. See Schreuer (n 8), at 4.

[28] Cf Puig (n 9), at 206.

[29] See also BK Guthrie, 'Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law' (2013) 45 N.Y.U. J. Int'l L. & Pol. 1151, at 1197, concluding that it is not possible to determine in the abstract which of the two analytical models adopted in scholarship is correct, suggesting rather that question be assessed with respect to the particular social, political, and legal contexts of individual countries.

of justice remains a viable benchmark for assessing the propriety of judicial action, as is it builds on the essential elements of the rule of law concept.[30]

Of concern are rather the systemic impediments, which prevent sustained and meaningful interactions between domestic courts and international investment tribunals. It is clear that investment arbitration has not been intended to, nor it is capable of, serving as a mechanism for the correction of errors and the achievement of consistency of law at the level of domestic courts. The review performed by investment tribunals over domestic judicial conduct is not an appellate one, in the sense that tribunals would be capable of undoing domestic court's determinations of fact or law, or reversing their judgments. Their awards are frequently not even binding on State courts.[31] But it is also clear that under the current system, the rule of law element equally cannot be strengthened through transnational judicial dialogue, as in other instances of interactions between domestic and international adjudicatory bodies, which contribute to the substantive development of a shared understanding of international norms, and thus foster domestic compliance.[32] In structural terms, the review performed by investment tribunals over domestic courts for consistency with due process and other substantive requirements of international law may arguably resemble the type of review of domestic judicial organs performed by the European Court of Human Rights or the Inter-American Court of Human Rights. However, one wonders whether the current patterns of interactions are sufficient to create a sustained dialogue – if, in fact, a proper dialogue can emerge at all. In view of the *ad hoc* nature of investment arbitration, with its strong orientation towards the resolution of single particular disputes and the remedying of past wrongs by providing financial compensation, one has doubts whether an occasional finding of State liability for improper judicial conduct does actually provide sufficient pressure to result in reforms of dysfunctional domestic judiciaries.[33] Courts, on their part, may not be aware of the possibility that their behavior could engage the host State's responsibility under an investment treaty.[34] One has further doubts where a process of acceptance and contestation can properly emerge where cases arising out of the same fact patterns are decided by different arbitral tribunals, and where the domestic courts reviewed are not in a position to meaningfully engage in a process of substantive contestation,[35] or where, in fact, the domestic courts engaging in conversation with investment tribunals may not even be the domestic courts reviewed.[36] Current reform proposals towards the creation of more permanent multilateral judicial institutions hold promise to change that.

[30] See further HP Aust and G Nolte, 'International Law and the Rule of Law at the National Level' in M Zurn, A Nollkaemper & R Peerenboom (eds), *Rule of law dynamics: in an era of international and transnational governance* (CUP 2012), 48-67, at 59ff.

[31] See also RB Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79 New York University Law Review 2029, 2045-2049, explaining why the appellate review model is inapplicable to interactions between domestic courts and NAFTA investment tribunals.

[32] See B Peters, 'The Rule of Law Dimensions of Dialogues between National Courts and Strasbourg' in in M Kanetake and PA Nollkaemper, *The rule of law at the national and international levels: contestations and deference* (2016).

[33] The author does not exclude positive influences in circumstances where the conduct of the judiciary has engaged a State's responsibility in several consecutive cases, as in the example of Ecuador described in the introduction to this dissertation.

[34] Cf Sattorova (n 27), 175-176.

[35] Cf WS Dodge, 'Loewen v. United States: Trials and Errors under NAFTA Chapter Eleven,' (2002) 52 DePaul L. Rev. 563, at 571, pointing to how investment tribunals are more insulated from review, as the review by domestic courts in the setting aside or enforcement stage is a limited one. This, of course, applies only to non-ICSID arbitrations. Under the ICSID system, domestic courts cannot properly review arbitral awards. See section I.1.

[36] In instances of post-award review, the reviewing courts are typically not those of the host State's respondents in arbitrations, but rather the domestic courts of the State hosting the seat of the arbitration, or courts of those States where the investor may seek to enforce an award against a respondent State. See further Ahdieh (n 31), 2020-2023, admitting that in the context of the NAFTA, the exchanges take place with domestic courts that are located in other States than the one involved in the arbitration.