PART I

Domestic Courts as Partners:

The Role of Domestic Courts and their Judgments in the Decision-Making Process of Investment Tribunals

I. INTRODUCTION INTO PART I

The focus of the next three chapters is on the circumstances where domestic courts can be seen as partners to investment tribunals. The notion of partnership is not used here to refer to some sort of cooperative arrangement that the two types of adjudicatory bodies might have entered into to advance their mutual interests. Instead, it denotes, on the one hand, the attitude of *openness* that investment tribunals exhibit in specific circumstances towards domestic judicial pronouncements in their own decision-making process.[1] On the other hand, however, it also attempts to describe the actual *reliance* of investment tribunals on domestic judicial decisions with a view to resolving the legal and factual issues that are relevant to deciding disputes between investors and host States.[2]

The inquiry proceeds on the premise that this reliance on domestic judicial organs is not incidental, but can be viewed as part of the specific roles that domestic courts perform in the context of investment arbitration.[3] Some of these roles are of a *formal* character, in the sense that they are expressly designed and thus also outlined in specific legal instruments, such as domestic statutes, (international) arbitration rules, and treaties.[4] One can speak of such formal functions predominantly in the case of investment arbitrations conducted outside the context of the ICSID Convention, which today account for about a third of all investor-State disputes submitted to arbitration. Modeled on international commercial arbitration, these investment arbitrations are not fully-internationalized, but are envisioned to operate within the domestic legal system of some state, in the context of which domestic courts then formally perform certain auxiliary and supervisory functions. On the other hand, it is possible to say that domestic courts perform also certain *informal* roles; that is, roles that are not the product of intentional institutional design and which lack an explicit legal basis. In a given social context, such informal roles can be said to emerge through the process of interaction between different social actors, or otherwise result from expectations attributed to an actor's particular societal position, and the specific

[1] This attitude can be contrasted with an attitude of antagonism or even hostility that can occasionally be exhibited by investment tribunals towards domestic courts when the conduct of the latter appears not to be in conformity with international standards (the focus of Part II) or when the latter engage with tribunals in some sort of jurisdictional competition (the focus of Part III).

[2] Reliance has deliberately been chosen here to distinguish the relationship from one of actual *dependence*, which is not the case in the relation between domestic courts and investment tribunals, but also to distinguish it from the notion of *assistance*, to the extent that the latter may imply some sort of a formal arrangement. As further explained in the ensuing introduction, the inquiry is not limited to the study of formal functions.

[3] The inquiry here is not focused on the political functions or roles that courts perform in any given legal system, namely conflict resolution, social control, and lawmaking. On these, see generally M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1983). The inquiry concentrates on the specific functions performered by domestic courts in the context of investment arbitration as a system of dispute settlement. For another example of such a narrower inquiry, see A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 9-10, who concentrates on the functions that domestic courts perform in the protection of the international rule of law.

[4] The distinction between formal and informal is based here on the dichotomy legal/non-legal, explicit/tacit, or designed/spontaneous, as used, for example, in the context of institutional theory to define informal institutions. See eg GM Hodgson, 'What Are Institutions?' (2006) 15(1) Journal of Economic Issues 1, 11. The same dichotomies are also commonly understood and applied in international legal scholarship. See eg A Aust 'The Theory and Practice of Informal International Instruments' (1986) 35 ICLQ 787-812, 787, defining an informal international instrument as 'an instrument which is not a treaty because the parties to it do not intend it to be legally binding'. See, however, J Pauwelyn, R Wessel, and J Wouters, *Informal International Lawmaking* (OUP 2012), 15-19, defining 'informal' as an opposition to 'traditional' lawmaking.

characteristics and qualities recognized to pertain to that specific position.[5] An example of the former is perhaps the sort of indirect review that domestic courts have come to perform in the context of certain international legal regimes, where by virtue of their ability to influence the way particular decisions of international courts are implemented domestically, they regularly interact, through dialectical engagement and critique, with their international counterparts.[6] In the context of investment arbitration, which is predominantly *ad hoc*, and thus less amenable to give rise to repeated-game type interactions, the domestic courts' informal functions are not directly the product of such interactions, but seem to be associated with certain inherent qualities that domestic courts are deemed to possess by virtue of them being fully-fledged judicial organs; namely, their independence vis-à-vis the other organs of the State, and their particular knowledge and expertise on domestic law. Due to these qualities, domestic courts can now best be seen as performing specific informal roles in the fact- and the law-ascertainment process.

The focus of the ensuing chapters is primarily on these informal roles, and not on the formal roles performed by domestic courts in certain instances. The reason for directing the inquiry in such way lies in the simple fact that domestic courts possess and perform certain formal functions only in some types of arbitral proceedings, whereas instances of them performing functions of informal nature can actually be found across the field of investment arbitration. Nonetheless, for the sake of completeness, these formal roles will briefly be discussed in the following section (I.1.),[7] before the introduction proceeds further with explaining the informal functions that will be the actual subject of the present inquiry (I.2), and the problems relating to the study of such functions (I.3).

I.1. Formal Functions pertaining to the Assistance in, and Supervision of, the Arbitral Process and its Outcome

As discussed in the previous Chapter, the *raison d'etre* of investment arbitration might be precisely to avoid the use of domestic courts to resolve disputes between investors and the host States of their investment. So much that the arbitration mechanisms under investment treaties and the ICSID Convention deliberately absolve the investor from having to pursue its case before those courts.[8] Yet, despite allowing the investor to escape the judicial system of the host State, investment arbitration, just as any other form of arbitration, ultimately cannot successfully

[5] In role theory in sociology, the former aspect has found elaboration in the symbolic interactionist role theory, which sees role not as fixed or prescribed but something that is constantly negotiated between individuals in their social interaction. The latter aspect has been the focus of functionalist, structuralist, as well as organizational role theories, which perceive role as the set of expectations that society places on an actor and assume them to be associated with identified social positions. See generally BJ Biddle, 'Recent Development in Role Theory' (1986) 12 Annual Review of Sociology 67.

[6] An example is the practice of the German Constitutional Court, enunciated in the famous *Solange I* decision, not to accord EC law priority over German law, until the protection of fundamental rights within Community law would be equivalent to that constitutionally required by the Federal Republic of Germany. For an account of this practice, see JA Frowein, 'Recent Case' (1988) 25 CMLR 201, 205. Another example is the Decision No 238/2014 of the Italian Constitutional Court, declaring as unconstitutional the legislative measures through which the Italian government sought to implement the decision rendered against Italy by the ICJ in the *Immunities* case (2012), because of the Constitutional Court's disagreement with the ICJ's rejection of an exception to State immunity from the civil jurisdiction of other States for acts *iure imperii* committed in gross violation of international law. On this, see D Tega 'Sovereignty of Rights vs "Global Constitutional" Law: The Italian Constitutional Court Decision No. 238/2014', < www.iconnectblog.com/2015/04/sovereignty-of-rights-vs-global-constitutional-law-the-italian-constitutional-court-decision-no-2382014/> accessed 14 June 2018.

[7] The ensuing discussion is not more than a sketch. For a more extensive overview, the reader is referred to practitioners guides and handbooks on international commercial arbitration, such as N Blackaby et al, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 415-40.

[8] See *supra* Section 2.1; and *infra* Section III.1.

function without the assistance of some domestic judicial system – even if this be only at the very last stage of enforcement.[9]

The degree of domestic courts' formal involvement in investment arbitration depends on the rules according to which the arbitral process is conducted.[10] This involvement can potentially be most far reaching in investment arbitrations conducted outside the context of the ICSID Convention – that is, arbitrations based on UNCITRAL or other arbitral rules, and administered by institutions such as the PCA, LCIA, SCC, ICC, or even the ICSID Additional Facility. In the context of such arbitrations,[11] a number of residual functions are performed in the first place by *the courts of the seat of arbitration*, which can play a critical role both in the pre- and in the post-award phase of the arbitration. Some of the functions performed by these courts are *auxiliary* in nature. Depending on the jurisdiction where the arbitration is conducted, for example, courts may be entrusted with providing support to arbitral tribunals or a party to the proceedings in the taking of evidence.[12] Furthermore, courts will often have the power of prescribing interim or conservatory measures in relation to arbitration proceedings,[13] or else assist in the enforcement of interim measure prescribed by investment tribunals themselves.[14] On the other hand, the courts of the seat of arbitration will typically perform also a number of *supervisory* functions. In some jurisdictions, for example, the courts may thus have the competence to decide on challenges concerning the scope and validity of the arbitration clause,[15] or on challenges pertaining to specific arbitrators,[16] already before an award is rendered. More commonly, once the award has been rendered, the courts will generally have the power to review and eventually set aside awards rendered in their country. In most jurisdictions, such review normally does not entail a full revision of the award on the merits, but is limited in scope to matters such as excess of powers, irregularities in the constitution of the arbitral tribunal or the conduct of the procedure, as well as the failure to comply with mandatory rules of the *lex fori* (such as those concerning the non-arbitrability of disputes and the State's public policy).[17] Apart from the courts of the seat of arbitration, some of supervisory tasks will also be performed by *the courts of the state where enforcement of the award* is sought. The enforcement of non-ICISD awards is namely subject to the national law of the place of enforcement and to the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The latter sets out a number of

[9] But then again, the role of domestic courts in such cases must also not be overstated, given that their functions sometimes do not entail more than rubberstamping the outcome of the arbitral process.

[10] See generally Kerr, M, 'Arbitration and the Courts: The UNCITRAL Model Law' (1985) 34 ICLQ 1.

[11] For a general overview of these functions, see W Ben Hamida, 'Investment Treaties and Domestic Courts: a Transnational Mosaic Reviving Thomas Wälde's Legacy' in J Werner et al (eds), *A Liber Amicorum Thomas Wälde: law beyond conventional thought* (Cameron May, 2009), 69-85, 77ff.

[12] See art 27 of UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (UN 2008) (UNCITRAL Model Law).

[13] See UNCITRAL Arbitration Rules (2013), art 26(9); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), art 32(5); International Chamber of Commerce Arbitration Rules (2017), arts 28(2) and 29(7); and London Court of International Arbitration (2014), arts 25.3 and 9.12. Under most of these rules, such requests to domestic courts are considered not to be incompatible with the arbitration agreement. Under the LCIA Rules, the prescription of interim measures is limited to the period before the arbitral tribunal is formed; thereafter, it can only be exercised with the tribunal's authorization. See also UNCITRAL Model Law, art 17J.

[14] See UNCITRAL Model Law, arts 17H and 17I.

[15] See UNCITRAL Model Law, art 16(3); and UNCITRAL Arbitration Rules, art 23(3).

[16] While the competence to decide on such challenges lies primarily with the institution under which the arbitration is conducted, a disputing party that is dissatisfied with the institution's decision is not prevented under most national arbitration laws from resorting to the competent national court to obtain a new decision. See UNCITRAL Model Law, arts 13 and 14. See also *Telekom Malayisia Berhard v Republic of Ghana* Case No HA/RK 2004, 667 (District Court of The Hague, 18 October 2004).

[17] See UNCITRAL Model Law, art 34. A great deal of States adopted the UNCITRAL Model Law or arbitration legislation that is in line with that law.

grounds on which recognition and enforcement of awards may be refused and therefore provides domestic courts with some limited powers of review.[18]

The involvement of domestic courts is, in contrast, a much more limited one in the case of investment arbitrations conducted in accordance with the ICSID Arbitration Rules. The ICSID Convention provides for an autonomous and self-contained system of arbitration, which is based on the principle of exclusivity of ICSID proceedings: consent to ICSID arbitration operates at "the exclusion of any other remedy".[19] As a consequence, domestic courts essentially have no role to play in the conduct of arbitration proceedings – save for the possibility of prescribing interim measures of protection in certain exceptional case.[20] Most significantly, domestic courts do not exercise supervisory jurisdiction over ICSID arbitrations. Matters pertaining to the challenges of arbitrators or to the validity of the arbitration agreement fall exclusively within the jurisdiction of ICSID Tribunals. Furthermore, insofar as the Convention provides for its own system of review of awards (which includes the possibility of annulment and revision), a party to ICSID proceedings may not initiate action before a domestic court to seek the annulment or another form of review of an ICSID award. Finally, domestic courts have also a limited role to play when it comes to the enforcement of ICSID awards. All States parties to the Convention are to recognize awards as binding and enforce their pecuniary obligations "as if" they were final judgments of a court.[21] While the procedure for their enforcement is governed by the law on the execution of judgments in each country,[22] the authority of domestic courts is restricted to verifying the authenticity of the award. Specifically, domestic courts in the jurisdiction where enforcement is sought cannot engage in either substantive or procedural review of the relevant ICSID award, given the express language of the ICSID Convention excluding such awards from any appeal or remedy other than those provided for under the Convention itself.[23]

The conclusions that follow from this brief overview can quickly be drawn. In non-ICSID investment arbitrations, domestic courts are endowed with important formal functions that can put them in the shoes of assistants – or as some would have put it, in the role of "executive partners"[24] – of investment tribunals: the disputing parties or even the investment arbitral tribunals themselves can seek the support of domestic courts to remove procedural obstacles in the arbitration process; the disputing parties can also seek the assistance of local courts where the arbitral process itself has gone awry. In ICSID investment arbitrations, however, the functions formally envisioned to be performed to local courts are practically negligible. Against this backdrop, were the inquiry to limit itself to the courts' formal functions, this would lead to the exclusion of about two thirds of investment arbitration cases. Even more significantly, neglect would be made of the many instances where investment tribunals have actually resorted to domestic courts primarily by virtue of their informal authority – namely, because their decisions were capable of assisting them in the ascertainment of domestic law, or else in the ascertainment of facts.

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[18] ibid art V.

[19] ICSID Convention, art 26. In the context of the Convention, domestic courts are thus considered to be under a duty to abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration. See further GR Delaume, 'ICSID Arbitration and the Courts' (1983) 77 AJIL 784, at 785.

[20] In accordance with ICSID Arbitration Rules, rule 39(6), when consenting to ICSID arbitration, the parties may agree that such measures may be requested from any judicial or other authority prior to or after the institution of the proceeding.

[21] ICSID Convention, art 54(1). For the purposes of recognition and enforcement, each State party shall designate one or more competent courts. See ICSID Convention, art 54(2).

[22] ICSID Convention, art 54(3).

[23] ICSID Convention, art 53(1). The remedies are limited to those provided for under arts 50 to 52.

[24] Kerr (n 10), at 2.

I.2. Informal Roles in the Law- and Fact-Ascertainment Process

As the following chapters intend to demonstrate more extensively, investment tribunals quite commonly turn to domestic judicial decisions because of particular pronouncements on points of law or fact that are relevant to their decision. The most important reason for investment tribunals to attribute a certain degree of informal authority to such pronouncements appears to relate to the epistemic superiority that domestic courts are deemed to possess in relation to questions of domestic law. Though often established on the basis of international investment treaties and mandated to decide claims based on international law, investment arbitral tribunals are bound to pronounce upon claims that are intrinsically related to host states' domestic law. Surely, it is international law – in the BIT era, predominantly the investment treaty – that provides the minimum standards of protection to the foreign investor. Yet, investments are not made in a vacuum, but within the legal system of the host state, which provides the parameters within which foreign investors operate. At the most fundamental level, it is the domestic law of the host state that determines the content of interests that will eventually attract the protection of international law. Furthermore, as Chapter 3 will demonstrate, domestic law remains relevant in several other ways in investment treaty arbitration. Given that the interpretation and application of domestic law remains largely within the purview of domestic judicial organs, which are more likely to possess greater expertise on such matters than investment tribunals, it is not surprising that domestic judgments have often played a prominent role in the law-ascertainment process.

This is not to say that other factors cannot explain the investment tribunal's reliance on domestic judgments. First, the epistemic superiority of domestic courts may not necessarily be limited to questions of domestic law. Domestic judicial organs often have access to factual records that are beyond the remit of investment tribunals, or are generally in a better position to establish certain points of fact. This might, for example, explain the tribunal's occasional reliance on domestic judicial determinations of facts. Furthermore, the perceived independent nature of the judiciary explains why judicial determinations are sometimes treated as carrying greater weight than that of other domestic organs and considered as "authoritative".[25] Last but not least, reliance on existing judicial pronouncements may under circumstances simply be a question of convenience.[26] The variety of possible rationales notwithstanding, the fact remains that domestic courts do play distinct roles in the law- and the fact-ascertainment process of investment tribunals, which cannot otherwise be considered to form part of their formally-designated functions. It is primarily to the study of these distinct roles that the following three chapters are thus devoted.

I.3. The Dual Effects of Domestic Judicial Pronouncements

In studying the role of domestic judicial pronouncements and the attitude of investment tribunals towards them, one is soon faced with the fact that domestic judgments – just like the decisions of most other adjudicatory bodies – generate two types of effects, each of which not necessarily co-existing in an easy balance. At the *concrete* level, each specific judgment determines the controversy between the litigating parties by authoritatively establishing the facts and the legal consequences ensuing from them in relation to the litigating parties. In other words, the most immediate effect of each judgment is the determination of the parties' specific legal relationship, in terms of rights and duties. At the *abstract* level, on the other hand, each individual judgment also incrementally contributes to law-clarification (or, in some legal systems, even law-making), by setting out legal

[25] See eg *The Rompetrol Group NV v Romania (Award)* (ICSID Case No ARB/06/3, 6 May 2013) [256] (referring to the 'authoritative determination by the Romanian High Court of Cassation and Justice').

[26] See *infra* Chatpter 5.

propositions – i.e., the abstract conclusions that can be drawn from the statement of reasons that the judicial body advanced in justification of its decision – on the basis of which other judicial bodies can resolve other controversies in future decisions.[27] In this sense, the concrete and the abstract effects of judicial decisions reflect the double function of litigation: the private, retrospective, and the public, prospective one.[28]

These distinct effects give rise to different questions in practice. At the concrete level, the question most often arises as to the normative effects of the judgment itself; that is, as to the consequences that a definitive judicial disposition of a specific dispute between the litigating parties will have in subsequent proceedings before other adjudicating bodies. This question can best be studied through the prism of the principle of *res judicata*. At the abstract level, instead, questions more often arise in relation to the normativity of the process through which legally-relevant propositions are extracted from a judicial decision and taken into account in the law ascertainment process. These questions are best studied from the perspective of rights and duties that the litigating parties (for example, from the perspective of tendering expert reports and evidence) and the adjudicatory body itself (for instance, through the prism of the principle of *jura novit curia*) might have in the ascertainment of the law. It must also be admitted, however, that the different perspectives cannot always easily be disentangled in practice (given that each concrete judicial determination sets out certain abstract propositions, while each abstract proposition always relates to a concrete, underlying situation).[29] Yet, these distinctions are not irrelevant to the present inquiry. As the present inquiry intends to show, investment tribunals have often reverted to the jurisprudence of domestic courts as a general aid to the construction of domestic law provisions, but have generally shown much more reservations towards judicial decisions that involved or relating to the claimant's investment.

To take account of the aforesaid, the inquiry in Part I will be divided in the following way. To provide the necessary background, Chapter 3 will first proceed to map the instances where domestic judicial decisions have played a role in the ascertainment of the law and the facts by investment tribunals. Chapter 4 will then discuss the role of domestic judicial decisions from the perspective of their concrete effects, by exploring whether such decisions could actually be binding on investment tribunals. Thereafter, Chapter 5 will discuss the role of domestic judicial decisions from the perspective of their abstract effects, by exploring the duties of investment tribunals with regard to the use of domestic jurisprudence in the law ascertainment process, and related problems.

[27] On these distinct effects of judicial decisions, see eg A Lincoln, 'The Relation of Judicial Decisions to the Law' (1907) 21 Harvard Law Review 120, 125.

[28] See V Lowe, 'The Function of Litigation in International Society' (2012) 61 ICLQ 209, at 212-14, distinguishing between the retrospective function of litigation, which has as its aim the settlement of the particular dispute between the parties, and the broader prospective function, which seeks to articulate legal principles applicable in like situations in the future, pursuant to the idea that justice requires like cases to be treated alike.

[29] Precisely because of this dual function of judgments, some have accurately pointed to the less than water-tight division between the doctrines of *res judicata* and precedent, or perhaps a fluidity about the boundary between the two in practice. See particularly I Scobbie 'Res Judicata, Precedent and the International Court: A Preliminary Sketch' (1999) 20 Aust YBIL 299, 303.