Summary – Domestic Courts in Investor-State Arbitration: Partners, Suspects, Competitors

This is a study about the roles accorded to domestic courts by investment tribunals in the process of arbitrating disputes between States and foreign investors. As such, it investigates the approaches taken and attitudes held towards domestic courts in the jurisprudence of arbitral tribunals. The study takes stock of this ever-growing jurisprudence; not only with a view to making sense of it, but with the intent to developing a coherent theory on how domestic courts are perceived by international adjudicators. The argument advanced in this study is that these roles can essentially be conceptualized in three ways. First, as *partners*, in the sense that domestic courts can assist arbitral tribunals in the determination of certain points of fact, as well as of points of applicable domestic law. Second, as *suspects*, in the sense that their conduct may itself be injurious to the investor and its investment, and as such become the object of scrutiny by arbitral tribunals. And third, as *competitors*, in the sense that domestic courts, by providing an avenue for redressing injuries suffered by the investor at the hands of a host State's authorities, can compete with arbitral tribunals as potential fora for resolving investment disputes. With a view to explaining these specific roles, the inquiry is divided into three parts, each comprised of three chapters dealing with different aspects of arbitral jurisprudence. These are preceded by chapters explaining, respectively, the theoretical and historical frames of reference through which the relationship between investment tribunals and domestic courts can possibly be thought of and conceptualized.

Chapter 1 introduces a number of theoretical tools that can be employed to conceptualizing the relationship between domestic courts and investment tribunals. Three types of tools are mentioned in particular. First, tools that are otherwise used to conceptualize the relationship between the different legal orders in which both types of adjudicatory bodies operate, such as the doctrines of monism and dualism and the principle of supremacy of international law. Second, tools that are customarily applied in regulating interactions between different adjudicatory bodies, such as the principles of *res judicata* and *lis alibi pendens*. And third, tools that are applied in the process of reviewing the decisions of one type of bodies by others, as is the case with the concepts of standard of review and deference. The theoretical tools discussed are not introduced with a normative aspiration, to determine what the proper relationship between domestic courts and investment tribunals should be. Indeed, the study actually explains that these theoretical tools are not without limitations. The tools are merely discussed with a view to informing the subsequent analysis of jurisprudence, given that some of these theoretical concepts appear to have guided investment tribunals' decision-making in practice.

Chapter 2 sets out, in turn, the historical developments that have arguably shaped and continue to shape investment tribunals' attitude towards domestic courts. The study argues that the present day attitude has much to do with the way that investor-State arbitration was inaugurated as a specific mechanism for the settlement of investment disputes. Designed in a way that permits investors to have direct recourse to international adjudication without the previous exhaustion of local remedies, investment arbitration has been able to progressively establish itself as a fully-fledged alternative to local litigation of investment disputes, leading thereby to a perception of redundancy of local courts. Such perception has been further underpinned by the parallel emergence of international law as the chief body of law prescribing the standards through which the propriety of host States' dealings with foreign investors are now measured. Once domestic law had ceased to provide the relevant normative benchmarks, domestic courts were namely deprived of the possibility to claim epistemic priority over other adjudicatory bodies. The study suggests that the procedural and substantive internationalization of investor-State relations which thus occurred with the introduction of investment arbitration is not in itself novel, but is

rather part of a long line of efforts, from at least the nineteenth century onwards, to exempt foreign investment from constraints posed by local contexts. These efforts, as the study argues, are ultimately linked to the long prevailing distrust among capital-exporting/Western States towards the ability of foreign, non-Western courts to adequately adjust controversies between foreign investors and the host States of their investments.

With the theoretical and historical scene thus set in chapters 1 and 2, the inquiry then proceeds with the analysis of present day arbitral jurisprudence. In **part 1** of the dissertation, comprising chapters 3 to 5, the various situations are first discussed where domestic courts can be seen as *partners* to investment tribunals. These, as the study argues, is primarily in the law ascertainment process. The study begins by explaining in chapter 3 that, 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 continues to be of relevance to a number of issues before investment tribunals – and thereby also domestic courts, as the judicial bodies primarily entrusted with the interpretation and application of that law. To inform the subsequent inquiry, chapter 3 hence maps out the different circumstances in which investment tribunals may be called to interpret and apply domestic law in the adjudicative process, demonstrating that such circumstances are much ubiquitous than investment tribunals may sometimes be willing to concede. The chapter shows that international investment law today operates in a complex relationship with other sources of law, including domestic law, with the consequence that investment tribunals are not in a position to ignore domestic judicial pronouncements interpreting and applying that law.

The two succeeding chapters then proceed to examine how investment tribunals have actually approached the findings and pronouncements of domestic courts when these were relevant to the issues before them. To that end, chapter 4 explores first the effects that international investment tribunals have been willing to concede to domestic courts' pronouncements previously made in domestic judicial proceedings involving the investor and/or its investment. The inquiry demonstrates that, 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, investment 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. Tribunals have thereby invoked a variety of grounds for declining effects to domestic judgments. They invoked arguments relating to the principles of the supremacy of international law and dualism, but also made an appeal to specific powers or duties bestowed upon or enjoyed by them by virtue of their adjudicatory functions, such as the *kompetenz-kompetenz* principle or the duty to autonomously appreciate evidence submitted to them. Ultimately, however, the inquiry also notes that, in spite of formal disclaimers regarding the purported lack of *res judicata* effects of domestic court pronouncements, investment tribunals have nonetheless often accorded them some weight in practice.

Chapter 5 thereafter examines the treatment of domestic courts' jurisprudence in the law ascertainment process more generally. The inquiry shows that, in the case of jurisprudence unrelated to the concrete investor or its investment, tribunals frequently acknowledged its utility, and in fact recurrently resorted to it in determining points of applicable domestic law that were relevant to determining issues pending before them. This was especially the case 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. As chapter 5 argues, the tribunals' inclination to resort in such circumstances to domestic courts' jurisprudence is not only a practical one, related to the fact that arbitrators sitting on such tribunals lack knowledge of the applicable domestic law. The chapter rather suggests that arbitrators are in fact not free to avoid considering such jurisprudence. In being adjudicatory bodies applying a law originating from a legal order other than the one to which they owe their existence, investment 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. The chapter thereby explains that, though this may not translate into an autonomous obligation to engage in researching relevant case law on their own initiative, arbitrators are at the very least required to seek the views of the litigating parties as to any domestic jurisprudence that may be pertinent to the interpretation or application of the applicable domestic law.

Overall, the analysis in part 1 thus revels a certain duality on the part of investment tribunals when it comes to domestic courts' role of *partners*. Whilst generally disinclined to give deference to prior court determinations pertaining to controversies involving the concrete foreign investor, investment tribunals have had little trouble accepting the role of domestic courts' jurisprudence generally in the law-ascertainment and law-clarification at the abstract level. All in all, however, what Part 1 of the inquiry has revealed is that the question of deference ultimately turns on the quality of judicial determinations made by domestic courts. In practice, regardless of whether the determinations in question were relevant because of concrete pronouncements *in casu*, or because of pronouncements *in abstracto*, investment tribunals have generally been prone to accept them as long as these pronouncements were found to emanate 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 accepted as partners in the law-ascertainment process to the extent that their overall conduct did not turn them into suspects.

In **part 2** of the dissertation, comprising chapters 6 to 8, the inquiry then shifts to those circumstances where investment tribunals approach domestic courts as *suspects*: namely, to situations where the conduct of domestic courts itself may fail to respect applicable international standards. In the exercise of their regular judicial functions, courts habitually confirm, amend, or extinguish proprietary and other rights that an investor possesses under domestic law. Those rights, however, oftentimes constitute assets protected under an investment treaty, or else are otherwise relevant to the operation of a protected investment. Where the judicial treatment of those rights fails to meet the standards prescribed by international law, the host State may thus incur responsibility for violating the applicable investment treaty. To take account of this fact, the subsequent chapters examine the standards pursuant to which investment tribunals most frequently scrutinize such "suspect" conduct of domestic courts.

Chapter 6 begins the examination of the investment tribunals' practice by reference to the concept of denial of justice; a concept that still today continues to provide the main normative framework for assessing the propriety of judicial conduct. Whilst forming part the minimum standard of treatment to which investors are entitled under customary international law, the prohibition of the denial of justice has by and large continued to be applied by investment tribunals as part of the fair and equitable treatment standard now prescribed in investment treaties. However, as chapter 6 ultimately shows, the appraisal of court conduct through the prism of denial of justice has largely remained subject to indeterminate standards, not much different from those applied by various arbitral and judicial bodies before WWII, and thus dependent on the subjective appraisal of the arbitrators deciding each specific case. Moreover, the inquiry shows that denial of justice claims have proven to be categorically 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 investors proper treatment in the administration of justice. As the analysis demonstrates, 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 has been considered to set a high threshold: only the gravest irregularities in domestic proceedings and only the most egregiously wrong judgments have been 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, more specific 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. Chapter 7 takes account of this practice, by looking at how investment tribunals have construed and applied such other treaty standards in relation to impugned judicial conduct. The study shows that, since many of the obligations currently found in investment treaties find their origins in the different elements of the minimum standard of treatment, many investment tribunals have struggled with the question how such treaty standards then precisely relate to the concept of denial of justice. Many have ultimately not been willing to draw categorical distinctions between disparate treaty standards (such as that of fair and equitable treatment, full protection and security, non-impairment, and even the due process obligation in expropriation clauses) and thus interpreted them not any differently from the customary obligation demanding from States the provision of an adequate system of justice. The inquiry notes, however, that there has also been a tendency on another part of investment tribunals to construe disparate treaty standards as additive to the customary international minimum standard, and thus as imposing more exacting or demanding obligations upon the judiciary than the denial of justice standard. This has been the case with treaty clauses requiring the provision of "effective means of asserting claims and enforcing rights", which were considered to set out a relatively more demanding treaty standard. Yet, it has also been observable in the growing acceptance of the possibility that the fair and equitable treatment standard itself could be violated by courts in other ways than through denial of justice.

Chapter 8 completes this part of the inquiry by discussing the extent to which procedures before domestic courts may have to be fully exhausted before wrongful judicial conduct can be established. The inquiry notes that, in the context of denial of justice claims, the achievement of finality of judicial action has largely been accepted as a substantive condition of claims, meaning that responsibility has only been taken to be engaged once the judicial system as a whole has been tested. Conceptually, the application of this finality rule has been linked to the specific nature of the international obligation at issue. Since the prohibition of denial of justice has been grounded in the duty to provide an adequate system of justice, and this latter is an obligation to maintain a system of a particular kind, the system as a whole needs to be tested before one can say that the duty has been violated. Yet, not all treaty standards may necessary impose an obligation to maintain a system of a particular kind. As the inquiry notes, investment tribunals have thus not been willing to accept the finality rule to be applicable to all types of treaty claims predicated upon the conduct of domestic courts. The problem, however, is that obligations pursuant to most treaty standards are capable of being construed in different ways, which makes the application of the finality rule contingent on how one interprets the concrete treaty standard.

On the whole, in relation to situations in which domestic courts performed the roles of *suspects*, the study reveals thus a twofold tendency. On the one hand, it demonstrates that it has been principally through the lens of denial of justice that investment tribunals appraised the propriety of judicial action, but also that this standard has been taken to impose a high threshold, which happened to be difficult to meet in practice. On the other hand, the study points to the growing inclination of tribunals to review judicial conduct against other standards of treatment prescribed by investment treaties. Some of these have been construed as imposing more onerous demands upon courts than merely an "adequate" administration of justice. As the inquiry suggests, the tendency of testing purportedly improper judicial treatment against disparate treaty standards is not only part of the efforts to avoid the stringent requirements of the denial of justice standard, but also to evade the requirement of judicial finality as a condition for establishing liability. The latter rule does not sit well with the system of investor-State arbitration where prior recourse to local remedies has generally been dispensed with as a condition for bringing a claim.

Finally, in **part 3** of the dissertation, comprising chapters 9 to 11, the focus of the inquiry moves on to those situations where domestic courts can be seen as *competitors* of investment tribunals. As the study argues, investment arbitration may have become the preferred method for the settlement of investment disputes. Often, however, the measures adversely affecting an investment, which the investor intends to challenge before an investment tribunal, may equally be justiciable in host State courts. In such situations, domestic courts may themselves provide an avenue for redress, ideally making recourse to arbitration unnecessary. Chapters 9 to 11 closely examine how investment tribunals responded to such instances where domestic courts challenge the tribunals' adjudicatory authority over particular grievances incurred by investors.

Opening the discussion, Chapter 9 first examines the various legal techniques employed by arbitrators themselves in dealing with situations of actual or potential jurisdictional competition with domestic courts. The inquiry demonstrates a two-fold tendency. On the one hand, investment tribunals have had the tendency to eschew direct competition with domestic courts by finding ways to avoid formal jurisdictional overlap. On the other hand, and at the same time, they have been predisposed towards solutions that allowed them to assert jurisdictional authority over the concrete investment dispute. To that end, tribunals adopted two broad strategies. In the first place, they have had the habit of restrictively interpreting and/or applying the pertinent jurisdiction-conferring instruments with a view to removing potential jurisdictional overlaps between domestic and international remedies. This did not entail the relinquishment of jurisdiction over the investment dispute as a whole, however; what tribunals were willing to relinquish was merely the authority to deal with issues that were otherwise primarily governed by domestic law. Second, and more commonly, with a view to asserting their authority over the investment dispute, tribunals distinguished the normative basis on which the claims before courts were grounded from the basis of the claims presented in the arbitration. Domestic 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. Investment tribunals thus conceived themselves as operating at a level different than that of domestic courts. Though the latter could equally be competent to adjudicate disputes arising out of the same underlying facts, this could not affect the tribunals' own mandates, since the same set of acts can give rise to parallel, but mutually independent claims.

In the next step, chapter 10 examines the various treaty devices through which States have attempted to regulate jurisdictional interactions between domestic courts and investment tribunals, and discusses how these devices have been implemented in practice. The inquiry shows that, when it comes to the interpretation and application of such treaty devices, investment tribunals have not constituted their role towards domestic courts any differently than in other contexts of jurisdictional competition. Despite treaty language carving out specific roles for domestic courts in the disposition of investment disputes, tribunals largely refused to abrogate their adjudicatory authority in favour of domestic courts. In the case of so-called fork-in-the-road clauses, which require investors to irrevocably opt for either litigating investment disputes in domestic courts of the host State, investment tribunals for example relied on the contract/treaty claim distinction to uphold their own jurisdiction regardless of whether investors previously engaged in domestic litigation. Claims based on domestic law presented to domestic courts were thus not treated as capable of precluding claims grounded in international law presented to investment tribunals. In the case of so-called mandatory local litigation clauses, which direct the aggrieved investors to first seek resolution of their disputes before host State's courts for a prescribed period of time, tribunals employed different techniques. They proceeded to avoid them by either considering such provisions to be less favourable to investors than direct recourse to treaty arbitration, or by finding them futile in the circumstances of the case.

Finally, chapter 11 looks at the role of the investor itself in dealing with instances of jurisdictional competition. It focuses especially on the possibility that the investor could relinquish

its right to pursue arbitration with regard to an investment dispute through contractual stipulations entered into with the host State, or on account of its overall conduct in relation to local litigation. The inquiry demonstrates that also in such circumstances, 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, and in the absence of very clear language to such effect. And so was the mere pursuit of prior local litigation not accepted by tribunals as being capable of amounting to an implied waiver of treaty remedies, or otherwise 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.

On the whole, what the inquiry in part 3 thus demonstrates is that, in situations of 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 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. All in all, 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.

As a whole, the study thus sheds light on an important aspect of the relationship between national judicial organs and international adjudicatory bodies. As such, it informs the further development and reform of the current system of investor-State dispute settlement.