Reforming Investor-State Dispute Resolution: Focusing on the Roles of Domestic Courts Wanli Ma

Erasmus School of Law

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Reforming Investor-State Dispute Resolution: Focusing on the roles of domestic courts

Hervorming van de geschillenbeslechting tussen investeerders en staten: Aandacht voor de rol van nationale rechtbanken

Thesis

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Contents

Abbreviations

2012 Digest	The UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration
Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes
APEC	Asia-Pacifc Economic Cooperation
ASA	The Swiss Arbitration Association
ASEAN	The Association of Southeast Asian Nations
AUSFTA	Australia-US Free Trade Agreement
BCB	British Caribbean Bank
BIT	Bilateral Investment Agreement
BRICS	Brazil, Russia, India, China and South Africa
BRTA	Bilateral and Regional Trade Agreement
CCJA	Common Court of Justice and Arbitration
CCP	The Civil Code of Procedure
CETA	Comprehensive Economic and Trade Agreement
CFIA	Cooperation and Facilitation Inverstment Agreement
CIETAC	China International Economic and Trade Arbitration Commission
COVID-19	Coronavirus Disease 2019
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DCCP	The Dutch Code of Civil Procedure
ECJ	The European Court of Justice
ECT	The Energy Charter Treaty
EU	The European Union
FAA	Federal Arbitration Act
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
G20	Group of 20
ICC	The International Court of Arbitration of the International Chamber of Commerce
ICC	The International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	International Investment Agreement
ILC	International Law Commission
ISA	Investor-State Arbitration
ISDS	Investor-State Dispute Settlement
LCIA	The London Court of International Arbitration
Mauritius Convention	The UN General Assembly adopted United Nations Convention on Transparency in Treaty-based Investor-State Arbitration
MFN Clause	Most-favored-nation Clause
MIC	Multilateral Investment Court

Model Law	The UNCITRAL Model Law on International Commercial Arbitration
MPRDA	Mineral and Petroleum Resource Development Act
MTF Rule	The Moving Treaty Frontier Rule
NAFTA	The North American Free Trade Agreement
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NGO	Non-Governmental Organization
OECD	Orgnization for Economic Cooperation and Development
OHADA	The Organization for the Harmonization in Africa of Business Law
PCA	The Permanent Court of Arbitration
RCEP	The Regional Comprehensive Economic Partnership
RLFI	The Russian Law on Foreign Investment
SAR	Special Administrative Region
SCA	The Singapore Court of Appeal
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SCIA	Shenzhen Court of International Arbitration
SDMP	S.D. Myers, Inc.
SIAC	Singapore International Arbitration Centre
SIAC IA Rules	The Singapore International Arbitration Centre Investment Arbitration Rules
TFEU	The Treaty on the Functioning of the European Union
TPP	The Trans-Pacific Partnership Agreement
Transparency Rules	The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UK	The United Kingdom
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	The United States
USMCA	The United States-Mexico-Canada Agreement
VCLT	The Vienna Convention on the Law of Treaties
VCST	The Vienna Convention on Succession of States in respect of Treaties
WJP	World Justice Project
WTO	The World Trade Organization

Tables and Figures

Chapter 1 Introduction

1.1 Research Background

Despite the debates in the economic literature that foreign direct investment (FDI) inflows do not have an independently positive influence on economic growth, FDI can make important contributions to hosting countries by bringing with it technology, skills, know-how, management knowledge, etc.[1] This also explains why countries around the world take various forms of measures to attract FDI inflows and maximize their function in boosting domestic economic development.[2] Indeed, alongside the continuous advancement of economic globalization, the FDI stock had been growing steadily for at least two decades.[3] Although the COVID-19 pandemic caused global FDI flows in 2020 to plummet to the lowest level since 2005 at US$ 846 billion,[4] global FDI activities will most likely rebound during the post-pandemic economic recovery.[5] Resulting from the gradual increase of FDI stocks around the world in the long term, investment disputes between foreign investors and host states will also occur from time to time and the creation of an effective investor-state dispute resolution mechanism is of great importance.

At the international level, thousands of international investment agreements (IIAs) constitute a rather broad network of legal protection for foreign investors. Those IIAs typically not only set out the substantive rights promised by national states for foreign investment but also foreign investors' entitlement to a procedural privilege – investment arbitration.[6] Investment arbitration is an international arbitral procedure designed to resolve disputes between foreign investors and host states, by which foreign investors can request arbitration with host states without their home states' espousal. Since the potential of investment arbitration in resolving investment disputes was initially felt by the international community, the growth of this form of dispute resolution has been remarkable.[7]

In addition to investment arbitration, litigation via the domestic courts of host states provides foreign investors with another method to resolve their disputes with public authorities in host states. In the earlier generations of investment agreements, the role of domestic courts in

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[1] Maria V. Carkovic and Ross Levine, "Does Foreign Direct Investment Accelerate Economic Growth?", University of Minnesota Department of Finance Working Paper (2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=314924 (last visited on April 15, 2021), p. 13 (arguing that "while microeconomic studies generally, though not uniformly, shed pessimistic evidence on the growth-effects of foreign capital, many macroeconomic studies find a positive link between FDI and growth").

[2] Karl P. Sauvant, "China Moves the G20 towards an International Investment Framework and Investment Facilitation", in Julien Chaisse ed., "China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy", Oxford University Press (2019), p. 311.

[3] International Trade Centre, "Investment Map", available at https://www.investmentmap.org/investment/time-series-by-country (last visited on April 15, 2021).

[4] OECD, "FDI in Figures", https://www.oecd.org/investment/FDI-in-Figures-April-2021.pdf (last visited on May 3, 2021), p. 1.

[5] Caroline Freund, etc., "Foreign Investors Cautiously See Brighter Skies ahead after Pandemic Shock", https://blogs.worldbank.org/psd/foreign-investors-cautiously-see-brighter-skies-ahead-after-pandemic-shock (last visited on May 4, 2021).

[6] Investment arbitration is also widely known as investor-state arbitration, international investment arbitration, and sometimes investor-state dispute settlement. While investment treaty arbitration or treaty-based investment arbitration only refers to investment arbitration initiated pursuant to IIAs, this study does not intend to distinguish investment arbitration from investment treaty arbitration since a dominant majority of investment arbitration is indeed treaty-based.

[7] Shahla F. Ali and Odysseas G. Repousis, "Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat", Denver Journal of International Law & Policy, Vol. 45, No. 2 (2020), p. 226.

resolving investment disputes was normally emphasized by the inclusion of the exhaustion of local remedies rule or the requirement of prior use of local remedies in the text. Nonetheless, such role of domestic courts has been eclipsed by the provision of a direct and immediate access to investment arbitration for foreign investors in more recent investment agreements. To some extent, the role of domestic courts in resolving investment disputes is discentered in more recent investment agreements as investment arbitration is largely offered as a substitute for litigation via the domestic courts of host states.

Despite the significant growth in the number of investment arbitration cases, investment arbitration has been facing widespread criticism for some time due to controversies ranging from perceived encroachment upon states' sovereignty to intrinsic deficiencies within the mechanism.[8] One of the main concerns is that investment arbitration "threatens states' abilities to implement public interest regulation, such as public health and environmental regulation."[9] While investment arbitration remains controversial with vigorous debates lingering on over its reform or abolition, many countries and organizations have been trying to respond with their own policy choice. For instance, some countries decided to exit the International Centre for Settlement of Investment Disputes (ICSID), terminate their investment treaty program, or keep investment arbitration out of their concluded investment agreements.[10] The EU, however, has made a specific proposal to establish a "multilateral investment court" (MIC) in a bid to replace the current investment arbitration system.[11]

While the international community has put its focus on investment arbitration in the reform of investor-state dispute resolution, scant attention has been given to the roles and functions of domestic courts in the resolution of investment disputes. But the reality is that, in the light of the significance of domestic courts at various stages of investor-state dispute resolution, the reform of investor-state dispute resolution cannot reach the level of satisfaction that it could have done if domestic courts were not to be included in the agenda. Therefore, at a critical moment when global efforts are being made to reform investor-state dispute resolution, substantial and thorough academic research surrounding investment arbitration is indispensable but the integration of domestic courts into this process is also important. This study intends to highlight the relevance of domestic courts in investor-state dispute resolution and consider how to reform this mechanism from the perspective of domestic courts.

1.2 Research Questions

The central research question of this study is: how can investor-state dispute resolution be reformed from the perspective of the roles and functions of domestic courts? The research surrounding the following sub-questions will help to answer the central research questions:

(i) What are the roles and functions of domestic courts in investor-state dispute resolution?

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[8] See *infra* "Chapter 2 Setting the Stage: The Legitimacy Crisis Facing Investment Arbitration and the Need to Reform Investor-State Dispute Resolution".

[9] Arseni Matveev, "Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty", The University of Western Australia Law Review, Vol. 40, No. 1 (2015), p. 349.

[10] See *infra* "4.3.1 State Practice on Terminating IIAs" & "4.4 Exclusion of Investment Arbitration from Treaties" of Chapter 4.

[11] European Parliament, "Multilateral Investment Court – Overview of the Reform Proposals and Prospects", https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf (last visited on January 3, 2022), p. 2.

(ii) What is the preferable mechanism in the allocation of jurisdiction between domestic courts and investment tribunals upon the application of a goal-based approach?

(iii) Is a judicial review mechanism as a post-award remedy applicable to non-ICSID arbitration effective?

1.3 Clarification of Key Terms

1.3.1 Investment Disputes

Investment disputes, at first glance, may cause much confusion as this term can be used to refer to a very broad spectrum of disputes between different stakeholders. This confusion in turn arises from the multi-layer denotation of the term "investment", which may include domestic investment and overseas investment, direct investment and portfolio investment, as well as institutional investment and private investment. However, by repeatedly referring to investment disputes, the intention of this research thesis is not to bring an inexhaustible range of disputes onboard for an all-inclusive study. Instead, the concept of investment disputes in this thesis should not be read without putting it into the limiting context of the international investment regime governing FDI activities. To further narrow down the scope of investment disputes, those disputes arising between/among national states or out of commercial investment contracts concluded between domestic and foreign individuals are excluded. Instead, investment disputes referred to in this thesis occur between a pair of asymmetrical parties, namely foreign investors and host states. Specifically, investment disputes herein are defined as those disputes arising between an investor from one national state, as one party, and another national state (including its constitutive authorities) in which the investor has invested capital, as the other party, with respect to the direct investment that has been made. Thus, investment disputes should not be understood as an all-embracing terminology for the purpose of this thesis.

1.3.2 International Investment Agreements

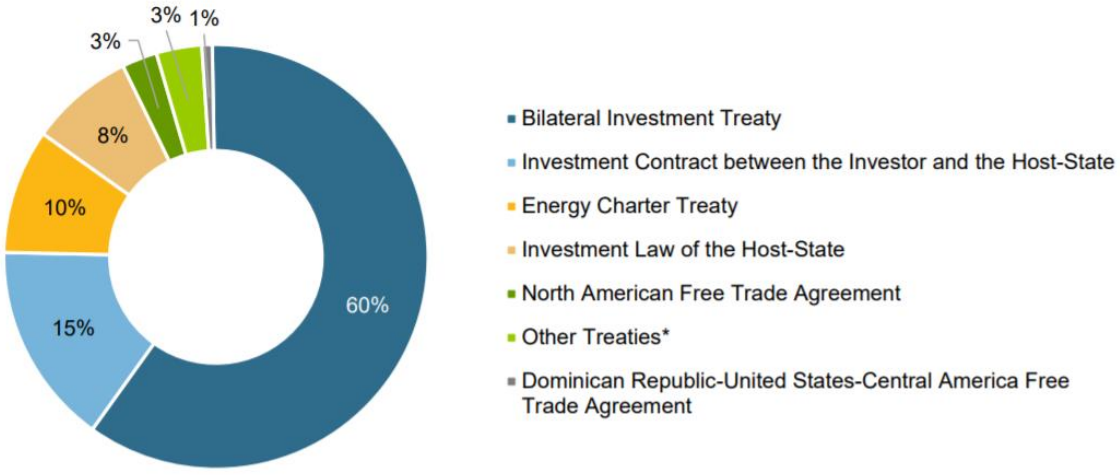
IIAs or investment agreements are another term which is repeatedly mentioned in this research thesis. These agreements in this context broadly refer to international treaties concluded between/among national states with the aim of addressing the protection, promotion and liberalization of cross-border investment activities. They are characterized by an agreed set of standards of protection that host states should accord to foreign investors coming from other treaty parties and their investments. IIAs mainly take the following forms: (1) bilateral investment treaties (BITs), such as the EU-China Comprehensive Agreement on Investment; (2) multilateral investment treaties, such as the Energy Charter Treaty (the ECT); and (3) investment chapters contained in free trade agreements (FTAs), such as Chapter 14 of the United States-Mexico-Canada Agreement (the USMCA).

1.3.3 Investment arbitration

When it comes to the use of an innovative form of arbitration to resolve investment disputes, a number of different but related terms may come to mind as they are often used alternatively. These terms mainly include international investment arbitration, foreign

investment arbitration, investment arbitration, investor-state arbitration (ISA), investment treaty arbitration, and treaty-based investment arbitration. To avoid unnecessary confusion, it should be noted that investment treaty arbitration or treaty-based investment arbitration refers exclusively to those arbitration cases initiated pursuant to IIAs. However, as Figure 1 suggests, foreign investors may also rely, though much less frequently, on investor-state contracts or domestic investment law to launch arbitration with host states. Investment arbitration is used in this research thesis because the roles of domestic courts in resolving investment disputes, such as reviewing investment awards or recognizing and enforcing such awards, are relevant in a broad sense regardless of the consent instruments that underlie arbitration. However, in considering the judicial role of domestic courts or the allocation of jurisdiction between domestic courts and investment tribunals, this research thesis starts from and focuses on the relevant procedural rules in IIAs, which certainly relate more to treaty-based investment arbitration than to the other forms of investment arbitration. Given thatmost of arbitration cases are treaty-based, investment arbitration instead of other related terms is selected for the purpose of this research thesis.

Figure 1 Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered under the ICSID Convention and Additional Facility Rules



Source: The ICSID Caseload Statistics (2021-1 Edition)

1.3.4 ICSID Arbitration and Non-ICSID Arbitration

By the standard of applicable arbitration rules, investment arbitration can be divided into ICSID arbitration and non-ICSID arbitration. Instead of equating to arbitration conducted under the auspices of ICSID, ICSID arbitration refer to such arbitration in which the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and the accompanying Rules of Procedure for Arbitration Proceedings (the ICSID Arbitration Rules) are the applicable arbitration rules. Those investment arbitrations applying other arbitration rules, including the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes (the Additional Facility

Rules), are generally referred to as non-ICSID arbitration. Since the ICSID Convention has established a self-contained arbitration regime, distinguishing ICSID arbitration from non-ICSID arbitration carries important practical significance.[12] For instance, when this research thesis takes on the study and evaluation of the role of domestic courts *loci arbitri* in reviewing investment awards, the whole context is limited to non-ICSID arbitration as the ICSID Convention has created a dedicated annulment procedure.

1.3.5 Investor-State Dispute Resolution

In this research thesis, investor-state dispute resolution is defined as a combination of different methods for the resolution of investment disputes, which predominantly includes court litigation and investment arbitration as determined by the scope of this research. A related concept in this regard is investor-state dispute settlement, or ISDS. While ISDS is much more frequently used in international investment law scholarship, investor-state dispute resolution rather than ISDS is selected here intentionally. That is because, despite the fact that ISDS-related provisions in IIAs often address not only investment arbitration but also litigation via domestic courts,[13] ISDS nowadays is largely equated by many to investment arbitration.[14] However, as the research questions suggest, this research thesis looks at the reformation of the system for the resolution of investment disputes from the perspective of domestic courts. Therefore, although investment arbitration is highly relevant throughout the entire discussion, the roles of domestic courts in resolving investment disputes, not least assuming standalone jurisdiction, are the core and should be covered by the parent concept. Hence investor-state dispute resolution should be understood to include both litigation via domestic courts and investment arbitration.

1.4 Research Methodology

Multiple research methods are employed in this research to seek the answers for the abovementioned central research question and sub-questions.

1.4.1 Legal Doctrinal Study

Legal doctrinal research is the first and foremost method that will be applied throughout the conduct of this study. It has been pointed out that doctrinal study is a two-part process, comprising the first step of locating the sources of law and the second one of interpreting and analyzing the relevant legal texts.[15] Corresponding to the different roles and functions played by domestic courts in investor-state dispute resolution, the sources of law to be explored range from international treaties, international arbitration rules, and model laws, to various domestic laws and official documents. For instance, exploring the role of domestic courts in accepting and hearing investment disputes demands the reading of IIAs and the ICSID

[12] See *infra* "3.3.1 The Dichotomization of Investment Arbitration" of Chapter 3.
[13] See *infra* "3.2 The Judicial Role of Domestic Courts" in Chapter 3.
[14] Columbia Center on Sustainable Development, "Primer: International Investment Treaties and Investor-State Dispute Settlement", https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement (last visited on November 15, 2021).
[15] Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research", Deakin Law Review, Vol. 17, No. 1 (2012), p. 110.

Convention, because the jurisdictional clauses contained therein also impact to some extent the jurisdiction exercised by domestic courts. National legislation is also an indispensable source of law that warrants considerable attention. When it comes to the exploration of judicial review by domestic courts of investment awards, arbitration laws in main jurisdictions where investment arbitration frequently is seated, including the United States, the Netherlands, France, the United Kingdom, Sweden, will be explored.

1.4.2 Case Study and Case Law Study

Case study and case law study will also be adopted. Case study in this research refers to the investment treaty-making practices of certain countries which indicate an observed decline in the prominence of investment arbitration and a corresponding rise in court litigation. Before conducting a comparative institutional analysis of different mechanisms modelling the jurisdictional allocation between domestic courts and investment tribunals, this study looks at the recent treaty-making practices of national states in the choice between domestic court litigation and investment arbitration. Indeed, there has been an increasingly apparent tendency to repudiate investment arbitration, as reflected by the recent policy stance of some of the most significant economies around the world. The case studies contained herein will reveal that not only developing countries, such as major Latin American countries, but also some mainstream developed countries, such as Australia and the United States, have indicated a preference for court litigation over investment arbitration at least in certain circumstances. In this study, the cases of several countries including Latin American countries, Australia, and the United States will be cited for an illustrative purpose.

When deciding on the countries to be selected, I paid particular attention to the rather broad representation of the samples covered in this study. For one thing, it is important to have both developed countries, such as the United States, Australia and New Zealand, and developing countries, such as India, Indonesia and South Africa. For another thing, in a bid to ensure a reasonable level of inclusiveness in this study, I also selected countries that have different sizes of economy. These samples include both large economies, such as western economic powers, and smaller economies, such as several Latin American countries. It is worth mentioning here that, the case study in Chapter 4 is intended to present a picture that in certain circumstances, some countries have demonstrated a tend to favor the increased involvement of domestic courts in investor-state dispute resolution. That is, however, not to say in general investment arbitration has been abandoned by the international community. Instead, many countries are still choosing to sign investment agreements with investment arbitration as a dispute resolution forum. That said, the choice made by some countries in their recent investment treaty-making practices to highlight the role of domestic courts is significant enough for us to take a step back and analyze the tradeoffs of several different institutional choices that countries can make between litigation via domestic courts and investment arbitration.

At the same time, in this research, case law study also manifests itself as an important tool for analysis. In Chapter 6 where a critical analysis has been conducted as to the mechanism of judicial review of investment awards by domestic courts *loci arbitri*, a dedicated analysis of several high-profile judicial review proceedings has been included. These selected judicial

review proceedings include such proceedings related to *Metalclad v. Mexico*, *BG v. Argentina*, the *Yukos* case and *Sanum Investments v. Laos*. These judicial review proceedings were selected not only because they are more significant in terms of the amount of compensation involved or the complexity of review proceedings but also they in a clearer way expose some of the defects of the judicial review system, such as the inefficient decision-making process and inconsistent judgments delivered by national judiciaries. For example, in this regard, the famous *Yukos* case (both because of the significant amount of compensation awarded and the length of the dispute resolution process) will be introduced to facilitate the analysis of the role and function of domestic courts in reviewing investment awards and the flaws of the judicial review mechanism. The discussions of the abovementioned judicial review proceedings are expected to reveal the way in which the judicial review mechanism works in reality and expose some of the drawbacks of the mechanism which would call for the reform of the design for post-award remedy in the context of investment arbitration.

1.4.3 Empirical Research and Empirical Evidence

Empirical research can also provide insights into the answers that this study seeks. An empirical study is often preferred by researchers because such a study derives its credibility and validity primarily from the methodology adopted in carrying out research, which is making use of verifiable real-life evidence to arrive at research outcomes. In other words, an empirical study relies on evidence obtained through observation or scientific data collection methods to reach its conclusions. Empirical research can be divided into quantitative research and qualitative research, depending on whether the data sample contains quantifiable or non-numerical data.[16]

In view of the advantages of empirical research, this study collects data from some reliable sources to help analyze in general how investor-state dispute resolution has evolved over the years, and in particular how the judicial review of investment awards works in reality. For instance, this research collects and presents data related to the number of investment arbitrations and data related to the increase of inward FDI stocks in a bid to show that investment arbitrations are expected to further increase as cross-border capitals continue. By introducing the data prepared by the World Justice Project in relation to the development of the rule of law in certain jurisdictions, this study seeks to reveal that the quality of the local court system is uneven across the world and not all domestic courts are reliable in all circustances.

More prominently, this study makes use of some of the orthodox databases, such as UNCTAD Investment Dispute Settlement Navigator, to collect empirical data regarding the operation of the judicial review mechanism. These empirical data will facilitate a solid understanding of different aspects of the judicial review of investment awards in practice, such as whether the investor side or the state side challenges investment awards more often,

[16] Formplus Blog, "What Is Empirical Research Study? [Examples & Methods]", available at https://www.formpl.us/blog/empirical-research (last visited on May 20, 2022).

how often such challenges would be supported by domestic courts, whether setting-aside proceedings would typically go through several instances of adjudication, and so on.

In addition, this research also from time to time refers to the empirical evidence presented by other researchers to support claims made herein. For example, empirical data in relation to the arbitration costs incurred by the claimant party and the respondent party will be cited in Chapter 2 to show that investment arbitration has become a very costly dispute resolution method for both foreign investors and host states. Both empirical research and the presentation of empirical evidence are expected to complement the other research methods adopted in this study to seek answers to the research questions raised in this chapter.

1.5 Review of Legal Research on Investor-State Dispute Resolution

In the last two decades, the academic literature on the topic of investor-state dispute resolution has flourished, which is in tune with the remarkable increase of the caseload of investment arbitration. Since investment arbitration has emerged as a prominent method for the resolution of investment disputes at the international level, this literature has been largely dominated by the research on investment arbitration rather than other dispute resolution methods. While some scholars conducted positive studies of the development and impact of investment arbitration,[17] others explored more fundamental issues in relation to investment arbitration at a normative level, such as whether it is public in nature.[18] There are also studies which look at the operation of investment arbitration from the economic and/or political perspective in the hope that a much deeper understanding of such a dispute resolution method would be enabled by the introduction of a much broader context.[19] In addition, some other studies in this field are concerned with a particular subject matter or geographic area in relation to investment arbitration, such as human rights protection,[20] environmental

[17] See, e.g., Susan D. Franck, "Development and Outcomes of Investment Treaty Arbitration", Harvard International Law Journal, Vol. 50, No. 2 (2009), pp. 435-490; Rachel L. Wellhausen, "Recent Trends in Investor-State Dispute Settlement", Journal of International Dispute Settlement, Vol. 7, No. 1 (2016), pp. 117-135; Wolfgang Alschner, "The Impact of Investment Arbitration on Investment Treaty Design: Myths versus reality", Yale Journal of International Law, Vol. 42, No. 1 (2018), pp. 1-66.

[18] See, e.g., Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law", The European Journal of International Law, Vol. 17, No. 1 (2006), pp. 121-150; Catharine Titi, "Are Investment Tribunals Ajudicating Political Dispites?", Journal of International Arbitration, Vol. 32, No. 3 (2015), pp. 261-288; José E. Alvarez, "Is Investor-State Arbitration 'Public'?", Journal of International Dispute Settlement, Vol. 7, No. 3 (2016), pp. 534-576.

[19] See, e.g., Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, "The Political Economy of the Investment Treaty Regime", Oxford University Press (2017), pp. 1-324; Alxander W. Resar and Tai-Heng Cheng, "Investor State Arbitration in a Changing World Order", Brill Research Perspectives in International Investment Law and Arbitration, 3.2-3 (2019), pp. 1-89; Michael Faure and Wanli Ma, "Investor-State Arbitration: Economic and Empirical Perspectives", Michigan Journal of International Law, Vol. 41, No. 1 (2020), pp. 1-62; Weijia Rao, "Domestic Politics and Settlement in Investor-State Arbitration", The Journal of Legal Studies, Vol. 50, No. 1 (2021), pp.145-185.

[20] See, e.g., James D. Fry, "International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity", Duke Journal of Comparative & International Law, Vol. 18, No. 1 (2007), pp. 77-150; Silvia Steininger, "What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration", Leiden Journal of International Law, Vol. 31, No. 1 (2018), pp. 33-58.

interests,[21] treaty interpretation,[22] remedial measures,[23] and developing countries' experience with investment arbitration.[24]

There has also been a large number of scholars and practitioners who placed their focus on the reflections of the investment arbitration system, generating lavish academic publications debating the virtues and defects of such a dispute resolution method. The perceived bias of investment arbitrators is one of the major concerns that attracts considerable scholarly attention. Through an empirical study based on a content analysis of arbitrators' resolutions, Van Harten provides support for the argument that investment arbitrators demonstrate systemic bias in favor of foreign investors.[25] A study by Langford, Behn and Lie illuminates the revolving door phenomenon in investment arbitration (individuals switching their roles as arbitrator, legal counsel, expert witness, or tribunal secretary), raising further doubts as to the independence and impartiality of investment arbitrators.[26] Rao's study challenges conventional wisdom that arbitrators show either a pro-investor or pro-state bias but suggests another troubling tendency, namely that they intentionally try to establish a reputation for neutrality by voting against prior impressions of them at the risk of incorrect decisions.[27] Reinisch and TenCate turned their attention to the outcomes of decision-making, suggesting that investment arbitrators have rendered inconsistent arbitral decisions in practice.[28] Other scholars, such as Choudhury, Arcuri and Montanaro, argue that investment arbitration fails to deliver justice in a balanced manner, which means public interests are often sacrificed for the

[21] See, e.g., Anatole Boute, "Combating Climate Change through Investment Arbitration", Fordham International Law Journal, Vol. 35, No. 3 (2012), pp. 613-664; Christina L. Beharry and Melinda E. Kuritzky, "Going Green: Managing the Environment through International Investment Arbitration", American University International Law Review, Vol. 30, No. 3 (2015), pp. 383-430.
[22] See, e.g., Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", American Journal of International Law, Vol. 104, No. 2 (2010), pp. 179-225; J. Romesh Weeramantry, "Treaty Interpretation in Investment Arbitration", Oxford University Press (2012), pp. 1-312.
[23] See, e.g., Borzu Sabahi, "Compensation and Restitution in Investor-State Arbitration: Principles and Practice", Oxford University Press (2011), pp. 1-256.
[24] See, e.g., Luke Nottage and J. Romesh Weeramantry, "Investment Arbitration in Asia: Five Perspectives on Law and Practice", Arbitration International, Vol. 28, No. 1 (2012), pp. 19-62; Catharine Titi, "Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas", Arbitration International, Vol. 30, No. 2 (2014), pp. 357-386.
[25] Gus Van Harten, "Arbitrator Behaviour in Asymmeterical Adjudication: An Empirical Study of Investment Treaty Arbitration", Osgoode Hall Law Journal, Vol. 50, No. 1 (2012), pp. 211-268.
[26] Malcolm Langford, Daniel Behn and Runar H. Lie, "The Revolving Door in International Investment Arbitration", Journal of International Economic Law, Vol. 20, No. 2 (2017), pp. 301-332.
[27] Weijia Rao, "Are Arbitrators Biased in ICSID Arbitration? A Dynamic Perspective", International Review of Law and Economics, Vol. 66 (2021), 105980.
[28] August Reinisch, "The Issues Raised by Parallel Proceedings and Possible Solutions", in Michael Waibel, etc., eds., "The Backlash against Investment Arbitration: Perceptions and Reality", Wolters Kluwer (2010), pp. 113- 126. Irene M. TenCate, "The Costs of Consistency: Precedeny in Investment Treaty Arbitration", Columbia Journal of Transantional Law, Vol. 51, No. 1 (2013), pp. 418-478.

benefit of private investors.[29] The literature on investment arbitration also sheds light on its procedural defects, such as the lack of transparency[30] and the costly and lengthy procedure.[31]

In the light of fierce accusations against investment arbitration, extensive studies have also sprung up making proposals to reform the system. Giorgetti, for example, suggests ensuring the impartiality of arbitrators by adopting different challenge rules and increasing diversity by enlarging the pool of arbitrators.[32] Franck argues that the lack of consistency in arbitral jurisprudence could be addressed from at least two perspectives: taking preventive solutions, such as consulting scholarship in rendering investment awards, and establishing an investment arbitration appellate court.[33] In seeking a better balance between respecting national states' right to regulate and protecting foreign investors' private interests, Korzun suggests that, among others, the right to regulate for legitimate government objectives should be included in the preambles of investment agreements and exceptions and other safeguard provisions should be introduced to insulate regulatory power.[34] Likewise, commentators also make suggestions with regard to how to increase transparency in the dispute resolution methods. While Welch argues that replacing investment arbitration with a permanent court would be an effective way,[35] Moneke suggests a more conservative approach by calling for improvements to be made to current mechanisms that promote transparency of investment arbitration.[36] Moreover, in an academic publication discussing arbitration costs, Franck proposes a range of measures that could be adopted to manage arbitration costs, including expedited rules, case management conferences, strict timetable compliance, security for costs, and enhanced regulation of legal counsels.[37]

Despite the overwhelming criticisms against the investment arbitration system, some enthusiasts tend to believe that the current system fares rather well and many attacks actually result from a lack of comprehension or misconception. Schill, for instance, contends that investment arbitration is a much-needed mechanism in that it enables host states to make

[29] Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit", Vanderbilt Journal of Transantional Law, Vol. 41, No. 3 (2008), pp. 775-832. Alessandra Arcuri and Fancesco Montanaro, "Justice for All: Protecting the Public Interest in Investment Treaties", Boston College Law Review, Vol. 59, No. 8 (2018), pp. 2791-2824.
[30] Daniel B. Magraw Jr. and Niranjali M. Amerasinghe, "Transparecny and Public Participation in Investor-State Arbitration", ILSA Journal of International & Comparative Law, Vol. 15, No. 2 (2009), pp. 337-360. Andrea K. Bjorklund, "The Emerging Civilization of Investment Arbitration", Penn State Law Review, Vol. 113, No. 4 (2009), pp. 1269-1300.
[31] Susan D. Franck, "Rationalizing Costs in Investment Treaty Arbitration", Washington University Law Review, Vol. 88, No. 4 (2019), pp. 769-852.
[32] Chiara Giorgetti, "Who Decides Who Decides in International Investment Arbitration?", University of Pennsylvania Journal of International Law, Vol. 35, No. 2 (2014), pp. 431-486.
[33] Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", Fordham Law Review, Vol. 73, No. 4 (2005), pp. 1521-1625.
[34] Vera Korzun, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs", Vanderbilt Journal of Transnational Law, Vol. 50, No. 2 (2017), pp. 355-414.
[35] James S. Welch, Jr., "Addressing the Issues in Investor-State Arbitration: Is It Time for A New Direction?", Atlantic Law Journal, Vol. 21 (2019), pp. 1-44.
[36] Enuma U. Moneke, "The Quest for Transparency in Investor-State Arbitration: Are the Transaprency Rules and the Mauritius Convention Effective Instruments of Reform?", Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 86, No. 2 (2020), pp. 157-186.
[37] Susan D. Franck, "Arbitration Costs: Myths and Realities in Investment Treaty Arbitration", Oxford University Press (2019).

genuinely credible commitments about the treatment of foreign investment and foreign investors to directly enforce those commitments against host states.[38] Brower and Blanchard argue that many criticisms aiming to eradicate investment arbitration are based on untested assumptions and inaccurate information, threatening to undermine the massive benefits facilitated by investment agreements which empower foreign investors to confront host states at the international level.[39]

In contrast to the heated discussions over the reform of investment arbitration, less scholarly attention has been cumulatively channelled to other methods for the resolution of investment disputes, such as litigating investment disputes via domestic courts. However, in recent years, more academic publications on the roles of domestic courts in investor-state dispute resolution started to emerge partly because the controversies raised by investment arbitration prompted commentators to look at other alternative methods. For instance, Trakman noted the announcement made by the Australian government in 2011 that it would no longer include arbitration clauses in investment agreements but instead insist that investment disputes should be heard by domestic courts, which prompted him to contemplate whether this would set a new trend. In the article on this topic, he set out the (alleged) advantages and disadvantages of investment arbitration and court litigation respectively, opposing a total disregard of the value generated by investment arbitration but agreeing that investment arbitration is not an elixir of perfection. He also pointed out that "states are more likely to trust the domestic courts of other states that share common social and economic traditions than those that do not."[40] Likewise, by examining the no-U turn provision in NAFTA and the sweeteners conflict between the United States and Mexico, Puig argues that, despite the benefits that may be brought by investment arbitration, it also has a substantial impact on the domestic institutions. In his view, regulating the relationship between domestic courts and investment tribunals is not only academically relevant but also has practical, doctrinal and policy implications. Thus, more research has to be done as to the coordination between the national and international decision-making bodies and the rules for access to investment arbitration.[41] Eliason turned attention to the role of domestic courts in reviewing investment awards, putting her focus on US domestic law and challenges of evident partiality on the part of arbitrators. She reached a conclusion that domestic courts are not the ideal places for handling challenges to investment awards since there are different standards of deference across jurisdictions and court judges are not familiar enough with international treaties and arbitration rules.[42]

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[38] Stephan W. Schill, "Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement", in Michael Waibel, etc., eds., "The Backlash against Investment Arbitration: Perceptions and Reality", Wolters Kluwer (2010), pp. 29-50.
[39] Charles N. Brower and Sadie Blanchard, "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States", Columbia Journal of Transnational Law, Vol. 52, No. 3 (2014), pp. 689-777.
[40] Leon E. Trakman, "Investor State Arbitration or Local Courts: Will Australia Set A New Trend?", Journal of World Trade, Vol. 46, No. 1 (2012), pp. 83-120.
[41] Sergio Puig, "Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga", Mexican Law Review, Vol. 5, No. 2 (2013), pp. 199-243.
[42] Antonia Eliason, "Evident Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform", Georgetown Journal of International Law, Vol. 50, No. 1 (2018), pp. 1-44.

Before spelling out the academic relevance of this research in the next section, it is necessary to introduce three more relevant publcations which more broadly probe into the relationship between domestic courts and investment tribunals. First comes the book co-authored by A. Saravanan and S.R. Subramanian, which is entitled *Role of Domestic Courts in the Settlement of Investor-State Disputes - The Indian Scenario*. While this book also broadly introduces the interactions between domestic courts and investment arbitration tribunals, its primary focus is India's approach to the protection of foreign investment and interactions between Indian courts and investment tribunals. The authors argue that, among others, since India has become both a capital importer and a capital exporter, the government should not overstate its interests in asserting host state regulatory discretion but should rather recalibrate its stand on investment treaty protection. More specifically, with reference to the relationship between court litigation and investment arbitration, the authors contend that the term of five years imposed by the latest Indian Model BIT on foreign investors to seek local remedies may not be needed.[43]

In his doctoral thesis *Domestic Courts in Investor-State Arbitration: Partners, Suspects, Competitors*, Vid Prislan conducted an in-depth study into the roles that investment tribunals accord to domestic courts when they adjudicate investment disputes. He pronounced that, instead of enquiring into the roles that domestic courts can generally play in the settlement of investment disputes, the focus of his dissertation is the relevance of domestic courts in the eyes of investment tribunals. In view of that research scope, he looked at how investment tribunals treat domestic courts and their pronouncements relying on the ever-growing investment arbitration jurisprudence. Starting from the perspective of investment tribunals, the roles of domestic courts in the investment arbitration process are conceptualized as a trinity: partners, suspects, and competitors. As partners, domestic courts through their decisions or pronouncements may assist investment tribunals in the determination of certain points of fact, as well as certain points of applicable domestic law. As suspects, the conduct of domestic courts becomes the object of scrutiny by investment tribunals as the judicial branch itself may cause unjust damage to the interests of foreign investors. As competitors, domestic courts provide a forum where foreign investors may litigate investment disputes with host state authorities, negating the need for, or possibility of, investment arbitration. Prislan's research with insight reveals the ways in which investment tribunals address domestic courts in the arbitral process, underscoring the high relevance of the relationship between national judicial organs and arbitral authorities in the reform of investor-state dispute resolution.[44] While Prislan's research is closely related to the topic of this study, especially the part discussing domestic courts' role as competitors, the scope of this study is apparently different from that of Prislan's work. Instead of conceptualizing the roles of domestic courts in investment arbitration accorded by investment tribunals, this study seeks to unveil the general roles of domestic courts in the resolution of investment disputes, particularly their

[43] A. Saravanan and S.R. Subramanian, "Role of Domestic Courts in the Settlement of Investor-State Disputes - The Indian Scenario", Springer (2020).
[44] Vid Prislan, "Domestic Courts in Investor-State Arbitration: Partners, Suspects, Competitors", Doctoral Thesis, Leiden University (2019).

judicial and supervisory roles, and to bring domestic courts into the overall discussions regarding the reform of the system governing investor-state dispute resolution.

In their recent monograph *Invetsor-State Dispute Settlement and National Courts: Current Framework and Reform Options*, Kaufmann-Kohler and Potestà examine the interactions between domestic courts and investment tribunals. They start from introducing the origins of investment arbitration as a ground-breaking dispute resolution mechanism, the growing criticisms of investment arbitration, and the outlook for the resolution of investment disputes, before detailing the interplay between domestic courts and investment tribunals as mandated by the extensive IIA framework. Instead of taking a step further to discuss how to reform investor-state dispute resolution from the perspective of domestic courts, they place emphasis on mapping out the different roles that domestic courts may play within several different possible scenarios with reference to the future system design governing the resolution of investment disputes. They note, that whether of not reforms should be made and whatever their format, the end goal should be a more efficient and just dispute resolution system for investment disputes and a fitting balance between the protection of investor rights and the preservation of public interests represented by states.[45] Compared to Kaufmann-Kohler and Potestà's work, this study is broader in research scope and is focused on restructuring the roles of domestic courts to duly facilitate the resolution of investment disputes.

1.6 Academic and Societal Relevance

1.6.1 Academic Relevance

The research of investor-state dispute resolution has appealed to rather a large number of legal scholars in recent years, leading to numerous articles and monographs which in turn have brought about academic prosperity in this research field. However, the dedicated and continuing efforts made by legal scholars have been mostly centered on investment arbitration for its remarkable and controversial nature in resolving investment disputes. With the emergence of the MIC system proposed by the EU, this brand-new forum for dispute resolution in international investment law is also becoming an increasingly popular subject in recent publications. Domestic courts, compared to investment arbitration and the MIC system, are much less frequently discussed by scholars when it comes to the resolution of investment disputes. While there are a few publications and theses that shed light on the involvement of domestic courts in international investment dispute resolution, most of them are limited to domestic courts' interaction with investment arbitration and stop short of systematically integrating domestic courts into the reform of investor-state dispute resolution.

This study differs from traditional literature surrounding the topic of investor-state dispute resolution in the sense that it does not place the primary focus on investment arbitration but endeavors to explore ways to reform investor-state dispute resolution from the perspective of domestic courts. It will add to the existing literature by: (1) exploring the roles and functions of domestic courts in investor-state dispute resolution; (2) highlighting that, as can be seen

[45] Gabrielle Kaufmann-Kohler and Michele Potestà, "Investor-State Dispute Settlement and National Courts: Current Framewrok and Reform Options", Spinger (2020).

from the recent investment treaty-making practice of some major economies around the world, domestic courts are likely to play a more active part in resolving investment disputes; (3) explaining why abandoning investment arbitration and fully relying on domestic courts is a bad idea; (4) stating that the current investor-state dispute resolution mechanism, namely investment arbitration as an alternative to domestic courts, is not effective; (5) arguing that investment arbitration as a complement to litigation via domestic courts is a more effective mechanism; and (6) arguing that the judicial review mechanism as a post-award remedy applicable to non-ICSID arbitration demonstrates significant disadvantages and that a better system should be put in place instead.

1.6.2 Societal Relevance

Investor-state dispute resolution is of significant societal relevance because the underlying investment disputes often involve wealthy foreign investors on one side and independent sovereign states on the other. For foreign investors who claim their commercial interests were infringed by national states in breach of investment agreements, a lawsuit with host states concerning their investment abroad usually involves enormous amounts of economic interests and thus perhaps significantly impacts upon their development or survival. On the other hand, host states also need to be cautious about their investment disputes with foreign investors, not only for the huge amount of damages usually involved, but also for the potential damage to their reputation in attracting foreign investment resulting from possible defeats. Considering the colossal influence of investment disputes on both sides of the disputing parties, an effective design of the investor-state dispute resolution mechanism is of extreme importance. Thus, any efforts made at the international level to reform investor-state dispute resolution should strive for a balance between the protection of foreign investors and the regulatory power of host states.

Amid the ongoing global efforts to reform investor-state dispute resolution, this study aims to participate in this critical policy debate by introducing a new perspective. This study highlights that finding ways to improve investment arbitration *per se* is important but not enough, and domestic courts should also be integrated into the overall reform process. By virtue of a comparative institutional analysis, this study suggests that either full reliance on domestic courts or having investment arbitration as an alternative to domestic courts is not the right way forward. Instead, domestic courts should retain primary jurisdiction over investment disputes while investment tribunals are expected to exercise secondary jurisdiction. Some recommendations are also provided herein to describe what a smart mix of domestic court litigation and investment arbitration should look like. This study also takes a step back to conduct a critical analysis of the judicial review system, concluding that relying on domestic courts *loci arbitri* for post-award remedy is not a good idea. It argues that a centralized appellate mechanism is a better choice, which provides support for the long-standing proposal of establishing an appellate mechanism on top of investment arbitration.

Despite all the benefits that a smart mix of domestic court litigation and investment arbitration may bring about, it should be noted that such approach is not a panacea that will magically eliminate all the concerns surrounding investor-state dispute resolution. For instance, the complement model itself cannot remedy the defects of investment arbitration or

the local court system of any given jurisdiction. Even if the complement model is adopted in a smart manner, the subsequent practice may reveal that more work would still need to be done before the concerns surrounding investor-state dispute resolution can be largely cleared.

1.7 Structure of the Thesis

Apart from this introduction, the study will consist of six chapters which proceed as follows: While Chapter 2 makes it clear that investment arbitration is engulfed by a legitimacy crisis and a consensus for the need of reform has arisen, Chapter 3 sets out the roles and functions of domestic courts in investor-state dispute resolution and their respective legal foundations. Thus, Chapter 3 is aimed to answer the first research sub-question: what are the roles and functions of domestic courts in investor-state dispute resolution? Baseon the elaboration that the adjudicative role of domestic courts may be expected to increase in the future as shown by the recent investment treaty-making practice in Chapter 4, Chapter 5 is centered upon a comparative institutional analysis of three approaches in regulating the allocation of power between domestic courts and investment arbitration.[46] Chapter 4 and Chapter 5 answer the second research sub-question: what is the preferable mechanism in the allocation of jurisdiction between domestic courts and investment tribunals upon the application of a goal-based approach? To answer the third research sub-question regarding whether a judicial review mechanism as a post-award remedy applicable to non-ICSID arbitration is effective, the focus of Chapter 6 is placed upon the practices of judicial review of investment awards and the problems that may be raised by the judicial review mechanism. Chapter 7 proceeds to conclude the research on the adjudicative and supervisory roles of domestic courts and to provide policy recommendations on how to improve the current mechanism underlying the resolution of investment disputes via the recalibration of domestic courts' adjudicative and supervisory roles in the process.

[46] These three approaches are domestic courts as an exclusive forum for investor-state dispute resolution, investment arbitration as an alternative to domestic courts, and investment arbitration as a complement to domestic courts. See *supra* "Chapter 5 The Adjudicative Role of Domestic Courts in Investor-State Dispute Resolution".

Chapter 2 Setting the Stage: The Legitimacy Crisis Facing Investment Arbitration and the Need to Reform Investor-State Dispute Resolution

2.1 Introduction

In modern times where transboundary investment activities contribute to the interwoven situation among individual economies, investment agreements concluded between/among national states/regions constitute the cornerstone of the international investment regime. These investment agreements often do not only specify the substantive protection which countries should provide for foreign investors, but also open a possibility for those investors to initiate arbitration with host states in the international sphere. While the growing popularity of investment arbitration among the investor community leads to an increasing caseload, attacks against the dispute resolution method by the wider international community invite a re-examination of its necessity and reliability. However, as investment arbitration is an integral part of investor-state dispute resolution, reforming the regime governing the resolution of investment disputes should look beyond the deficiencies of the arbitration system. Before proceeding to discuss the roles of domestic courts in the overall reform of investor-state dispute resolution, this chapter seeks to set the stage for such discussions by introducing the general context. To this end, this chapter first looks at the accrual of global FDI stocks and the investment disputes that could be generated thereby, and this indicates that an appropriate framework of dispute resolution methods becomes even more important than before (Section 2.2). It then moves to introduce the creation of the ICSID regime and the treaty practice in investor-state dispute resolution, which accounts for the increasing recourse to investment arbitration (Section 2.3). However, the continuing growth of investment arbitration caseload also puts the dispute resolution method under more scrutiny with stakeholders questioning its legitimacy from different aspects (Section 2.4). The concluding remarks of this chapter thus highlight the urgent need to reform investor-state dispute resolution by not only focusing on the investment arbitration system itself but also the relevance of other institutions, not least domestic courts (Section 2.5).

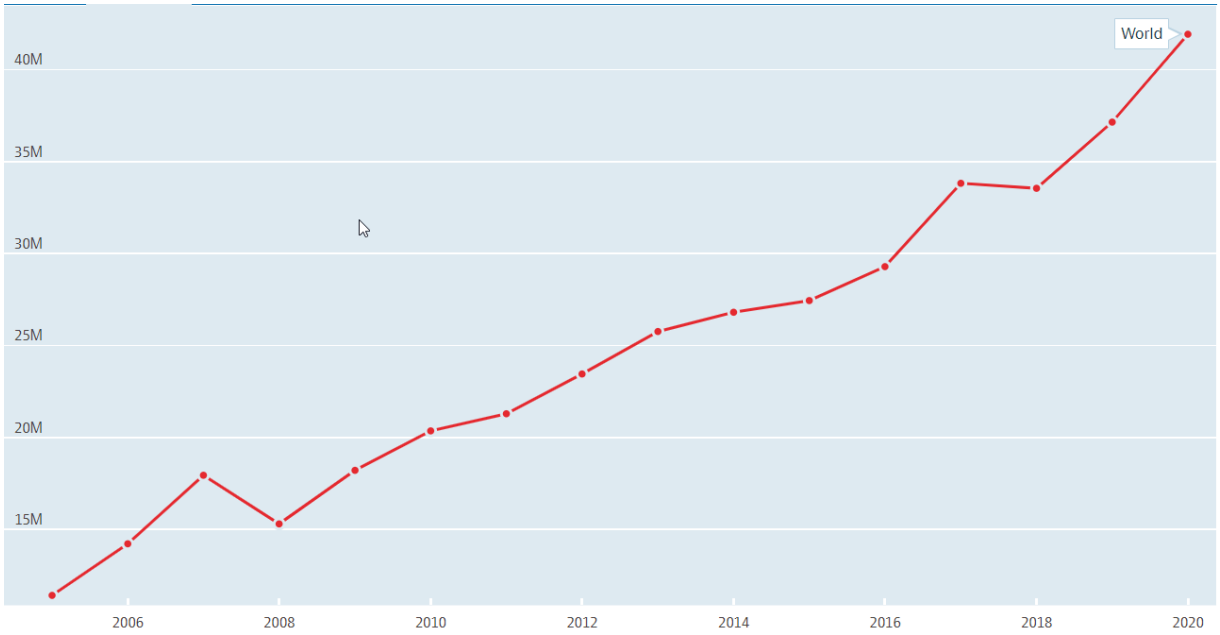
2.2 The Accruing FDI Stocks and the Resulting Demand for Dispute Resolution

FDI, as a vehicle for cross-border capital movement, bears testimony to the deep-rooted interconnected nature of the global economy. Despite the relentless skepticism against FDI, most empirical studies conclude that host states benefit from FDI activities as they witness the rise of factor productivity and the growth of national income, which may not be achieved by domestic investment alone.[1] In consequence, driven by the perception of the benefits enabled by FDI, countries around the world increasingly go to great lengths to vie for foreign capital.[2] The combined effects of a host of variables, such as regulatory framework, business environment and opportunities, FDI policies and incentives, institutional frameworks, market access, comparative costs and political stability, have shaped a pattern where some countries

[1] OECD, "Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs", OECD Publication Service (2002), pp. 9-10.
[2] *Ibid*, at 5.

are less attractive as investment destinations than others for foreign investors.[3] However, amidst the ups and downs of FDI activities at different points of time, the uneven distribution of FDI inflows has not set back the accrual of global FDI stocks over years. As shown by Figure 2, the global total of inward FDI stocks sky-rocketed from US$11.4 million in 2005 to US$41.9 million in 2020.

Figure 2 Global Inward FDI Stocks over Years



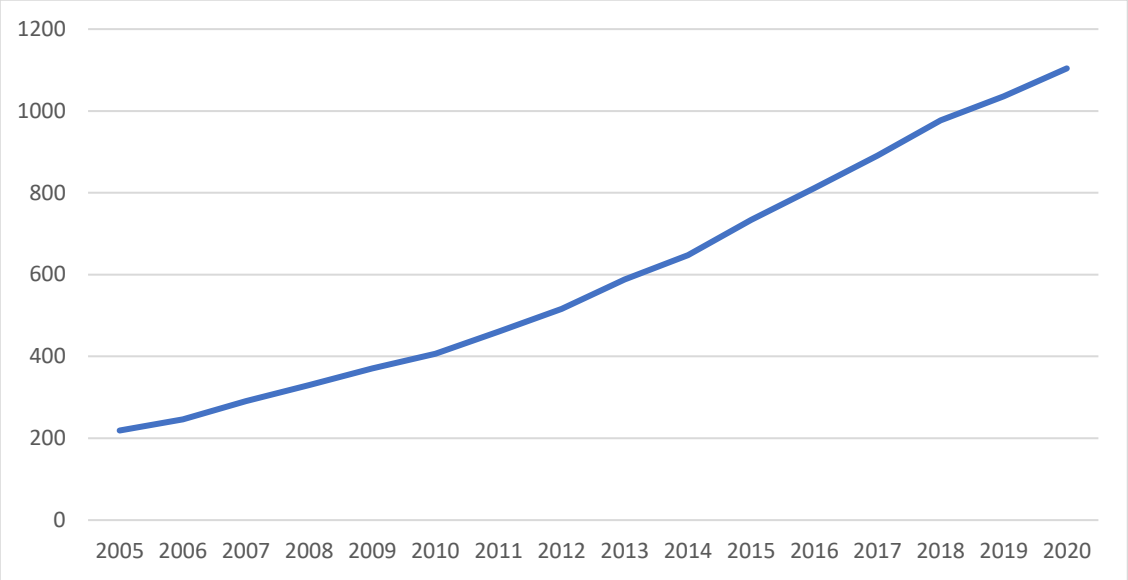
Source: OECD Data

While the increase of FDI stocks delivers benefits to both foreign investors and host states, the tally of troublesome investment disputes between them is also most likely to rise in proportion. That is because foreign investments are subject to regulation by host states' authorities, the strictness of which varies among countries and depends on the FDI rules implemented locally.[4] In the ordinary course of business, foreign investors and their investments may lock horns with host states over a wide range of issues, such as alleged expropriation of assets (whether it is direct or indirect), refusal to grant approvals and licenses, and discriminatory administrative decrees. Although the occurrence of investment disputes is a function of a number of variables, the increasing influx of cross-border capital is likely to generate more of such disputes, other things being equal. Compiling an accurate list of the number of investment disputes over time is understandably elusive. However, the statistics for investment arbitration cases, which should represent only a fraction of investment disputes, would provide a glimpse into the dynamics of these disputes.

[3] UNCTAD, "UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs", UNCTAD Publication (2009), p. iii.

[4] OECD, for example, maintains a database which measure the regulatory restrictiveness of the FDI rules implemented by a host of economies by looking at foreign equity limitations, screening or approval mechanisms, restrictions on the employment of foreigners as key personnel, and operational restrictions. OECD, "FDI Regulatory Restrictiveness Index", https://www.oecd.org/investment/fdiindex.htm (last visited on October 18, 2021).

Figure 3 Number of Investment Treaty Arbitration Cases Initiated over Years



Data Source: UNCTAD

Consistent with the general tendency of accruing global FDI stocks, Figure 3 reveals that the total number of investment treaty arbitration cases (measured by initiation) also kept increasing over years. While global FDI activities seemingly would continue to ebb and flow, the overall amount of foreign investment in host states is likely to keep increasing.[5] With FDI continuing to act as a key factor driving the world economy, investment disputes between foreign investors and host states would remain as an issue of considerable relevance.

2.3 The ICSID Convention and Phenomenal Growth of Investment Arbitration

There have been multiple methods in place for the resolution of investment disputes between foreign investors and host states. Foreign investors can, for instance, try to seek relief at the domestic courts of host states largely by relying on applicable domestic legal systems. They may also mobilize resources to lobby for the involvement of their home states in the hope that the leverage introduced would be able to facilitate the achievement of satisfactory resolution. However, whether justifiable or not, foreign investors may often have scant confidence in the legal regimes and justice systems of other investment destinations.[6] This should be especially true in the early years of the post-Second World War era when many de-colonized countries were struggling to restore their political foundations.[7] On the other hand, diplomatic protection was not universally available on demand, which means it could not be relied on by

[5] UNCTAD, "Global Investment Flows Rebound in First Half of 2021, Recovery Highly Uneven", https://unctad.org/news/global-investment-flows-rebound-first-half-2021-recovery-highly-uneven (last visited on October 24, 2021).
[6] Gabrielle Kaufmann-Kohler and Michele Potestà, "Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options", Springer Open (2020), p. 20.
[7] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration", p. 306 (arguing that the modern international investment regime has its roots in the immediate post-World War II period).

most foreign investors as a conventional dispute resolution method.[8] Thus, the need for launching efforts to find an innovative approach for the resolution of investment disputes emerged within the global investment community.

The entry into force of the ICSID Convention and the establishment of the infrastructure of ICSID in 1966 marked a significant breakthrough of such efforts as a formal mechanism was put in place for arbitration between foreign investors and host states. It was also around the same time that national states started to include investment arbitration-related clauses in their BITs, which provided the requisite consent for foreign investors to launch investment arbitration. By the 1990s, the inclusion of investment arbitration as a dispute resolution mechanism in BITs had become standard.[9] The ICSID regime combined with the wide network of investment agreements provided the most important pillars for the conduct of investment arbitration. The investment arbitration system, however, had a rather slow start with the first known investment treaty arbitration case initiated in 1987 between Asian Agricultural Products Ltd., a Hong Kong corporation, and the Republic of Sri Lanka based on the UK-Sri Lanka BIT (1980).[10] That sluggishness was reversed by the subsequent surge of investment arbitration cases at the time of the new millennium and, as shown in Figure 3, more than 1,100 investment treaty arbitration cases had been initiated by 2020. Thus, however the investment arbitration system is perceived by other stakeholders, "the proliferation and growing importance of investment tribunals and exponential recourse to international arbitration illustrate only too well the continuing attractiveness of this system for investors."[11]

2.4 The Legitimacy Crisis of Investment Arbitration

Despite the rapid increase of the instances of investment arbitration which contributes to the claim that international investment law is basically the fastest growing area of international law,[12] it seems that this dispute resolution mechanism has become a victim of its own success. The large amount of critical attention directed towards arbitration of investment disputes from "states, investors, civil society, non-governmental organizations, and legal scholars of domestic and international law" has plunged the dispute resolution mechanism into a veritable "legitimacy crisis".[13] This crisis turns out to be related to multiple facets of

[8] Ursula Kriebaum, "Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes", ICSID Review, Vol. 33, No. 1 (2018), p. 18 (arguing that "Big players are more likely than small companies to obtain diplomatic protection").
[9] UNCTAD, "Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II", United Nations Publication (2014), p. 23.
[10] Note that prior to *Asian Agricultural Products Ltd. v. the Republic of Sri Lanka*, at least more than twenty contract-based investment arbitration cases had been registered with ICSID. ICSID, "Cases Database", https://icsid.worldbank.org/cases/case-database (last visited on October 29, 2021).
[11] Catharine Titi, "Are Investment Tribunals Adjudicating Political Disputes?", Journal of International Arbitration, Vol. 32, No. 3 (2015), pp. 261-262.
[12] Charles N. Brower and Stephan W. Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?", Chicago Journal of International Law, Vol. 9, No. 2 (2009), pp. 471-472. Stephan W. Schill, "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach", Virginia Journal of International Law, Vol. 52, No. 1 (2011), p. 58.
[13] Schill, *supra* note 12, at 58.

the investment arbitration system, including "predictability, accountability, fairness, the willingness of players to use and be bound by the system, and the independence or impartiality of the tribunal".[14]

Neverthelss, it should be noted that empirical evidence that has been presented in the literature so far does not always support the allegations against investment arbitration, thus adding more complexity to an overall evaluation of the performance of the dispute resolution method. In this connection, one may find it difficult, if possible at all, to quantify the extent to which each and every allegation has contributed to the legitimacy crisis of investment arbitration and the degree to which the defects of investment arbitration have negatively affected the justice and fairness of the overall investor-state dispute resolution mechanism.

Meanwhile, as investment arbitration has been viewed with an increasing amount of suspicion and skepticism, litigation via the domestic courts of host states, as a competiting method for the resolution of investment disputes, surely does not stand as a perfect alternative. Indeed, some of the concerns over investment arbitration may equally apply to the local court system in certain jurisdictions, such as those related to the independence and impartiality of decision makers (court judges) and the overall length of the proceedings. While a comparative institutional analysis will be conducted in Chapter 5 as to domestic courts as the exclusive forum for investor-state dispute resolution from a theoretical perspective, this research does not intend to conduct an empirical study to evaluate whether there is a similar legitimacy crisis of the local court system of any (selected) jurisdictions.

The deep distrust with the legitimacy of investment arbitration has become a handy and ostensible argument at times referred to by states to legitimize their strategic choice to put a restraint on investment arbitration. With that said, all these criticisms lay bare the shaky foundations of the investment arbitration mechanism in its current form as well as the urgent need to find a better institutional design for investment dispute resolution.

2.4.1 Lack of Consistency and Predictability

The debates about the lack of consistency in arbitral decisions rendered by investment tribunals have been going on for a long period of time in academia.[15] A few years after the investment arbitration mechanism embarked on the process of extraordinary growth around the beginning of the new millennium, Franck had already indicated that the lack of consistency started to emerge in the system as a result of investment tribunals applying investor protection standards differently and thus delivering divergent findings on liability.[16] She argued that instead of providing more clarity for stakeholders involved in the system, the arbitral process blurred the meaning of those rights to which foreign investors are entitled

[14] Julia Hueckel, "Rebalancing Legitimacy and Sovereignty in International Investment Agreements", Emory Law Journal, Vol. 61, No. 3 (2012), p. 610.
[15] International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, "Consistency, Efficiency and Transparency in Investment Treaty Arbitration", available at https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf (last visited on January 4, 2022), p. 6.
[16] Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", Fordham Law Review, Vol. 73, No. 4 (2005), p. 1523.

under IIAs.[17] The three scenarios that she identified, under which inconsistent decisions are deemed to arise, still seem to be thought-provoking for the discussions of reforming investor-state dispute resolution led by UNCITRAL Working Group III.[18] Although the concern over inconsistent awards in investment arbitration is not new, whether the lack of consistency is a genuine problem has invited diverging opinions from commentators and thus remains a controversial issue.[19] Schultz notably asserted that it is the quality of decisions, rather than their consistency, which defines the moral value of an adjudicative mechanism such as investment arbitration and the mandate of arbitrators is to do justice in every individual case instead of safeguarding the consistency of the mechanism.[20] Hindelang maintained that calling for consistency across different investment agreements would even risk "depriving state parties of their control over the investment instruments".[21] However, an increasingly accepted and thus more mainstream view in academia seems to be that inconsistent awards (and annulment decisions if applicable) would "threaten the sustainability of the international investment regime", and that a greater degree of consistency in investment arbitration would be desirable.[22] Ten Cate likewise argued that consistency would contribute to the equitable treatment of litigants,[23] ensure the continuity and predictability of the legal system,[24] and promote the legitimacy of decision-making.[25] Similarly, Hindelang, notwithstanding his suspicion of a high degree of consistency in investment arbitration, noted that consistency in decision-making not only concerns "equality, legitimacy, and perceived fairness of an adjudicative mechanism", but "predictability and long-term planning of those" affected by the system.[26]

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[17] *Ibid*.

[18] *Ibid*, at 1545-1546 (arguing that inconsistent decisions generally arise under three scenarios: 1) "different tribunals can come to different conclusions about the same standard in the same treaty"; 2) "different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights"; 3) "different tribunals organized under different treaties will consider disputes involving a similar commercial situation and similar investment rights, but will come to opposite conclusions"). UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thrity-Fourth Session (Vienna, 27 November-1 December 2017) Part II, available at https://undocs.org/en/A/CN.9/930/Add.1/Rev.1 (last visited on January 4, 2022), p. 3/6 (stating that "a distinction was made between circumstances in which inconsistent interpretations might be justified due to, for example, variations in the language of the investment treaties and circumstances in which such inconsistencies would not be justified, as the same measure and the same underlying treaty provision were being addressed", and that the need was highlighted to "distinguish between achieving consistency of interpretation within the same investment treaty and consistency of interpretation across investment treaties").

[19] International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, *supra* note 15, at 7.

[20] Thomas Schultz, "Against Consistency in Investment Arbitration", in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales eds., "The Foundations of International Investment Law: Bringing Theory into Practice", Oxford University Press (2014), p. 297.

[21] Steffen Hindelang, "Study on Investor-State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law", Transnational Dispute Management, Vol. 13, No. 1 (2016), p.28.

[22] International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, supra note 15, at 7. Irene M. TenCate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration", Columbia Journal of Transnational Law, Vol. 51, No. 2 (2013), pp. 419-420.

[23] TenCate, *supra* note 22, at 448-450.

[24] *Ibid*, at 450-454(arguing that the stability of law would offer peace of mind and enable "actors to predict the consequences of contemplated courses of action with greater precision").

[25] *Ibid*, at 455-456 (arguing that consistence would enhance the perception that legal decision-makers deliver decisions in accordance with facts and norms instead of arbitrary criteria).

[26] Hindelang, supra note 21, at 25.

Although there does not seem to be a definitive study that fully takes stock of the degree of inconsistency in investment arbitration, the general perception of a lack of consistency in arbitral decisions has struck a chord with many commentators and practitioners. Ten Cate, for instance, maintained that whereas the lack of inconsistency probably used to be confined to academic discussions, it could not be denied that investment tribunals "have rendered inconsistent decisions about controversial issues".[27] Professor Kaufmann-Kohler, one of the few leading female arbitrators in the investment arbitration community, noted that although investment tribunals managed to achieve a degree of consistency on some issues, such as the distinction between treaty and contract claims and the interpretation of fair and equitable treatment, arbitral decisions demonstrated a disturbing level of inconsistency in many other areas, such as the application of the umbrella clause and the application of a state of necessity.[28] She further added that considering the fact that investment law is still at its early stages of development, consistency is required in investment arbitration for the sake of the promotion of the rule of law.[29] In a remarkable empirical study on the topic of the predictability of the investment treaty arbitration system, Franck and Wylie concluded that the arbitral outcomes exhibited a degree of predictability, but they also admitted that case-related and hybrid models showed at most that "the results were not completely random".[30] Some commentators also referred to specific investment arbitration cases to ascertain the severity of inconsistency in the investment arbitration system. Yannaca-Small made it clear that, although the CME v Czech Republic and Lauder v Czech Republic share the same or similar facts, the investment Tribunals handling the two cases ended up in rendering inconsistent decisions which attracted much critical attention.[31] Furthermore, Burke-White made a reference to four cases involving claims by U.S. investors against Argentina over the measures taken by the government during the 2001-02 financial crisis to unveil the lack of consistency within the ICSID system. He stated that although the four awards handed down as of early 2008 all considered the applicability of the non-precluded measures provision and Argentina's defense of necessity, investment tribunals reached "contradictory and, at times, legally questionable conclusions".[32] The high degree of inconsistency in investment arbitral jurisprudence is equally underscored by the fact that investment tribunals have not developed a uniform practice in awarding costs and setting fees, giving rise to more uncertainty about the costs and benefits of arbitral proceedings.[33]

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[27] TenCate, *supra* note 22, at 427.
[28] Gabrielle Kaufmann-Kohler, "Is Consistency a Myth?", in Yas Banifatemi ed., "Precedent in International Arbitration", JurisNet, LLC (2008), pp. 138-143.
[29] *Ibid*, at 143-145 (noting that although a degree of inconsistency is probably inherent in any legal system and is not intolerable, "the rule of law is only the rule of law if it is consistently applied so as to be predictable").
[30] Susan D. Franck and Lindsey E. Wylie, "Predicting Outcomes in Investment Treaty Arbitration", Duke Law Journal, Vol. 65, No. 3 (2015), p. 521.
[31] Katia Yannaca-Small, "Improving the System of Investor-State Dispute Settlement", OECD Working Papers on International Investment 2006/01, available at https://www.oecd.org/china/WP-2006_1.pdf (last visited on July 15, 2019), p. 11.
[32] William W. Burke-White, "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System", Asian Journal of WTO and International Health Law and Policy, Vol. 3, No. 1 (2008), pp. 209-210.
[33] John Y. Gotanda, "Consistently Inconsistent: The Need for Predictability in Awarding Costs and Fees in Investment Treaty Arbitration", ICSID Review, Vol. 28, No. 2 (2013), pp. 420-421.

The existing literature also sheds light on the origins of the lack of consistency that besets the investment arbitration system. First of all, the underlying investment agreements often contain broad or even vague legal concepts which are likely to apply to a range of circumstances, thus largely leaving the interpretation of substantive provisions to the discretion of investment tribunals.[34] Second, the ad hoc nature of investment arbitration significantly contributes to the inconsistency in arbitral decisions because each investment tribunal is responsible for a single case and there is no appellate system in place.[35] Third, although investment tribunals have started to refer to past investment awards since the late 1990s, the doctrine of *stare decisis* is absent from the investment arbitration mechanism.[36] Fourth, the under-development of investment disciplines due to the late emergence of modern investment instruments results in a number of unsettled issues in the protection and regulation of foreign investment.[37]

2.4.2 A Threat to Public Interests

Cross-border capital movements not only entail the dynamics between foreign investors and host states but usually generate spill-over effects, positive and negative alike, on the general public at large.[38] Thus, the regulation and protection of foreign investment by host states is very likely to touch upon issues of critical importance for the whole society. The public facet of foreign investment regulation renders the regulatory process a delicate matter in that investor rights may sometimes stand in opposition to public interests. While earlier investment agreements were said to solely focus on investor protection and stop short of addressing concerns over public interests, the latest generation of IIAs typically take the maintenance and advancement of public interests on board.[39] For instance, an observed characteristic of more recently concluded investment agreements is that the invocation of public interests is listed as a basis to vindicate government measures that would otherwise be regarded as at odds with the state's commitments under an investment instrument.[40] In other words, the right to regulate for legitimate public welfare goals is increasingly recognized by investment treaty-making practice. The recognition of public interests in turn shows that by signing up to investment agreements, national states do not subordinate the right to regulate to investor protection nor agree to compensation for any changes concerning the regulatory framework subsequent to the establishment of foreign investment.[41]

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[34] Hindelang, *supra* note 21, at 25. International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, *supra* note 15, at 6.
[35] Richard Chen, "Precedent and Dialogue in Investment Treaty Arbitration", Harvard International Law Journal, Vol. 60, No. 1 (2019), p. 47.
[36] *Ibid*, at 48 and 68.
[37] International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, *supra* note 15, at 6.
[38] George K. Foster, "Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties", Lews & Clark Law Review, Vol. 17, No. 2 (2013), pp. 363-366 (noting both the positive and negative impacts that international investment is able to produce on the society).
[39] Vera Korzum, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs", Vanderbilt Journal of Transnational Law, Vol. 50, No. 2 (2017), p. 374.
[40] *Ibid*, at 374.
[41] Hindelang, *supra* note 21, at 42.

Arbitral proceedings initiated by foreign investors against host states seem to forcefully throw the competing interests involved in foreign investment regulation into sharp relief. Whereas traditional concerns of aggrieved investors before investment tribunals were commonly related to technical issues, such as expropriation and nationalization, the phenomenal rise of investment arbitration is accompanied by the growth of investment claims that directly target a range of regulatory measures devised by host states.[42] These investment claims aiming to challenge the regulatory powers of host governments are known as regulatory disputes.[43] While the remedy sought in most of these regulatory disputes is damages for any decreased value in investment as the collateral harm of government measures, some investors may also try to pursue the removal of the government measures in question through the decisions by investment tribunals.[44] The rising number of regulatory disputes has lent more ammunition to critics of the investment arbitration mechanism. In their opinion, the right to regulate is an expression of state sovereignty. Thus, allowing foreign investors to challenge government measures before private tribunals equates to encouraging multi-national companies to encroach upon state sovereignty.[45] They also seem to be concerned that public interests would be impaired as a result of investment arbitration. The accusation is that the excessive procedural rights enjoyed by foreign investors in the form of investment arbitration would undermine host states' "ability to regulate to protect the environment, prevent corporate abuses of human rights, or otherwise promote the public interest".[46] The conviction of foreign investors' ability to interfere with host states' right to regulate through investment arbitration may even be reinforced by the claim that IIAs transfer authority and power from states to investors and some companies appear to be more powerful than some of the states where they invest.[47] In addition, the increasing size of regulatory disputes also raises democratic concerns about investment arbitration among scholars. Choudhury maintained that while regulations for public welfare goals are promulgated by democratically elected officials or legislators, arbitrators that adjudicate regulatory disputes are neither elected nor appointed by the general public.[48] The process of investment arbitration is also vulnerable to criticism associated with democratic deficits as some core democratic values, such as public participation and accountability, are allegedly overlooked by the system.[49]

In theory, investment tribunals may have an opportunity to pour oil on troubled waters if they manage to strike an appropriate balance between investor protection and public interest by "interpreting the investment instrument so as to reflect the intentions of the state parties".[50]

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[42] William W. Burke-White and Andreas von Staden, "Private Litigation in Public Law Sphere: The Standard of Review in Investor-State Arbitrations", Yale Journal of International Law, Vol. 35, No. 2 (2010), p. 284.
[43] Korzum, *supra* note 39, at 380.
[44] *Ibid*, at 381.
[45] *Ibid*, at 382.
[46] Foster, *supra* note 38, at 366.
[47] Tai-Heng Cheng, "Power, Authority and International Investment Law", American University International Law Review, Vol. 20, No. 3 (2005), p. 492.
[48] Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", Vanderbilt Journal of Transnational Law, Vol. 41, No. 3 (2008), p. 782.
[49] *Ibid*, at 784-789. Andreas Kulick, "Investment Arbitration, Investment Treaty Interpretation, and Democracy", Cambridge Journal of International and Comparative Law, Vol. 4, No. 2 (2015), p. 443.
[50] Hindelang, *supra* note 21, at 43.

Nonetheless, in practice, the rather common belief is that "investment tribunals have not been overly successful in adequately paying attention to public interests of the host state" in their interpretation of investment agreements.[51] In addition, investment tribunals do not seem to achieve a consensus in the benchmarks that distinguish legitimate regulation, which would then relieve host states from the duties of compensation, and from regulatory expropriation, which would substantiate the alleged breaches of investment treaty commitments. Some investment tribunals tend to draw a line between the two forms of government behavior by looking into "their goals, nature, and the manner in which they were applied". Following this line of thought, if the regulation in dispute is proved to serve a legitimate public welfare goal and is applied in a non-discriminatory manner, host states would thus be immune from the duty to pay damages for the decreased value in investment.[52] However, other tribunals hold the opinion that a legitimate public policy objective cannot on its own exonerate host states from expropriation without compensation. The Tribunal in *Azurix v. Argentina*, for instance, noted that a legitimate public policy goal behind the regulation is not a sufficient basis for a government to expropriate without compensation.[53]

An even more prevalent belief among critics of investment arbitration is that the rising number of investment claims and the considerable costs of the arbitral process would lead up to "regulatory chill".[54] This refers to the allegation that national states are likely to back off from optimal regulation under the banner of public interest due to fears of having to be the respondent state in investment arbitration.[55] Whether the chilling effects of investment arbitration are verifiable is not yet clonfirmed by convincing data,[56] but an economic study concludes that regulatory chill may occur in some circumstances as a result of frivolous lawsuits.[57] A real-life example of regulatory chill is New Zealand's decision to postpone the regulation of plain packaging for cigarettes in view of *Philip Morris v. Australia*.[58]

Another aspect of the alleged threat posed by investment arbitration towards public interests is related to the claim of power asymmetry created by the unbalanced investment treaty regime. While foreign investors may in most cases be under the thumb of host states as a result of the latter's sovereign power, these investors do not usually have comparable disadvantages in their relations with local stakeholders, such as indigenous people and consumers.[59] Investment agreements, however, fail to address the power imbalance between foreign investors, which sometimes may form an alliance with host states, and local stakeholders.[60] In an article that calls for the repair of a "fundamental flaw of the investment law regime", which is the lack of justice for all, Arcuri and Montanro argued that the citizens

[51] *Ibid*, at 43-44.
[52] Korzum, *supra* note 39, at 376.
[53] *Ibid*, at 377.
[54] Arseni Matveev, "Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty", The University of Western Australia Law Review, Vol. 40, No. 1 (2015), p. 358.
[55] Korzum, *supra* note 39, at 383.
[56] *Ibid*.
[57] Eckhard Janeba, "Regulatory Chill and the Effect of Investor State Dispute Settlements", Review of International Economics, Vol. 27, No. 4 (2019), p. 1195.
[58] Hindelang, *supra* note 21, at 44.
[59] Foster, *supra* note 38, at 380.
[60] *Ibid*, at 368.

of host states have limited participatory rights in the arbitral proceedings.[61] This allegation of an imbalance between investor rights and public interest that is deeply rooted in the design of investment treaties casts more doubt on the legitimacy of investment arbitration.

2.4.3 Lack of Transparency

Despite the controversial nature of the introduction of a general rule of transparency in investment arbitration,[62] recent developments in procedural rules regulating arbitral proceedings reveal a shift in opinion from confidentiality to transparency.[63] Meanwhile, critics of the investment arbitration system have long argued that all stages involved in arbitral proceedings are not transparent enough.[64] This criticism of a lack of transparency in investment arbitration usually revolves around the adequate and timely disclosure of documents, openness of the hearings, the chance for third-party participation, and the possibility of *amicus curiae* submissions.[65] Their calls for a more transparent regime are underpinned by the rationale that, among others, public interests, typically involved in investment arbitrations, highlight the general public's right to access information about the proceedings that could influence their well-being and the government's conduct.[66] More transparency would also reinforce the legitimacy of investment arbitration because the public would have more chance to make sure that investment tribunals handle the disputes before them in a just and honest manner.[67] Moreover, more transparency would conceivably contribute to a higher level of consistency among arbitral decisions, thus facilitating the further development of a stable arbitral jurisprudence.[68] The benefits of increased transparency may even go beyond the bounds of the dispute resolution system as "the greater volume of documents available in the public domain can help investment treaty drafters adapt the models to meet new challenges".[69]

Among the accusations of lack of transparency is that most investment arbitral proceedings are not accessible by the public as a result of the reliance of investment arbitration on the ad hoc model of international commercial arbitration.[70] However, Behn's empirical observation seems to be slightly different in that he identified a trend towards the inclusion of non-

[61] Alessandra Arcuri and Francesco Montanro, "Justice for All? Protecting the Public Interest in Investment Treaties", Boston College Law Review, Vol. 59, No. 8 (2018), pp. 2798-2800.
[62] Gary Born, "International Commercial Arbitration", Kluwer Law International (2014), p.2828 (stating that "it is unclear why confidentiality has been suggested to be of less importance in investor-state arbitrations than in other contexts and whether a general rule of 'transparency' in investment arbitrations would be appropriate").
[63] Matthew Carmody, "Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration?", International Trade and Business Law Review, Vol. 19 (2016), p. 129.
[64] International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, *supra* note 15, at 53.
[65] James D. Fry and Odysseas G. Repousis, "Towards a New World for Investor-State Arbitration through Transparency", New York University Journal of International Law and Politics, Vol. 48, No. 3 (2016), p. 811.
[66] Carmody, *supra* note 63, at 131-135.
[67] *Ibid*, at 136.
[68] *Ibid*, at 136-137.
[69] Fry and Repousis, *supra* note 65, at 807.
[70] Hindelang, *supra* note 21, at 69-70.

disputing party intervention through *amicus curiae* submissions in investment arbitration.[71] This increasing possibility of third-party intervention is nevertheless rarely invoked.[72] Perhaps a more often mentioned example to demonstrate the lack of transparency is that the outcomes of investment arbitration are not duly disclosed to the public. In addition to the fact that there is not a mandatory rule requiring that investment arbitration awards must be made public, the disclosure of the occurrence of investment arbitration to the public is not obligatory in the instances of non-ICSID arbitration.[73] The empirical study by Behn, covering investment treaty arbitration cases fully or partially resolved between 2011 and 2014, found that "a surprising number of awards" (39% out of the dataset) remain confidential.[74] Two inferences that may be made from the empirical study are, respectively, that ICSID awards are more likely to be made public in comparison to non-ICSID awards, and that the claimant, instead of the respondent state, seems to be more reluctant to disclose the awards to the public, especially in case they lose the case.[75] Behn thus reached the conclusion that the continued opaqueness of investment arbitral proceedings exacerbates the legitimacy crisis facing the dispute resolution mechanism.[76] Moreover, Hafner-Burton and Victor's empirical study sheds more light on the secrecy of investment arbitration by unravelling the private incentives that drive disputing parties to avoid public lime-light. They found out that most arbitral proceedings of which the outcomes were kept secret were done so through settlement. They also claimed that cases arising out of "long-lived, highly regulated industries" are more likely to be kept secret because the ongoing operation of these industries often requires politically messy deals for which both parties equally wish to shun public scrutiny. They added that the involvement of countries with a history of losses in investment arbitration would also increase the possibility of secrecy since these countries are inclined to avoid more adverse reputational effects that might be triggered by investment arbitrations.[77]

Less controversial than whether transparency in investment arbitration is satisfactory is the claim that transparency has been increasingly improving in recent years. In contrast to the conventional presumption of confidentiality in international commercial arbitration, the distinct trend towards greater transparency has been observed in investment arbitration.[78] UNCITRAL's Working Group II on Arbitration and Conciliation, for instance, adopted a separate instrument – the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules), which took effect in 2014, with a view to boost transparency and openness of the proceedings of investment treaty arbitration.[79] The Transparency Rules focus on four substantive areas of arbitral proceedings, including

[71] Daniel Behn, "Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art", Georgetown Journal of International Law, Vol. 46, No. 2 (2015), p. 379.
[72] *Ibid*, at 382.
[73] *Ibid*, at 379.
[74] *Ibid*, at 379-381.
[75] *Ibid*, at 381.
[76] *Ibid*, at 379.
[77] Emilie M. Hafner-Burton and David G. Victor, "Secrecy in International Investment Arbitration: An Empirical Analysis", Journal of International Dispute Settlement, Vol. 7, No. 1 (2016), p. 180.
[78] Hindelang, *supra* note 21, at 71. Samuel Levander, "Resolving Dynamic Interpretation: An Empirical Analysis of the UNCITRAL Rules on Transparency", Columbia Journal of Transnational Law, Vol. 52, No. 2 (2014), p. 515.
[79] Carmody, *supra* note 63, at 97-98.

notification of new arbitration cases, disclosure of documents, standards for third-party submissions, and open hearings.[80] In order to expand the scope of application of the Transparency Rules, the UN General Assembly adopted United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) in December 2014. Unlike the Transparency Rules that by default apply to investment agreements concluded on or after April 1, 2014, the Mauritius Convention expands the application to investment agreements before that date.[81] The Mauritius Convention further applies the Transparency Rules to any investment treaty arbitration, whether or not they are initiated under the UNCITRAL Arbitration Rules.[82] However, contracting parties of the Mauritius Convention are allowed to declare reservations of several different forms to narrow down its application.[83] However, whether the Transparency Rules in combination with the Mauritius Convention will inject much more transparency into the investment arbitration system depends on their reception by national states and this remains unclear at this moment.[84] Fry and Repousis thus notably appealed to the international community to "realize the importance of greater transparency, for the sake of the health of the investment law system".[85]

2.4.4 Independent Arbitrators?

A large body of criticism against investment arbitration is related to the decision-makers, casting considerable doubt on the appropriateness of ad hoc arbitrators in adjudicating investment disputes that are often associated with public interests.[86] The first common allegation is that there are no sufficient guarantees put in place to ensure the impartiality and independence of investment arbitrators. Some argued that many investment arbitrators are closely linked with the corporate world and subscribe to the view of multinational companies in prioritizing business interests, leading to the argument that these arbitrators are not neutral guardians of the investment arbitration system which they are supposed to be.[87] Others believed that the party-appointment system would further impair the impartiality of investment tribunals as a result of the so-called affiliations bias, as arbitrators tend to favor

[80] *Ibid*, at 122-123.
[81] Article 1.1, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.
[82] Article 2.1, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.
[83] Article 3, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.
[84] Fry and Repousis, *supra* note 65, at 865.
[85] *Ibid*.
[86] Catherine A. Rogers, "The Politics of International Investment Arbitrators", Santa Clara Journal of International Law, Vol. 12, No. 1 (2013), p. 226 (arguing that "[a]rbitrators are the lightning rod for investment arbitration's most contentious political debates"). Gabrielle Kaufmann-Kohler and Michele Potestà, "Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in connection with the Introduction of a Permanent Investment Tribunal or an Appeal System?", Geneva Center for International Dispute Settlement, available at https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf (last visited on July 25, 2019), p. 11 (stating that a type of criticisms of investment arbitration are focused on the decision-makers).
[87] Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice How Law Firms, Arbitrators and Financiers are Fuelling An Investment Arbitration Boom", Corporate Europe Observatory and the Transnational Institute, available at https://www.tni.org/files/download/profitingfrominjustice.pdf (last visited on July 25, 2019), pp. 35-36.

their appointing parties in the decision-making process.[88] Perhaps a more compelling argument supporting the claim of lack of impartiality and independence is related to the missing element of security of tenure in the investment arbitration system for adjudicators.[89] Unlike the established tradition in public adjudication that adjudicators are entitled to stable salaries, investment arbitrators are remunerated directly by the disputing parties in the current system.[90] That fluctuating basis for wages suggests that investment arbitrators have "a financial and professional stake" in the investment arbitration system.[91] In this way, investment arbitrators are offered a financial incentive to favor foreign investors in the decision-making process for the sake of the maintenance of a continued stream of income and the advancement of their professional careers.[92] Arguably, this allegation is probably even more convincing in the jurisdictional phase of arbitral proceedings because a pro-investor decision is a necessary premise for the evolution to the merit phase. In this regard, Van Harten's empirical research purports to provide tentative support for the claim that, in the resolutions of contested jurisdictional issues, investment arbitrators show a systemic bias in favor of investors.[93]

The lack of diversity in the investment arbitrator community is often denounced by commentators as well because the aggregation of the shared identity characteristics among investment arbitrators is likely to provide a matrix for the emergence of a systematic bias. While there have long been claims that international arbitrators tend to be "pale, male, stale",[94] the often-mentioned diversity crisis in investment arbitration only adds to the classical portrait of an international arbitrator. The club of investment arbitrators was described as a close-knit community where most of the (eminent) members are "men from a small group of developed countries".[95] An empirical study of the diversity picture of investment arbitrators led to a finding that while the community of investment arbitrators manifests impressive diversity in terms of "professional experience, legal tradition, languages and public international law expertise", the situation seems to be grave as far as gender balance and participation of less developed countries are concerned.[96] Puig's network analysis of ICSID arbitrators equally uncovered the remarkable gender imbalance and uneven

[88] Kaufmann-Kohler and Potestà, *supra* note 86, at 12. Jan Paulsson, "Moral Hazard in International Dispute Resolution", ICSID Review, Vol. 25, No. 2 (2010), pp. 348-349 (stating that the affiliation effects prove that the party-appointment system is inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators). Sergio Puig and Anton Strezhnev, "Affiliation Bias in Arbitration: An Experimental Approach", The Journal of Legal Studies, Vol. 46, No. 2 (2017), pp. 393-394 (demonstrating that "being appointed by one of the parties in a dispute directly changes the behavior of arbitrators" and "the appointment itself is the cause of some of the bias toward the arbitrator's appointing party").
[89] Hindelang, *supra* note 21, at 73.
[90] Colin M. Brown, "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches", ICSID Review, Vol. 32, No. 3 (2017), p. 679.
[91] Eberhardt and Olivet, *supra* note 87, at 35.
[92] Brown, *supra* note 90, at 679.
[93] Gus van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration", Osgoode Hall Law Journal, Vol. 50, No. 1 (2012), p. 252.
[94] Susan D. Franck, etc., "The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration", Columbia Journal of Transnational Law, Vol. 53, No. 3 (2015), p. 452.
[95] Eberhardt and Olivet, *supra* note 87, at 36.
[96] Robert Kovacs and Alex Fawke, "An Empirical Analysis of Diversity in Investment Arbitration: the Good, the Bad and the Ugly", Transnational Dispute Management, Vol. 12, No. 4 (2015), p. 26.

distribution of nationality within the community.[97] Notwithstanding the fact that 87 nationalities were identified in the dataset, most of these arbitrators are from specific developed countries, including New Zealand, Australia, Canada, Switzerland, France, the UK and the US.[98] In addition, Kidane seems to believe that the under-representation of developing countries in the community of investment arbitrators implies that those arbitrators who are ideologically biased against developing countries are empowered to measure the public policies of these countries against investment treaty standards. He thus argued in favor of fairer representation at investment tribunals and even a majority from developing countries within the community.[99]

What appears to be more controversial is the phenomenon of the so-called revolving door in investment arbitration whereby investment arbitrators are able to switch their roles in the system sequentially or even simultaneously. These multiple roles range from arbitrators, legal counsels, expert witnesses and tribunal secretaries.[100] Some investment arbitrators switching their hats in the investment arbitration system have raised doubts among the general public about the independence and impartiality of these arbitrators. Investment arbitrators' experience of being legal counsels in other cases is likely to influence the arbitrators' ability to discuss the same issues without prejudice, thus posing a risk to the integrity of the arbitral process and threatening the legitimacy of investment arbitration. Perhaps a more unsettling consequence out of the revolving door phenomenon is that, from the perspective of outsiders of the arbitration industry, the actors in investment arbitration would be inclined to form unwanted close relationships, further compromising the independence and impartiality of investment arbitrators.[101] Moreover, the possibility of double hatting is likely to further incentivize investment arbitrators to interpret investment instruments in a way that would encourage more investment claims to sustain the current business model and thereby maintain their source of income.[102] A recent empirical study aiming to offer a comprehensive analysis of all the members of the investment arbitration community shows that although the phenomenon of revolving door continues to exist, it is not a common or widespread practice across the entire network of cases. In fact, the highly influential and well-known actors in the system are more likely to switch between different roles.[103]

2.4.5 Lack of an Appeals Facility

One of the prominent features of arbitration is that, unlike the multi-tier adjudication mechanism that is often associated with national legal systems, disputing parties generally have no chance to apply for review of an error of law or an error in the appreciation of facts

[97] Sergio Puig, "Social Capital in the Arbitration Market", The European Journal of International Law, Vol. 25, No. 2 (2014), pp. 404-405.
[98] *Ibid*, at 405.
[99] Won Kidane, "China and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa", Loyola University Chicago Law Journal, Vol. 49, No. 2 (2017), p. 463.
[100] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration", Journal of International Economic Law, Vol. 20, No. 2 (2017), p. 301.
[101] Eberhardt and Olivet, *supra* note 87, at 43.
[102] Hindelang, *supra* note 21, at 74.
[103] Langford, Behn and Lie, *supra* note 100, at 328.

in an arbitral decision.[104] This lack of opportunity to have "a second bite at the cherry" may be framed as one of the main reasons why disputing parties choose arbitration over national courts – the principle of finality and the consequential speedy decision-making.[105] However, academics and practitioners alike have challenged the precedence of finality over fairness in international arbitration and the proposal to establish an appeals mechanism for both commercial and investment arbitration has been on the table for some time.[106] Ten Cate argues that, although calls for appeals facilities exist both in the settings of commercial arbitration and investment arbitration, appellate review targets only one function in each of these two forms of arbitration: error correction in commercial arbitration and centralized law-making in investment arbitration.[107] Nevertheless, other scholars seem to consider that an appellate mechanism in investment arbitration would serve two purposes: "it will promote the consistency and correctness of decisions."[108] Judge James Crawford notably states that the introduction of an appellate body would enhance the legitimacy of the investment arbitration system.[109] Likewise, Professor Stephan Schill believes that the introduction of an appellate mechanism to investment arbitration would further the rule of law since an additional instance of review is likely to increase the correctness of arbitral decisions.[110]

Whether investment arbitration needs an appellate mechanism has been a recurrent topic in the scholarship of this field,[111] but an appeal based on the merits of an investment award is not yet possible for the most part in the system.[112] The annulment procedure in ICSID arbitration and the judicial review (by courts *loci arbitri*) mechanism in non-ICSID

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[104] Irene M. TenCate, "International Arbitration and the Ends of Appellate Review", New York University Journal of International Law and Politics, Vol. 44, No. 4 (2012), p. 1110.
[105] Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?", Journal of International Arbitration, Vol. 30, No. 5 (2013), p. 531.
[106] TenCate, *supra* note 104, at 1110.
[107] *Ibid*, at 1110-1112 (while "[e]rror correction protects litigants against erroneous decisions and safeguards the integrity of adjudication", "[l]awmaking refers to the role of appellate courts in the development and harmonization of norms").
[108] Christoph H. Schreuer and A. de la Brena, "Does ISDS Need an Appeals Mechanism?", Transnational Dispute Management, https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1734#citation (last visited on August 20, 2019). Thomas W. Walsh, "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?", Berkeley Journal of International Law, Vol. 24, No. 2 (2006), p. 456 (arguing that two motivations exist for the establishment of an appeals facility in the ICSID system: first, "the systemic interest in maintaining the consistency of the ICSID jurisprudence across all disputes"; second, "the localized interest of parties – primarily investors – in assuring the accuracy of awards in individual disputes"). Brown, *supra* note 90, at 679-680. Hindelang, *supra* note 21, at 82.
[109] James Crawford, "Is There a Need for an Appellate System?", in Federico Ortino, Audley Sheppard and Hugo Warner, eds., "Investment Treaty Law: Current Issues (Vol. 1)", British Institute of International and Comparative Law (2006), p. 13.
[110] Stephan W. Schill, "Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward", E15 Task Force on Investment Policy, Think Piece, International Centre for Trade and Sustainable Development and World Economic Forum, available at http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf (last visited on August 20, 2019), p. 8.
[111] Ian Laird and Rebecca Askew, "Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?", The Journal of Appellate Practice and Process, Vol. 7, No. 2 (2005), pp. 285-302. David A. Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges", Vanderbilt Journal of Transnational Law, Vol. 39, No. 1 (2006), pp. 39-76. Anders Nilsson and Oscar Englesson, "Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?", Journal of International Arbitration, Vol. 30, No. 5 (2013), pp. 561-579.
[112] Brown, *supra* note 90, at 679.

arbitration alike typically do not allow a review of investment awards on the grounds of correctness.[113] Indeed, as a direct response to the increased support for an appeals facility from the United States, particularly the U.S. Congress,[114] ICSID issued a discussion paper titled Possible Improvements of the Framework for ICSID Arbitration in October 2004 in order to consult Contracting States on the topic of an appeals facility.[115] ICSID suggested that an appeals facility could be established within the ICSID Additional Facility Arbitration Rules and could be relied upon for review of investment awards made pursuant to different arbitration rules so long as the underlying treaties allow such a possibility.[116] However, the responses to this initiative from states proved to be lukewarm,[117] leading ICSID to announce that an attempt to establish an appeals facility at that time was premature.[118] In addition, while some earlier IIAs contemplate the possibility of introducing an appellate mechanism in due course,[119] states and stakeholders started to take specific measures towards an appeals facility in investment arbitration only from 2015.[120] The EU, for instance, is notably at the vanguard of introducing an appellate mechanism to investment arbitration via recent treaty practice. The CETA is said to be the first agreement that contains a clear commitment to the creation of an appellate tribunal, which is also shared by the EU-Vietnam FTA and the EU's proposal for the Transatlantic Trade and Investment Partnership.[121] However, the EU's practice hardly changes the lack of an appeal facility in investment arbitration since the EU's appellate mechanisms established under the CETA and the EU-Vietnam FTA are mandated to hear appeals arising out of these treaties and therefore have no jurisdiction over appeals of investment awards made in accordance with other investment agreements.[122] In addition to the EU, China, Morocco, and Ecuador are three other countries which agree with the need to establish an appellate mechanism in the investment arbitration system.[123] South Africa

[113] *Ibid.*
[114] Laird and Askew, *supra* note 111, at 294 (arguing that the debate for an appeals facility in investment arbitration existed "largely due to the fact that the US Congress thinks it is a good idea"). Elsa Sardinha, "The Impetus for the Creation of an Appellate Mechanism", ICSID Review, Vol. 32, No. 2 (2017), p. 508.
[115] Laird and Askew, *supra* note 111, at 297.
[116] Sardinha, *supra* note 114, at 508.
[117] *Ibid.*
[118] Laird and Askew, *supra* note 111, at 297 (claiming that although ICSID signalled that it would "continue to work on the development of an appellate body concept", the work ceased in particular due to technical and policy issues raised in the Discussion Paper).
[119] Sardinha, *supra* note 114, at 507 (arguing that all U.S. investment agreements after 2002 contemplate this possibility). Gantz, *supra* note 111, at 41 (mentioning that the United States-Central American-Dominican Republic Free Trade Agreement requires the parties to establish a negotiating group for an "appellate body or similar mechanism"). Laird and Askew, *supra* note 111, at 297 (stating that, by reference to the Discussion Paper, "by mid-2005 as many as twenty countries may have signed treaties with provisions on an appeal mechanism").
[120] Sardinha, *supra* note 114, at 507
[121] Catherine Li, "The EU's Proposal Regarding the Establishment of the Investment Court System and the Response from Asia", Journal of World Trade, Vol. 52, No. 6 (2018), p. 944.
[122] Sardinha, *supra* note 114, at 512.
[123] UNCITRAL (Working Group III), "Possible Reforms of Investor-State Dispute Settlement (ISDS) Submission from the Government of China", A/CN.9/WG.III/WP.177, p. 4 (arguing that an appellate mechanism is desirable in the sense that "[i]t would help improve error-correcting mechanisms, strengthen legal expectations for investment dispute settlement and establish limitations for the conduct of judges," and reduce the likelihood of the abuse of rights by disputing parties as a result of a higher level of standardization and clarification in arbitral procedures). UNCITRAL (Working Group III), "Possible Reforms of Investor-State Dispute Settlement (ISDS) Submission from the Government of Morocco", A/CN.9/WG.III/WP.161, p. 6

likewise believes that an appellate mechanism or a multilateral investor court could promote the rule of law by introducing an additional instance of review that could ensure the correction of erroneous arbitral decisions but there are doubts about whether they could increase the consistency of investment arbitral jurisprudence.[124]Bahrain, nevertheless, is more skeptical of an appeals facility because of fears of additional costs and delay in the dispute resolution process as well as a possible result of rampant recourse to appeals by investors.[125] Sardinha maintains that the slow adoption and proliferation of an appellate mechanism in IIAs implies that national states "have tolerated (and may continue to tolerate) a degree of inconsistency given the costs and complications involved in creating an appellate mechanism."[126]

The concern over the missing element of an appeals facility in investment arbitration, for one thing, is deeply rooted in the pursuit of consistency and predictability of the investment treaty regime.[127] It should be noted that from the previous analysis of the existing literature on inconsistent investment arbitral jurisprudence (3.1), some commentators argue that the lack of consistency is a loophole in the investment arbitration system that requires a remedy. The ongoing expansion of the network of IIAs and the rapid growth of investment arbitration cases are likely to give new momentum to inconsistency in the dispute resolution mechanism.[128] The introduction of an appellate mechanism could help in the sense that a centralized review of the decisions by the first-instance authorities is expected to improve the uniformity of law as "the law is interpreted, shaped, and articulated consistently."[129] In addition, some critics of investment arbitration fear that erroneous arbitral decisions, in terms of an error of law or a manifest misapprehension of fact, could not be corrected in the system because no appellate mechanism is in place.[130] Brown notes that, owing to the lack of an appeals facility in investment arbitration, arbitral decisions could be legally wrong yet could not be corrected.[131] The ICSID annulment committee in *CMS v. Argentina*, for instance, determined that the decision made by the investment Tribunal was legally wrong but took no action correspondingly because it goes beyond the scope of review of the ICSID annulment procedure.[132] Constituents around the world, who are familiar with the idea of multi-tier

(arguing that an appellate mechanism would ensure consistency in the application and interpretation of substantive provisions in IIAs, provide more predictability for states and investors, and rectify errors in investment awards). UNCITRAL (Working Group III), "Possible Reforms of Investor-State Dispute Settlement (ISDS) Submission from the Government of Ecuador", A/CN.9/WG.III/WP.175, p. 3 (arguing that an appellate mechanism "would make it possible for arbitral awards to be reviewed and corrected, thereby providing parties with a coherent and fair decision that is in accordance with the law").

[124] UNCITRAL (Working Group III), "Possible Reforms of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa", A/CN.9/WG.III/WP.176, pp. 11-14 (maintaining that an appellate mechanism is more practical in comparison to the investment court system because the former is politically easier to achieve).

[125] UNCITRAL (Working Group III), "Possible Reforms of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain", A/CN.9/WG.III/WP.180, p. 11.

[126] Sardinha, *supra* note 114, at 507.

[127] Walsh, *supra* note 108, at 457-458.

[128] TenCate, *supra* note 104, at 1173.

[129] Walsh, *supra* note 108, at 457.

[130] Brown, *supra* note 90, at 680. Hindelang, *supra* note 21, at 81-82.

[131] Brown, *supra* note 90, at 680.

[132] *Ibid*.

adjudication, would probably find it difficult to support such a mechanism, namely arbitration of investment disputes by private tribunals with no chance of appeals.[133] Brown argues that, in the context of commercial arbitration, the lack of an appellate mechanism is probably less problematic since speedy decision-making has rare impact on the overall public interests.[134] However, the involvement of national states in dispute resolution and the usually concomitant public interest suggest that such a gap is more problematic in investment arbitration.[135] Hindelang shares the same concern, questioning whether, in the light of the substantial public interests involved in investment arbitration, "poorly reasoned or erroneous decisions would be more acceptable than (slightly) prolonged proceedings."[136]

2.4.6 Costly and Lengthy Proceedings

While the debate on efficiency (in terms of costs and time required for arbitral proceedings) has existed for a long time in the realm of international commercial arbitration, it entered into the discussions of investment arbitration as a relatively recent concern.[137] This contrast probably relates to the mere involvement of sovereign states and public interest in investment arbitration which requires a delicate balancing process with efficiency at one end, and other considerations, such as the need for transparency and the assurance of the rule of law, at the other.[138] That being said, a consensus among different stakeholders nowadays seems to be that investment arbitration has become too costly and lengthy.[139] A survey conducted by the International Bar Association Subcommittee on Investment Treaty Arbitration reveals that around 95% of all Survey respondents regard the duration of investment arbitral proceedings to be an issue of concern with more than half expressing significant concern.[140] Meanwhile, a clear majority of the respondents also consider costs of investment arbitration as an issue of at least some concern.[141] Arbitration practitioners and clients allegedly raise concerns about the duration and costs of arbitral proceedings frequently.[142] Franck argues that the perceived high costs of investment arbitration may lead countries to "abandon arbitration altogether, mandate other forms of dispute resolution (perhaps as a precursor to arbitration or as an alternative), use arbitration strategically in conjunction with other processes, return to international diplomacy, or reject the creation of IIAs."[143] However, Hindelang cautions that charges of "excessive costs" should not be made too quickly in the context of investment

[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] Hindelang, *supra* note 21, at 82.
[137] Lars Markert, "Improving Efficiency in Investment Arbitration", Contemporary Asia Arbitration Journal, Vol. 4, No. 2 (2011), p. 217.
[138] *Ibid.*
[139] Roberto Echandi, "The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987-2017) and Policy Implications", ICSID Review, Vol. 0, No. 0 (2019), p. 24.
[140] International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, *supra* note 15, at 36.
[141] *Ibid.*
[142] Albert Jan van den Berg, "Time and Costs: Issues and Initiatives from an Arbitrator's Perspective", ICSID Review, Vol. 28, No. 1 (2013), p. 218.
[143] Susan D. Franck, "Rationalizing Costs in Investment Treaty Arbitration", Washington University Law Review, Vol. 88, No. 4 (2011), p. 789.

arbitration where complex questions of law and fact often arise because "justice cannot be expected to be 'free of charge', either in investment arbitration or in domestic courts."[144]

The costs incurred in investment arbitral proceedings can be substantial,[145] which, in turn, seem to be one of the two greatest disadvantages of international arbitration according to in-house counsel from leading corporations.[146] Hodgson and Campbell's 2017 study of damages and costs in investment treaty arbitration suggests that the average party costs for the claimant side are slightly above $6 million U.S. dollars while that for the respondent side is around $4.8 million U.S. dollars.[147] Considering that the largest claims increase the average costs significantly, the median party costs may be more representative as they mitigate the disruptive effects of those claims.[148] Indeed, the median party costs for the claimant side and the respondent side are respectively around $3.4 million U.S. dollars and around $2.8 million U.S. dollars.[149] These arbitration costs include "fees for arbitrators, administration, legal representation and experts."[150] The largest shares of these arbitration costs are allegedly charged by the parties' lawyers whose services are priced at several hundred U.S. dollars per hour, per lawyer.[151] The hourly fees can reach $1,000 U.S. dollars for lawyers from elite law firms.[152] The high costs of legal representation provided by lawyers have raised concern over the role of law firms in driving up the costs of investment arbitration.[153] There is an allegation that investment lawyers have become the new international "ambulance chasers" who turn investment arbitration into a lucrative industry by constantly keeping clients informed about the opportunities to sue host states before investment tribunals.[154] Meanwhile, large law firms also raise arbitration costs by way of mobilizing "teams of lawyers using expensive litigation techniques borrowed from corporate litigation practice."[155] The bills for investment arbitration may conceivably be excessive for developing countries (especially those frequent defendants in the system) which often have a relatively limited budget for public spending. The Philippines government, for instance, allegedly spent $58 million U.S. dollars in two cases initiated by German airport operator Fraport which could have been used to cover the salaries of 12,500 teachers for 1 year, vaccinate 3.8 million children against some diseases, or

[144] Hindelang, supra note 21, at 83-85.
[145] Matthew Hodgson and Elizabeth Evans, "Chapter 17: Allocation of Costs in ICSID Arbitrations", in Crina Baltag, ed., "ICSID Convention after 50 Years: Unsettled Issues", Kluwer Law International (2016), p. 454.
[146] Lucy Reed, "More on Corporate Criticism of International Arbitration", Kluwer Arbitration Blog, 16 July 2010, available at http://arbitrationblog.kluwerarbitration.com/2010/07/16/more-on-corporate-criticism-of-international-arbitration/ (last visited on August 25, 2019).
[147] Matthew Hodgson and Alastair Campbell, "Damages and Costs in Investment Treaty Arbitration Revisited", Global Arbitration Review, 14 December 2017, available at http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf (last visited on August 25, 2019).
[148] *Ibid.*
[149] *Ibid.*
[150] Diana Rosert, "The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration", International Institute for Sustainable Development, 2014, available at https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf (last visited on August 25, 2019), p. 8.
[151] Eberhardt and Olivet, *supra* note 87, at 15. Rosert, *supra* note 150, at 9.
[152] *Ibid.*
[153] Rosert, *supra* note 150, at 9.
[154] Eberhardt and Olivet, *supra* note 87, at 23.
[155] Rosert, *supra* note 150, at 9.

build two new airports.[156] Furthermore, commentators are concerned that investment arbitral proceedings are not fast with the average length of these proceedings being approximately 4 years.[157] The allegedly lengthy arbitral proceedings undoubtedly play some role in driving up the costs of investment arbitration as well.[158]

A report by the International Bar Association Subcommittee on Investment Treaty Arbitration provides some insights into the factors that contribute to the increasing time and costs of investment arbitration.[159] First of all, under both the ICSID and UNCITRAL arbitration rules, parties are allowed room to apply dilatory tactics in the process of constituting investment tribunals.[160] Second, the resolution of investment disputes via a sole arbitrator is seldom used in smaller value or less complex disputes, adding some extra (and arguably unnecessary) time and expense spent on arbitral proceedings by parties.[161] Third, delays in arbitral procedures may also arise from the fact that international arbitrators are often overloaded with work and may therefore lack availability for investment disputes in hand.[162] Fourth, the current investment arbitration mechanism allegedly cannot filter out meritless claims adequately since an investment tribunal may rule that a claim is meritless or fails as a matter of law only after numerous steps.[163] Last, the arguably excessive time taken to deliver arbitral awards and lengthy submissions and exhibits are also referred to by the report as causes for inefficiency in investment arbitration.[164] Van den Berg, himself as a renowned arbitrator, likewise sheds light on the possible factors that may partly account for the disturbing costs and time involved in investment arbitral proceedings from an arbitrator's perspective.[165] He first points out that arbitrators tend to be overly laissez-faire with respect to the scheduling of the procedure by disputing parties' counsels who may be incentivized to cause delays for more billable hours.[166] The other issue mentioned is that a number of arbitrators do not have detailed recording of time spent on a single case and simply guess the number of hours spent. However, these guesses, not infrequently, greatly deviate from the accurate numbers, which lead to an increase in tribunal costs for disputing parties.[167]

The UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) identified the duration and costs of investment arbitral proceedings as a concern of the investment arbitration system for consideration and discussions.[168] Contrary to the traditional conception

[156] Eberhardt and Olivet, *supra* note 87, at 15.
[157] Echandi, *supra* note 139, at 24.
[158] Van den Berg, *supra* note 142, at 218 (arguing that nowadays almost all arbitral institutions remunerate arbitrators on the basis of the number of hours that they spend on the adjudication of a case). Rosert, *supra* note 150, at 9 (arguing that "[h]ow many lawyers and hours are devoted to a case is arguably influenced by the amount in dispute and the complexity and length of the proceedings").
[159] International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, *supra* note 15, at 36-52.
[160] *Ibid*, at 37-38.
[161] *Ibid*, at 39-40.
[162] *Ibid*, at 40-41.
[163] *Ibid*, at 41-43.
[164] *Ibid*, at 49-50.
[165] Van den Berg, *supra* note 142, at 218-220.
[166] *Ibid*, at 218.
[167] *Ibid*, at 219-220.
[168] UNCITRAL (Working Group III), "Possible Reform of Investor-State Dispute Settlement", A/CN.9/WG.III/WP.142, pp. 6-7.

that arbitration is relatively speedy and low-cost, investment arbitration cases are often the subject of complaints involving increasingly high costs and lengthy proceedings.[169] The submissions from a range of countries for the initiative under the auspices of the UNCITRAL Working Group III, especially those from the South, give insight into the huge strains that have been placed on developing countries' budgets by the enormous expenses incurred in investment arbitration. Morocco argues that the increase in the costs partly accounts for the growing discontent with international arbitration, especially with respect to its impact on public policies and the sustainable development of national states.[170] Bahrain expresses concerns over the impact of the duration and costs of investment arbitral proceedings on both investors, particularly small and medium-sized enterprises, and states.[171] Bahrain further suggests that the fees payable to legal counsels and experts, instead of tribunal costs or administrative fees, are the true cause of the escalating costs in investment arbitration.[172] The Dominican Republic's submission reveals that a panel of academics, government officials (Latin America), and lawyers argued at the second intersessional regional meeting (co-organized by the Dominican Republic and UNCITRAL) that the potential causes of the increased costs and duration in investment arbitral proceedings include: "the complexity of the case, varied expectations of parties, dilatory tactics by the parties, scheduling difficulties, possible procedural incidents, ineffective management of the case, as well as the lack of cohesion among arbitrators."[173] China highlights that host governments, especially those of developing countries, are financially threatened by the high costs of investment arbitration, which "needs to be addressed by establishing appropriate mechanisms."[174] The governments of Thailand and Turkey also seem to be concerned about costly investment arbitral proceedings, thus indicating a number of proposals to reduce arbitration costs. These proposals include, among others, the establishment of an international advisory center for developing countries, stricter regulation of third-party funding, predetermined time frames, budgetary planning, and early dismissal of unfounded and meritless claims.[175]

2.5 Concluding Remarks

In anticipation of the positive impact that could be brought by cross-border capitals, national states have been competing to attract the attention of investors from afar. While the dynamics of FDI activities are closely linked to the global macro-economy, the incremental accumulation of global FDI stocks has been the norm. However, as a result of the regulation by host states' authorities, the occurrence of investment disputes between foreign investors and host states is only too normal. The accrual of global FDI stocks, in turn, is likely to

[169] *Ibid*, at 6.
[170] UNCITRAL (Working Group III), A/CN.9/WG.III/WP.161, p. 3.
[171] UNCITRAL (Working Group III), *supra* note 123, A/CN.9/WG.III/WP.180, at 6.
[172] UNCITRAL (Working Group III), *supra* note 125, A/CN.9/WG.III/WP.180, at 6.
[173] UNCITRAL (Working Group III), "Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Dominican Republic", A/CN.9/WG.III/WP.160, pp. 7-8.
[174] UNCITRAL (Working Group III), *supra* note 123, A/CN.9/WG.III/WP.177, at 3.
[175] UNCITRAL (Working Group III), "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Thailand", A/CN.9/WG.III/WP.162, p. 4. UNCITRAL (Working Group III), "Submission from the Government of Turkey", A/CN.9/WG.III/WP.174, p. 3.

provide a hotbed for the increase of such investment disputes. While other methods are often also available for foreign investors to seek remedy, investment arbitration could be uniquely attractive for those investors as they can directly engage host states in arbitration at the international level. That is evidenced by the phenomenal growth of investment arbitration cases recorded around the world starting from the late 1990s. Nevertheless, the investment arbitration system did not evolve without its own problems. Instead, the arbitration of investment disputes has generated considerable criticism for a range of alleged flaws, such as the lack of transparency, incorrect and inconsistent arbitration awards, arbitrator bias, and low economy. Since investment arbitration has become a defining feature of the international investment regime and investor-state dispute resolution, the legitimacy crisis threatening its sustainability requires the global investment community to respond accordingly. Those responses may be directed at investment arbitration *per se*, but may also suggest a look at other alternatives, including litigation via domestic courts.

Chapter 3 The Roles of Domestic Courts in Investor-State Dispute Resolution

3.1 Introduction

Foreign investors and host states, as core players within the framework of investor-state dispute resolution, are not always able to draw an amicable full stop to investment disputes between them amicably. This commonplace phenomenon makes the participation of relevant individuals and institutes, in association with parties to investment disputes, in the dispute resolution process necessary. At first glance, domestic courts may seemingly stand in striking contrast with the international aspects of dispute resolution, but they indeed have been embodying both national and international elements in the era of globalization for a long time.[1] Against the backdrop of investment disputes increasingly arising between foreign investors and host states, domestic courts function as a vital link in the chain of the dispute resolution process by undertaking different missions in diverse circumstances. Although the specific role played by a domestic court in a single case is uncertain without a given context, domestic courts, in general, either through leading the process or by interplaying with other institutes, are not a negligible force in resolving conflicts with respect to the international obligations of host states.

For any serious attempts to reform the current design of investor-state dispute resolution, the roles and functions of domestic courts should not be left out of the picture. This is largely because, as demonstrated in this chapter, domestic courts are an integral part of the overall investor-state dispute resolution system. Through certain rules in IIAs such as the requirement of prior pursuit of local remedies and the fork-in-the-road provision, domestic courts clearly share the jurisdiction over investment disputes with investment tribunals, let alone the fact that foreign investor can choose to submit the disputes to domestic courts in disregard of the extra prodecural benefits provided by IIAs. However, that does not change the fact that, in general terms, IIAs largely enable foreign investors to bypass the domestic courts of host states for a direct and immediate access to investment arbitration, constituting a treaty design feature which offers investment arbitration as a substitute for litigation via domestic courts.

Throughout the existing literature on the topic of investor-state dispute resolution, a dominant part of attention has been directed at investment arbitration and a majority of criticisms have been levelled against investment arbitration. The ongoing efforts to reform investor-state dispute resolution at the international level, whether initiated by ICSID or UNCITRAL, also largely focus on the defects of investment arbitration rather than those of domestic courts. Therefore, it is safe to say that the current crisis of the investor-state dispute resolution system is much more related to investment arbitration than to domestic courts. That, however,

[1] Richard A. Falk, "The Role of Domestic Courts in the International Legal Order", Indiana Law Journal, Vol. 39, No. 3 (1964), pp. 429-445. Karen Knop, "Here and There: International Law in Domestic Courts", New York University Journal of International Law and Politics, Vol. 32, No. 2 (2000), pp. 501-535. Antonios Tzanakopoulos, "Domestic Courts in International Law: The International Judicial Function of National Courts", Loyola of Los Angeles International and Comparative Law Review, Vol. 34, No. 1 (2011), pp. 133-168.

in no way suggests that court litigation in itself is a better dispute resolution method than investment arbitration.

Reforming the manner in which domestic courts are involved in investor-state dispute resolution would contribute to the improvement of the investor-state dispute resolution system. This is not only because of the fact that domestic courts are key players in the field but also the limitations of a piecemeal approach to reforming investment arbitration in alleviating certain concerns surrounding the current design of investor-state dispute resolution, such as that investment arbitration accords an unfair privilege to foreign investors and that national states are subject to an increasing amount of sovereignty and financial costs. Recent development of the investment treaty-making practice of certain countries in shifting away from investment arbitration towards court litigation in resolving investment disputes (Chapter 4) also justifies the need to reconsider the role of domestic courts in seeking a way out of the crisis for investor-state dispute resolution. In addition, it should be clarified that while this research may ultimately argue that the domestic courts of host states should be awarded a primary role in IIAs (Chapter 7), it does not touch upon the topic of reform the local court system in any specific jurisdiction. With that said, it is almost self-evident that a more robust, efficient and reliable court system would create more favorable conditions for the resolution of investment disputes.

This chapter intends to depict the roles of domestic courts within the context of investor-state dispute resolution and their respective sources of law, particularly those of international law, by examining the pertinent provisions embedded in international investment agreements, international conventions, arbitration rules, and miscellaneous official documents. After elaborating on the judicial role of domestic courts through a systematic study of the procedural rules of IIAs (Section 3.2), this chapter looks at the function of domestic courts *loci arbitri* in reviewing investment awards and its legal authorization (Section 3.3). This chapter then looks at the support (Section 3.4) and reluctance (Section 3.5) that domestic courts may show for the conduct of arbitral procedures. This chapter concludes with the main findings at the end (Section 3.6).

3.2 The Judicial Role of Domestic Courts

In general, multiple choices are available for foreign investors to safeguard their interests in the event of losses as a result of breaches of obligations by host states in the light of the different dispute resolution mechanisms put in place by legal instruments. Reinisch identified several forums available for foreign investors to settle disputes with host states, including domestic courts, ICSID conciliation, ICSID arbitration, ICSID additional facility arbitration, other institutional and *ad hoc* arbitration, diplomatic protection, and international courts or tribunals.[2] It is thus apparent that domestic courts are a channel that foreign investors can resort to for the resolution of their disputes with host states. However, an astonishing and still rising number of literature spotlights investment arbitration as arguably the most arresting

[2] UNCTAD, "Dispute Settlement International Centre for Settlement of Investment Disputes: 2.2 Selecting the Appropriate Forum", available at http://unctad.org/en/docs/edmmisc232add1_en.pdf (last visited on January 6, 2022).

way for resolving such disputes. While investment arbitration has become a prominent feature of the modern international investment regime, it cannot and should not dwarf the value of domestic courts in resolving investment disputes. The judicial role of domestic courts in investor-state dispute resolution essentially is derived from the territorial link of foreign investments with the sovereignty of host states. And this role is sustained clearly by the relevant rules of different sources in the domain of investment law.

3.2.1 The Inherent Jurisdiction of Domestic Courts in Host States

As foreigners residing and working in another country or territory outside their home country is not a phenomenon confined to modern times, foreigners along with their property have been subject to abuses and misconduct of local governing authorities for a long time.[3] Despite the emergence of the notion of states' responsibility for injuries to foreigners in the middle of eighteenth century, investment disputes often were either not settled, or evolved into hostile reprisal or even 'gunboat diplomacy' if they could not be resolved by peaceful dialogues, domestic court proceedings, or diplomatic protection, prior to the introduction of investment arbitration.[4] The practice of resolving investment disputes via domestic courts apparently precedes the boom of investment arbitration and comes into play in this domain as a crucial dispute resolution mechanism.

According to Nollkaemper, domestic courts tend to take a relatively strong position in international legal order compared to that of international courts, granting themselves an increasing role in the maintenance of the rule of international law. Domestic courts are not a substitute in cases where international courts and tribunals are absent. Domestic courts therefore are held to have a primary role in international claims, which lies in the respect and protection that international law accords to states.[5] This doctrine applies to international investment law in the sense that domestic courts, as the judicial organ of a state, are entitled to reserve the jurisdiction and competence over investment disputes, if so desired by states. The judicial role of domestic courts in this regard indeed inherently flows from the sovereignty that states possess. Sovereignty, as a venerable notion in international law, embodies the meaning of 'sovereignty as jurisdictional competence to make and/or apply law'.[6] As a logical consequence, this empowers domestic courts to lead a role, if not a predominant type, in resolving private-public disputes related to FDI activities in the state's territory. While the principle of sovereignty serves as an argument for states to assert control

[3] O. Thomas Johnson Jr. and Jonathan Gimblett, "From Gunboats to BITs: The Evolution of Modern International Investment Law", Yearbook on International Investment Law & Policy (2011), p. 649.
[4] *Ibid*. David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment 2012/03, available at http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf (last visited on January 6, 2022), p. 9.
[5] Since the book aims at shedding light onto the roles of national courts in the international rule of law, it does not specifically target a certain branch of the trunk of international law. But the author clearly intends to bring national courts in the context of international investment law into the picture, as he already mentions NAFTA, arbitral tribunals and the major *Lowen* case prior to the expression of those statements. Andre Nollkaemper, "National Courts and the International Rule of Law", Oxford University Press (2011), pp. 25-26.
[6] Craig Hammer, "The Changing Character of Sovereignty in International Law and International Relations", Columbia Journal of Transnational Law, Vol. 43, No. 141 (2004), p. 145.

over the adjudication of investment disputes, it also highlights a form of restraint by the judicial branch on the political branch of a state.

It is a default rule that, if there is no investment agreement in place, investment disputes would automatically fall within the jurisdiction of the domestic courts, most likely, of national states hosting foreign investments.[7] However, as investment disputes arguably involve the interests of both the host state of the investment and the home country of the investor, the domestic courts of both countries in theory are able to operate as a forum to settle the dispute. As a matter of fact, the likelihood for domestic courts in the home country to wield this power is minuscule, if not non-existent, because of the enormous obstacles posed by private and public international law. Investment disputes arise from the investment projects made by foreign investors within the territory of the host state and are based on the alleged violations of obligations by the host state. Thus, an investment dispute displays a much closer connection with the host state than the home state. In addition, as Shaw argues, 'the independence and equality of states made it philosophically and practically difficult to permit municipal courts of one country to manifest their power over foreign sovereign states, without their consent.'[8] Even if a foreign investor manages to sue the host state in its home country on the condition of a waiver of immunity from jurisdiction by the host state, immunity from execution vested in states would still constitute an intractable issue that might thwart the investor's anticipation of due remedy. Last but not the least, the host state is regarded as reluctant to subject itself to the jurisdiction of other states.[9] Therefore, in spite of the assumption that proceedings inside the courts of the home country would benefit an investor more, the domestic courts of the host state normally stand out as a more realistic option for the investor.

3.2.2 Limitations Imposed on the Jurisdiction of Arbitral Tribunals

The jurisdiction of tribunals in investment arbitration is a delicate matter as it concerns the interests of both parties to investment disputes and determines the competence of the arbitrator(s) in charge of the arbitration case. Indeed, the jurisdictional issue is significant for international adjudication because it operates as a gateway for international courts and tribunals to touch upon the merits of cases. It is not surprising that parties to international disputes frequently formulate preliminary objections to the jurisdiction of adjudicative bodies by taking advantage of ambiguity in the relevant concepts.[10] In accordance with the well-known *Kompetenz-Kompetenz* doctrine anchored in international arbitration, the power to determine their own competence in investment arbitration cases is conferred upon arbitral tribunals.[11] If arbitral tribunals are bent on an excessive expansion of their jurisdiction over

[7] UNCTAD, *supra* note 2, at 9.

[8] Malcolm N. Shaw, "International Law (Fifth Edition)", Cambridge University Press (2004), p. 622.

[9] Michael Byrne, "Resolution of Investment Disputes in China under Bilateral Investment Treaties", Asian Dispute Review, Vol. 4, No. 2 (2002), p. 124.

[10] Filippo Fontanelli and Attila Tanzi, "Jurisdiction and Admissibility in Investment Arbitration. A View from the Bridge at the Practice", The Law & Practice of International Courts and Tribunals, Vol. 16, No. 1 (2017), p. 3.

[11] *Kompetenz-Kompetenz* refers to "the ability of the arbitral tribunal to rule on the question of whether it has jurisdiction before intervention by national courts", which is now a fundamental rule in international law and

investment disputes, sovereign states would be compelled to augment the allocation of resources to international adjudication at the expense of taxpayers; however, if they dismiss cases at hand based on unreasonable jurisdictional obstacles, investors' right to arbitrate would be impaired if not abrogated. The relevance of the jurisdiction of investment tribunals to the judicial role of domestic courts is pronounced, because investment arbitration and litigation via domestic courts can be alternative mechanisms for investor-state dispute resolution. Awareness of limitations imposed on the jurisdiction of investment tribunals will contribute to an understanding of the jurisdiction of domestic courts over investment disputes.

Investment arbitration, like other forms of arbitration, has to be based on an agreement between/among disputing parties. Thus, consent from the parties to investment arbitration is the fundamental source of legitimacy for the arbitral process.[12] States' consent to arbitration turns out to be a decisive factor for whether or not the benefits for foreign investors in this mechanism could be realized. The ICSID Convention in its provisions requires 'consent in writing', but does not specify the modalities of consent.[13] However, there are in practice three modalities of states' consent: arbitration clauses in investor-state contracts, IIAs, and national legislation.[14] Investment arbitration based on the last two modalities of consent is referred to as 'arbitration without privity' by Jan Paulsson, because foreign investors are permitted to institute arbitration "whether or not any specific agreement has been concluded with the particular complainant."[15] Statistics show that IIAs are the most commonly used instrument of consent for foreign investors to bring forward arbitration cases against host states, but

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widely recognized in national laws. Thomson Reuters Practical Law, "Glossary: Kompetenz-Kompetenz", available at https://content.next.westlaw.com/Document/Id249cccb1c9611e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp (last visited on January 6, 2022). Waibel regarded this doctrine as a corollary of the nature of arbitration as a binding, third-party dispute resolution mechanism. Without it arbitral tribunals could not well perform their arbitral function, thus effectiveness of arbitration would also suffer. Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility", Legal Studies Research Paper Series (University of Cambridge Faculty of Law), Paper No. 9/2014, February 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789 (last visited on January 6, 2022).

[12] Christoph Schreuer, "Investment Arbitration based on National Legislation", available at http://www.univie.ac.at/intlaw/wordpress/wp-content/uploads/2012/11/investment_arbitr_liber_a_Karl.pdf (last visited on January 6, 2022).

[13] Article 25(1) of the ICSID Convention stipulates that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that state) and a national of another Contracting State, which the parties to the dispute **consent in writing** to submit to the Centre. …" Article 25 (1), Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[14] Consensual agreement in private contracts is used as the ground for foreign investors to file an arbitration against host states in a number of cases, including *Holiday Inns S.A. and others v. Morocco* (ICSID Case No.ARB/72/1) and *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case No.ARB/00/7). Article 16.3 of the Power Purchase Agreement (PPA, 9 October 1998) in the Case between Cambodia Power Company and Kingdom of Cambodia is an illustrative example of "arbitration clause". Besides, the relevant laws of Albania and South Sudan offered consent to arbitrate specified disputes with foreign investors, respective bringing about *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2) and *Sudapet Company Limited v. Republic of South Sudan* (ICSID Case No. ARB/12/26).

[15] Jan Paulsson, "Arbitration without Privity", ICSID Review, Vol. 10, No. 2 (1995), p. 233.

arbitration clauses and national legislation are also invoked to this end.[16] In practice, sovereign states barely provide general consent to arbitrate all types of investment disputes. On the contrary, they choose to strictly limit the subject matter that would be compatible with investment arbitration.

The consent given by national states does not mean certainty for foreign investors to have their disputes settled before investment tribunals, because these tribunals, notwithstanding their relatively broad discretion, are bound by the jurisdictional rules contained in IIAs. Waibel identifies the scope of jurisdiction from four dimensions, referring to respectively personal jurisdiction (*ratione personae*), territorial jurisdiction (*ratione loci*), temporal jurisdiction (*ratione temporis*), and subject matter jurisdiction (*ratione materiae*).[17] If any of the four mentioned dimensions fails, a given investment tribunal is unable to establish competence over a particular case.[18] Personal jurisdiction deals with the eligibility of the disputing parties to arbitrate their disputes, preventing unqualified parties from misusing arbitration proceedings. Article 25(1) of the ICSID Convention requires that the parties to a dispute must be a Contracting State, including any constituent subdivision or agency of a Contracting State if specified, and a national of another Contracting State.[19] But there are normally additional requirements which investors must satisfy as contained in IIAs or even domestic law.[20] Territorial jurisdiction emphasizes a link between the investment and the territory of the respondent state, otherwise the respondent state has got nothing to be responsible for with the investment unless it consents to it. Temporal jurisdiction, within the framework of ICSID arbitration, requires that at the time when the arbitration proceeding is initiated, the state must be a member of the ICSID Convention. At the same time, the

[16] According to my study and calculation, as of November 15, 2017, there had been 646 investment arbitration cases under ICSID framework, among which 67 cases are based on national investment law, accounting for a little bit more than 10% of the total cases, while 103 cases are based on contracts, accounting for almost 16% of the cases. However, cases based on IIAs are the dominant type with 476 cases, accounting for the rest 74%. Data were collected from ICSID case database, available at https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx (last visited on November 15, 2017).

[17] Waibel holds that the jurisdiction of international tribunals depends on the consent as to its all elements, thus failure to meet any of the elements is fatal to the jurisdiction and competence of a given tribunal. Besides, the division of jurisdiction into four elements is also descriptive. Waibel, *supra* note 11, at 31-57.

[18] The ICSID Convention adopts both the terms 'jurisdiction' and 'competence' but has no reference to 'admissibility'. But in reality objections of inadmissibility become a standard repertoire for the respondents to discontinue arbitration proceedings. The distinction between the concepts of 'jurisdiction' and 'admissibility' is bewildering, which often emerges in the practice and persists in spite of scholarly attempts to solve it. But this paper has no intention to bring the complex issue into consideration but assumes jurisdiction is an interchangeable notion with competence and leaves admissibility out of the picture. Waibel, *supra* note 11, at 31-57. Jan Paulsson, "Jurisdiction and Admissibility", in Gerald Aksen and Robert Georg Briner, eds., "Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner", ICC Publishing (2005), pp. 601-617. Gerold Zeiler, "Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings", in Christina Binder, et al., (eds), "International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer", Oxford University Press (2009), pp. 76-91.

[19] Schreuer, *supra* note 12.

[20] Christoph Schreuer, "Jurisdiction and Applicable Law in Investment Treaty Arbitration", McGill Journal of Dispute Resolution, Vol. 1, No. 1 (2014), p. 1.

investors should meet the jurisdictional requirements of nationality.[21] Temporal jurisdiction of investment tribunals is also related to the temporal application of the substantive obligations contained in IIAs.[22] Subject matter jurisdiction refers to the jurisdictional requirements with regard to the nature and object of an investment dispute.[23] Article 25(1) of the ICSID Convention clearly sets out the requirements of subject matter jurisdiction for arbitral tribunals established in accordance with its rules.[24] However, those requirements do not provide adequate parameters for the determination of the subject matter jurisdiction of ICSID tribunals inasmuch as the key notions in the mentioned article, such as "dispute", "investment", etc., are not clear enough without reference to the relevant clauses in IIAs.

IIAs are to some extent a "declaration of rights" for foreign investors and their investments, under which sovereign states choose to subject themselves to a range of international obligations for anticipated benefits. As Dolzer and Stevens point out, most BITs have included common provisions as regards national treatment, most-favored-nation treatment, fair and equitable treatment, rights to full protection and security, rights to "prompt, adequate, effective" compensation in the event of expropriation or of governmental measures "tantamount to expropriation", and rights to freely transfer assets or proceeds out of host states in convertible currency.[25] But, in practice, if there is not an effective mechanism to operate in case of breaches of obligations by the state party, those rights in favor of foreign investors would likely only remain on paper. The rather strict jurisdictional requirements for investment tribunals set out by pertinent rules indicate that not all disputes framed under investment agreements can be consistently solvable by investment arbitration.[26] In view of the limitations imposed on the jurisdiction of investment tribunals, other dispute resolution mechanisms, including litigation via domestic courts, may be the only choices for foreign investors in some cases.

3.2.3 Domestic Courts: A Common Forum for Dispute Settlement in IIAs

[21] Johan Billiet, et al., "International Investment Arbitration: A Practical Handbook", Maklu-Publishers (2016), p. 233.

[22] *Ibid*, at 234. In the case between Ping An and Belgium, the arbitral tribunal denied its jurisdiction over the claim because in its opinion the China-Belgium BIT 2009 applies precisely to disputes that arise on and after 1 December 2009. *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* (ICSID Case No.ARB/12/29).

[23] Billiet, et al., *supra* note 21, at 220.

[24] Article 25 (1), the ICSID Convention. The subject matter jurisdiction of ICSID tribunals is defined as 'any legal dispute arising directly out of an investment'. Mr. Escobar holds that this definition indicates the subject jurisdiction of ICSID tribunals contains three elements: (1) the requirement of a legal dispute; (b) the requirement that the legal dispute arise directly out of the underlying transaction; and (c) that such underlying transaction qualify as an investment. UNCTAD, "Dispute Settlement Internation Centre for Settlement of Investment Disputes: 2.5 Requirements Ratione Materiae", available at http://unctad.org/en/docs/edmmisc232add4_en.pdf (last visited on January 6, 2022), p. 7.

[25] Jason Webb Yackee, "Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?", Law & Society Review, Vol. 42, No. 4 (2008), p. 808.

[26] Oliveira once identified that, a given tribunal called in over an investment dispute must take into consideration its own jurisdictional entitlements and the merits of the case, while weighing the authority of domestic courts over investment disputes. Thiago Braz Jardim Oliveira, "The Authority of Domestic Courts in Adjudicating International Investment Disputes: Beyond the Distinction between Treaty and Contract Claims", Journal of International Dispute Settlement, Vol. 4, No. 1 (2013), p. 195.

Litigation and arbitration are identified as two mainstream dispute settlement mechanisms in resolving investment disputes. In the absence of instruments providing for investment arbitration as an option, aggrieved foreign investors can resort to domestic courts within the territory of host states for remedy.[27] However, the intrinsic defects of domestic courts raised doubts of stakeholders in FDI activities, which in turn catalyzed the creation of investment arbitration as an innovative mechanism.[28] The phenomenal rise in investment arbitration cases is accompanied by a great deal of scholarly discussions on this topic. Domestic courts, on the other hand, are comparatively less studied in this regard, and thus may generate an illusion of a small presence of domestic courts in IIAs. In fact, alongside the developmental trajectory of IIAs, dispute resolution provisions in those agreements hardly ever fail to mention investors' access to litigation via domestic courts. Even prior to the wide acceptance of investment arbitration by national states, domestic courts already stood out as a forum to protect foreign investors' legitimate interests pursuant to IIAs.[29]

According to a large sample survey on dispute settlement provisions made by Pohl, Mashigo and Nohen, there is a tiny fraction of IIAs limiting investors' remedy channel to domestic courts only. In that case, investment arbitration is not an option for foreign investors. But those treaties almost all date from earlier times and only allow claims under expropriation clauses instead of other substantive provisions.[30] For instance, Article 5.1 of the Bangladesh – Korea, Republic of BIT (1986) states that:

> '…The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.'

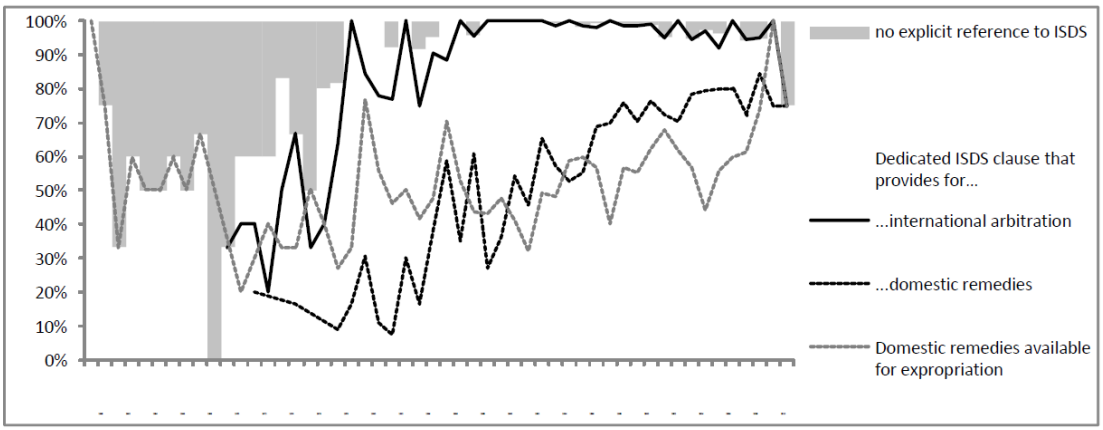
[27] Alexandre Gauthier, "Background Paper: Investor-State Dispute Settlement Mechanisms: What Is Their History and Where Are They Going?", Publication No. 2015-115-E, Library Parliament (Ottawa, Canada), available at https://lop.parl.ca/Content/LOP/ResearchPublications/2015-115-e.pdf (last visited on January 6, 2022), p. 1.

[28] As Gauthier points out, there are at least two defects in relation to domestic courts in investment dispute settlement. First, domestic courts differ from one country to another, thus providing uncertainty for foreign investors who have to pursue claims in aonther jurisdiction. Second, there is suspicion that domestic courts are not fully independent and may be biased against foreign investors. *Ibid*, at 2. In addition, "historically in many countries, governments were immune from lawsuits in the national courts except in cases specifically permitted by national statute". Fasken Martineau, "Investor-State Arbitration: A Handbook for Investors", available at http://www.fasken.com/files/publication/acf33319-3d34-43b0-b99b-0c5f8caccff5/presentation/publicationattachment/59f66d5e-d712-401d-a895-14c9c2db9ff5/investorstatearbitration.pdf (last visited on January 6, 2022), p. 2.

[29] Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Study", OECD Working Papers on International Investment 2012/02, available at https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf (last visited on January 6, 2022), p. 11.

[30] *Ibid*, at 10.

Figure 4 Proportion of Bilateral Treaties Concluded in a Given Year that Explicitly Provide for Access to International Arbitration and Domestic Remedies; the Grey Shaded Sections Indicate the Proportion of Treaties that Contain No Explicit Reference to Investment Dispute Settlement[31]



Source: Pohl, Mashigo and Nohen

As indicated by Figure 4 above, domestic remedies being available for foreign investors under expropriation clauses is a common occurrence throughout the years coming within the ambit of this survey, though no pattern of regularity is easy to find in temporal terms. Besides, domestic remedies in general have become a norm for treaty-writing practice as a dominant majority of bilateral treaties include domestic remedies for the benefit of investors. It is also clear that domestic remedies have been frequently available for investors to bring claims under all the substantive provisions contained in IIAs since 1972 instead of only under expropriation clauses in the earlier treaties. In addition, more than 70% of recent treaties include domestic remedies as a dispute resolution mechanism.[32] Thus, domestic courts, together with investment tribunals, have provided important avenues for foreign investors to seek relief when they enter into dispute with host states. Although the struggle about the future direction of investor-state dispute resolution continues, domestic remedies and investment arbitration often are both available for foreign investors to cope with the harm inflicted upon by host state authorities at the moment.

3.2.4 Exhaustion of Local Remedies Prior to the Institution of Arbitration

This subsection intends to study the requirement of the exhaustion of local remedies prior to the institution of investment arbitration that is contained in conventional IIAs, determining the judicial role of domestic courts over investment disputes conferred upon by this requirement. Local remedies, according to the International Law Commission (ILC), refer to "legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury."[33] A corollary of this definition is that local remedies basically contain

[31] *Ibid*, at 11.
[32] *Ibid*.
[33] ILC, Article 14 Exhaustion of Local Remedies, ILC's Draft Articles on Diplomatic Protection (2006), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf (last visited on January 6, 2022).

both administrative remedies and judicial remedies within the jurisdiction of the state in question. In the context of investor-state dispute resolution, local remedies are also of relevance, especially when there are specific references thereof in IIAs. Owing to the fact that domestic courts are the major focus of this research thesis, the connotation of local remedies is intentionally confined to judicial remedies before the domestic courts of host states, though it is recognized that in certain circumstances of treaty language in IIAs, only an administrative remedy is mentioned other than a judicial remedy.[34] While the provision of investment arbitration is featured in the dispute resolution clauses of modern IIAs, the judicial role of domestic courts is also often specified therein as a forum for foreign investors to seek redress.

3.2.4.1 Exhaustion of Local Remedies in International Law

The exhaustion of local remedies lies in the context of customary international law, whose origin is identified as in the field of diplomatic protection by states over their nationals. The rule of the exhaustion of local remedies is designed to ensure respect for the sovereignty of host states in this particular area of international dispute settlement.[35] It requires a foreign individual to first seek redress from administrative or judicial organs of the host state or the respondent state until a final decision is rendered before a recourse to diplomatic protection or international claims is possible.[36] The ILC codified this rule in its Draft Articles on Diplomatic Protection by stating that "A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies."[37] It is also identified that there is a rationale behind the creation of this rule, making it still relevant in international law after the enormous development of international dispute settlement.[38]

The requirement of the exhaustion of local remedies is also enshrined in the judgements of several cases under the auspices of the International Court of Justice (ICJ). The jurisprudence of the ICJ on the exhaustion of local remedies matters in that the cases handled by the court are often concerned with cross-border investments and private-public discord, though in those

[34] For instance, in many investment treaties to which China is a party, there are requirements of exhaustion of administrative review procedures with the maximum limitation of three months before the claims is mature enough to be submitted to arbitration, but remain silent on judicial remedy accorded by domestic courts. Martin Dietrich Brauch, "Exhaustion of Local Remedies in International Investment Law", IISD Best Practices Series, January 2017, available at https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf (last visited on May 20, 2022), p. 11.

[35] Chittharanjan F. Amerasinghe, "Diplomatic Protection", Oxford University Press (2008), p. 142.

[36] Brauch, *supra* note 34, at 2.

[37] ILC, *supra* note 33.

[38] There are several justifications found for the support of this rule: 1) when an individual goes abroad it is presumed that he/she accepts local remedy for the possible damage; 2) the acts of local administrative and judicial organs are entitled to deference by foreign states; 3) the principle of comity requires home states from espousing claims of their citizens unless in exceptional circumstances; 4) it is not clear whether the state is responsible for the alleged wrongful conduct; and 5) anyway host states should have an opportunity to remedy the injury. James R. Crawford and Thomas D. Grant, "Local Remedies, Exhaustion of", Max Plank Encyclopedia of Public, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e59 (last visited on January 6, 2022).

cases the claims of the foreign investors were presented by their home countries. In *Interhandel*, Switzerland espoused the claim of a Swiss-based company, whose shares in an American company were seized by the US government during World War II, by launching a lawsuit against the United States before the ICJ. On October 1, 1957, Switzerland applied to the Court for a declaration that the US was under an obligation to restore all the assets to the Swiss company or, alternatively, the dispute between the two parties was fit for submission for judicial settlement, arbitration or conciliation.[39] With a judgment on March 21, 1959, the majority of the Court endorsed the opinion that this dispute was not admissible at that stage because the domestic proceedings were still pending before a U.S. district court, indicating that the Swiss company involved in this case had not exhausted all the available local remedies offered by the US. The Court precisely asserted that the exhaustion of local remedies is a well-established rule of customary international law.[40] The *ELSI* case further affirmed the exhaustion of local remedies as an important principle in international dispute settlement. In this case, the United States alleged that Italy had breached its obligations under the 1948 United States-Italy Treaty of Friendship, Commerce and Navigation in relation to its treatment of ELSI, an Italian company owned by two American corporations. The US complained that it was the requisition order from the Italian side that caused the bankruptcy of ELSI. Italy in its Counter-Memorial raised an objection to the admissibility of this case on the ground that the two U.S. corporations had failed to exhaust the local remedies available to them in Italy.[41] The US side argued that the article based on which this case was brought is categorical in its terms and unqualified by any reference to the local remedies rule. It further explained that had the parties intended the jurisdiction conferred upon the Court to be qualified by the exhaustion of local remedies, there would have been specific reference contained therein. But the ICJ found "itself unable to accept that an important principle of customary international law should be held to have been tacitly dispersed with, in the absence of any words making clear an intention to do so."[42] In the *Dallio* case between Guinea and

[39] ICJ, "Interhandel (Switzerland v. United States of America) Overview of the Case", available at http://www.icj-cij.org/en/case/34/judgments (last visited on January 7, 2022).

[40] The court in the judgment noted that the "rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." ICJ, "Judgment of March 21st, 1959", Interhandel Case (Switzerland v. United States of America) (Preliminary Objections), available at http://www.icj-cij.org/files/case-related/34/034-19590321-JUD-01-00-EN.pdf (last visited on January 7, 2022), p. 27.

[41] ICJ, "Judgment of 20 July 1989", Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), available at http://www.icj-cij.org/files/case-related/76/076-19890720-JUD-01-00-EN.pdf (last visited on Janaury 7, 2022), para. 49, p. 42.

[42] *Ibid*, para. 50, p. 42. Sean D. Murphy, "The ELSI Case: An Investment Dispute at the International Court of Justice", Yale Journal of International Law, Vol. 16, No. 2 (1991), pp. 407-408.

Congo, the Court referred to the *Interhandel* case and repeated its stance that the exhaustion of local remedies is a rule that needs to be observed.[43]

Trindade contends that the rule of the exhaustion of local remedies is now generally accepted by the international community requiring state responsibility only to be enforceable at the international level after the individual involved exhausts local remedies, i.e., after the respondent state avails itself of the opportunity to salvage the situation by its own means within the domestic legal framework.[44] This rule, however, is not unconditional in its application; instead, there are limitations imposed, such as the availability or futility of local remedies, the waiver of this rule by the parties involved, etc.[45] Although the rule of the exhaustion of local remedies is applied somewhat inconsistently in different sub-divisions of international law,[46] investor-state dispute resolution as embedded in international investment law would also be significantly influenced by the rule.

3.2.4.2 Exhaustion of Local Remedies in IIAs

The rule of the exhaustion of local remedies, as illustrated above, originated from the practice of diplomatic protection, but its traces are also well recorded in the evolutionary trajectory of international investment law. IIAs have been going through developments and updates as time flashes by, as a result of which distinctions among IIAs of different times are not hard to discern.[47] Since most IIAs contain dispute resolution clauses in their texts,[48] the variation among different generations of those agreements can be evidenced by the inclusion of the requirement of exhausting local remedies or not. The rule of the exhaustion of local remedies

[43] ICJ, "Judgment of 24 May 2007", Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) Preliminary Objections, available at http://www.icj-cij.org/files/case-related/103/103-20070524-JUD-01-00-EN.pdf (last visited on January 7, 2022), para. 42, p. 21.

[44] A.A. Cancado Trindade, "Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law", Belgian Review of International Law, Vol. 12, No. 2 (1976), p.501.

[45] Crawford and Grant identified at least seven exceptions of this rule which respectively are waiver, futility, the distinction between direct injury to the State and claims by way of diplomatic protection, absence of breach of internal law, lack of relevant connection between injured party and respondent state, undue delay, and lack of access. Crawford and Grant, *supra* note 38. Amerasinghe also provided insights into exceptions to or limitations on the rule, including ineffective remedies, undue delay, repetition of injury or likelihood of further damage, and circumstances rendering the requirement of exhaustion of remedies unreasonable. See Amerasinghe, *supra* note 35, at 149-161.

[46] The rule of exhaustion of local remedies in the context of international human rights law is different from its customary international law origins, particularly with respect to the actors and interests concerned. It is also said that the study of the rule in human rights law context would also shed light on the rule's impact on international investment dispute resolution. Brauch, *supra* note 34, at 4.

[47] Vandevelde in his article studied the evolution of Model BITs based on which negotiations over BITs are unfolded. He roughly divided the history of Model BITs into three eras: the first era ran from the 1950s until the end of the 1980s; the second era ranged from late 1980s to the end of 20th century; and the third era started from the turn of the new century to the time of this paper. He analyzed the complex web of factors that interact with each other, bringing about changes to Model BITs and thus further influencing the BIT practices in the world. Kenneth J. Vandevelde, "Model Bilateral Investment Treaties: The Way Forward", Southwestern Journal of International Law, Vol. 18 (2011), pp. 307-314.

[48] In the large sample survey, the authors found out that 96% of the treaties in the sample contain language in dispute resolution, including almost all of the recently concluded treaties. Pohl, Mashigo and Nohen, *supra* note 29, at 10.

is said to appear only in some first-generation BITs and in more recent BITs concluded by Argentina, Romania, Turkey, the United Arab Emirates and Uruguay, among others.[49] Even so, a study of this doctrine in IIAs is still worthwhile as the doctrine indeed operates as an important source of the affirmation of domestic courts' authority in adjudicating investment disputes. In addition, this doctrine has never been officially proclaimed dead in the context of international investment law, so scholarly discussions are of relevance and it remains a possible policy choice for national states.

The provision of investment arbitration in the dispute resolution section is a key feature of modern IIAs. The attitude towards the exhaustion of local remedies adopted by ICSID, as the paramount organization in the area of investment arbitration,[50] should exert a crucial impact on the standpoints chosen by sovereign states in their treaty-making practices, in particular those of Contracting States to the ICSID Convention. Article 26 of the Convention provides that:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may ***require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention***." [emphasis added]

This provision clearly states the stance of ICSID that contracting states' consent to ICSID arbitration by default excludes the space for other forms of remedy that can be chosen to redress alleged claims. However, the exhaustion of local remedies, either administrative remedy or judicial remedy, is permitted to be inserted into instruments of consent at the free will of Contracting States. States in their treaty practices, arguably inspired by the clause, sometimes reproduce the language spelt out in the quote above.[51] However, the wording might also give rise to interpretative difficulties. For instance, whether or not Contracting States are permitted to introduce a requirement of exhausting not only administrative but also judicial remedies before parties to a given dispute can resort to ICSID arbitration, is not readily clear.

The rule of the exhaustion of local remedies is also identified in several BITs to which the Netherlands is a party. For instance, Article 12 of the BIT between the Netherlands and Malaysia reads that:[52]

> "In the event of any dispute arising between a national or a company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party, the other Contracting Party shall, after the exhaustion of all local administrative and judicial remedies, agree to such dispute being submitted for conciliation or

[49] Brauch, *supra* note 34, at 7.

[50] Puig escalated this opinion to a new height as he contended that ICSID has become nearly synonymous with the field of international investment law. Sergio Puig, "Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law", Georgetown Journal of International Law, Vol. 44 (2013), p. 531.

[51] Brauch, *supra* note 34, at 12.

[52] Article 12, Agreement on Economic Co-operation between the Kingdom of the Netherlands and Malaysia (1971), retrieved from http://investmentpolicyhub.unctad.org/Download/TreatyFile/1959 (last visited on January 7, 2022).

> arbitration to the International Centre for Settlement of Investment Disputes established under the Washington Convention on the Settlement of Investment Disputes of March 18, 1965."

In addition to the above example, Article XI of the BIT between the Netherlands and Singapore and Article 6 of the BIT between the Netherlands and South Korea both contain the same stipulation despite nuanced differences in wording.[53] All these clauses offer foreign investors a possibility of recourse to ICSID arbitration on the stringent premise that local remedies available to them within the host state are exhausted.

Article 13 of the BIT between Australia and Poland equally includes the exhaustion of local remedies as a precondition for foreign investors to launch international arbitration in all but disputes relating to expropriation and nationalization.[54] In particular, paragraph (4) of this article states that:[55]

> "Where the dispute arises otherwise than under Article 7 of this Agreement, action pursuant to paragraph (3) of this article may be taken where local remedies available pursuant to paragraph (2) of this Article have been exhausted."

Notwithstanding the fact that the exhaustion of local remedies has in general been dispensed with in international investment law,[56] after the new millennium this rule still witnesses its own impact, albeit limited, on the investment treaty-making practice. For example, Article 8.2 of the Albania-Lithuania BIT provides that:[57]

> "If such a dispute cannot be settled amicably within six months from the date of the written notification provided in paragraph 1, and domestic judicial and administrative remedies have been exhausted, the Contracting Party or the investor shall be entitled to submit the dispute either to ICSID arbitration or ad hoc UNCITRAL arbitration."

3.2.5 Pursuit of Local Remedies Prior to the Institution of Investment Arbitration

The exhaustion of local remedies, as the name indicates, requires the full utilization of all the available remedies provided by the respondent state, thereby imposing a considerable burden

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[53] Article XI, Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore (1972), retrieved from http://investmentpolicyhub.unctad.org/Download/TreatyFile/2079 (last visited on January 7, 2022). Article 6, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Korea (1974), retrieved from http://investmentpolicyhub.unctad.org/Download/TreatyFile/3120 (last visited on January 7, 2022). However, it is noted that the aforementioned the Netherlands-South Korea BIT (1974) was terminated and replaced by Agreement on the Promotion and Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of the Republic of Korea (2003).

[54] Article 13 and Article 7, Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments (1991), retrieved from http://investmentpolicyhub.unctad.org/Download/TreatyFile/163 (last visited on January 7, 2022).

[55] *Ibid*, Article 13.4.

[56] Brauch, *supra* note 34, at 1. Paul Peters, "Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties", Netherlands International Law Review, Vol. 44, No. 2 (1997), p. 234.

[57] Article 8.2, Agreement between the Council of Ministers of the Republic of Albania and the Government of the Republic of Lithuania on the Promotion and Protection of Investments (2007), retrieved from http://investmentpolicyhub.unctad.org/Download/TreatyFile/20 (last visited on January 7, 2022).

on the injured person in search of corresponding redress at the international level. Perhaps in a bid to relieve foreign investors to some extent from such a seemingly disadvantageous position, the application of this doctrine in international investment law is watered down in certain treaties. Those treaties still give no permission for foreign investors to bypass domestic remedies or to immediately launch arbitration, which is in line with the purpose of exhaustion of local remedies, but in the meantime supplement this restriction with a time-limit varying from one treaty to another. Whereas the distinction between this type of provision and the traditional concept of the exhaustion of local remedies is readily distinguishable, both rules require a chronological sequence in the use of domestic remedies and international arbitration by foreign investors. Thus, the provisions of pursuit of local remedies with a clear time-limit can be understood as a special form or a toned-down version of the rule of the exhaustion of local remedies in the context of international investment law. It appears that this type of provision was a common feature among IIAs of the 1970s and 1980s, but since then it has been less used by national states.[58]

An observation of the rule of the pursuit of local remedies in IIAs shows that there are notable differences between the wordings of this rule across investment agreements, resulting in uneven treatment for concerned foreign investors. Accordingly, the rule of the pursuit of local remedies is capable of division into two models. We call them here Model 1 and Model 2. Model 1 permits foreign investors to prolong the legal battle to an international arbitral tribunal even if a final decision has been made by respective local authorities within the prescribed time-limit, so long as the dispute continues to exist or, in other words, the aggrieved investor is not satisfied. Nonetheless, Model 2 is different from Model 1 in the sense that it does not necessarily allow foreign investors to institute investment arbitration if a final decision is pronounced within the specified period by domestic agencies.

The BIT between Jordan and Romania provides an illuminating example of Model 1, whose investment dispute settlement section requires the pursuit of local remedies at least in a specified period. Articles 8(3) and 8(4) of this BIT provide that:

> "(3) In the event that an investment dispute between an investor of one Contracting Party and the other Contracting Party, in the territory of which the investment has been made, continues to exist after the final decision of the national tribunal or of another competent body from the country in which the investment has been made, either of them is entitled to submit the dispute, for conciliation or arbitration, within two months after the exhausted of domestic remedies, to the International Center for the Settlement of Investment Dispute, according to procedure provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965.
>
> (4) However, the condition under paragraph (3) of this Article relating to the exhaustion of the ways of remedies provided for in the legislation of the Contracting Party in the territory of which the investment has been made, cannot be opposed by the Contracting Party to the investor of the other Contracting Party after a term of six months running from the date of the first act of judicial procedure for the settlement of this dispute by tribunal."

[58] Pohl, Mashigo and Nohen, *supra* note 29, at 13-14.

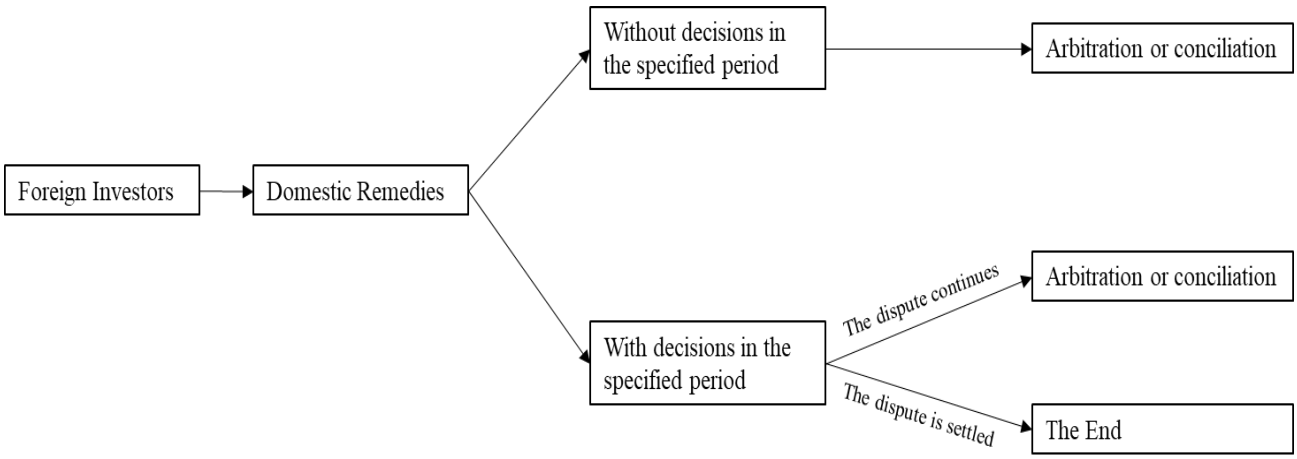
In the light of the clauses restated above, foreign investors covered by the BIT are obliged to seek (exhaust) domestic remedies prior to recourse to ICSID arbitration; however, if six months have elapsed without a final decision since the date on which the first act of judicial procedure was made, foreign investors can thus circumvent domestic remedies so as to enforce their treaty rights at the international level. This model on the one hand shows a certain degree of deference to judicial sovereignty possessed by the contracting states, while on the other hand puts a limitation on the time foreign investors need to commit to awaiting decisions from local authorities in charge of the disputes.

This model is also reflected by the BIT between the Belgium-Luxembourg Economic Union and Rwanda, even though both the time limitations and the starting date differ from the Jordan-Romania BIT mentioned above, as Articles 10(3) and 10(4) contained in that BIT reads as follows:

> "3. If any such dispute between an investor from one Contracting Party and the other Contracting Party cannot be settled in a satisfactory manner after all administrative and judicial remedies available under the legislation of the Contracting Party in whose territory the investment was made have been exhausted, the Contracting Parties shall recognize the right of each party to the dispute to initiate before the International Centre for Settlement of Investment Disputes, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965, the procedure set out in that Convention so that the dispute may be settled by conciliation or arbitration.
>
> To this end, each Contracting Party hereby gives its irrevocable advance consent to the submission of any dispute to the Centre.
>
> 4. However, the condition referred to in paragraph 3 of this article concerning the exhaustion of the administrative and judicial remedies available under the legislation of the Contracting Party in whose territory the investment was made cannot be invoked by that Party against the investor from the other Party later than 18 months from the date of the written notification, accompanied by a sufficiently detailed memorandum, from the investor of one Contracting Party to the other Contracting Party."

Model 1 of the rule of the pursuit of local remedies requires foreign investors to seek local remedies for a fixed period of time, but also asserts their right to arbitrate disputes after such a period or on the condition that they are not satisfied with the results. This model is illustrated in the following diagram.

Figure 5 Model 1 of the Pursuit of Local Remedies: Dispute Settlement Path Diagram



The dispute resolution clauses included in the BIT between the UK and Uruguay, however, turn out to be a good illustration for Model 2 by containing the following language relating to the pursuit of local remedies in Article 8:

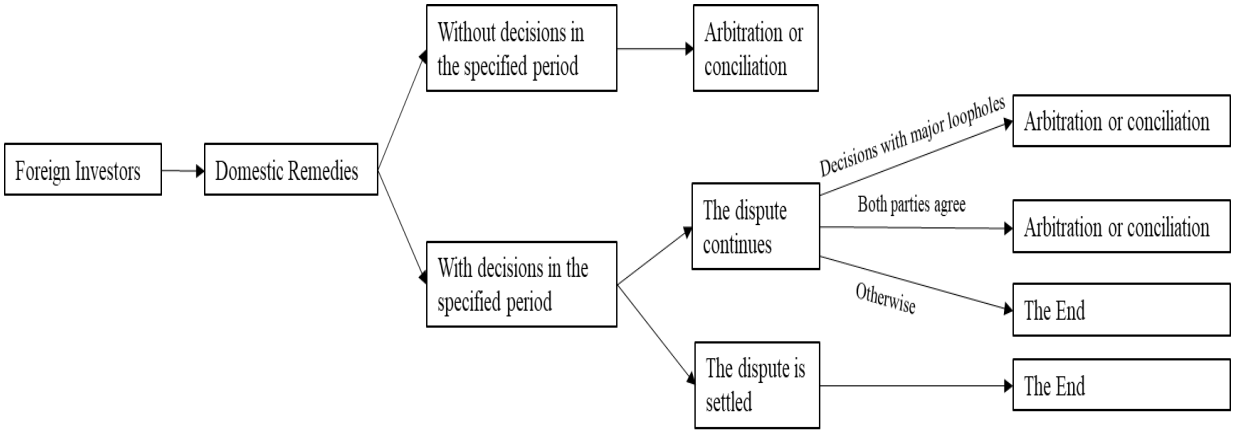
> "(1) Disputes which arise between a national or a company of one Contracting Party and the other Contracting Party with regard to an investment of the former, which have not been amicably settled after a period of three months has elapsed from written notification of a claim, shall be submitted, at the request of one of the parties involved, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.
>
> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:
> (a) if one of the parties so request, in any of the following circumstances:
> (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
> (ii) where the final decision of the aforementioned tribunal is manifestly unjust or violates the provisions of this Agreement;
> (b) where the Contracting Party, in accordance with the powers which its internal law confers upon it, and the national or company of the other Contracting Party have so agreed."

It is therefore clear that before international arbitration is able to commence, covered investors under the UK-Uruguay BIT must submit the dispute to a competent local court. But provided that the given court did not deliver a final decision within the certain period, then the investor would have direct access to arbitration instead of being stuck in the saga of local remedies.[59] Then, a doubt could naturally spring into one's mind as to what would happen if a final decision was rendered during the time-limit. Unlike the provisions of Model 1, here it is specified that once local remedies were sought by the parties and decisions made timely,

[59] Article 8 (4) of the BIT between the UK and Uruguay reads that: "As regards the Oriental Republic of Uruguay, the decision of the competent tribunal within the meaning of paragraph (1) of this Article means a judicial decision without appeal." Thus, it indicates that on the part of Uruguay the decision therein only refers to a judgment delivered by the first-stance court.

investment arbitration can be invoked only in limited circumstances. In other words, a decision given by local authorities would by default call an end to the dispute unless parties to the dispute can either attest that the decision is manifestly unjust or violates the provisions of the agreement, or they achieve agreement on the extension of the dispute to international arbitration. Consequently, Model 2 does not *ex ante* grant parties to a dispute the right to pursue arbitration if the dispute continues to exist after a decision at the local level was made, which is exactly what Model 1 signals, but imposes more burdens for investors to benefit from investment arbitration. Compared to Model 1, this model is less favorable for foreign investors because they are endowed with less discretion to initiate international arbitration under the circumstance that a decision was made within the specified period by local authorities. Model 2 can be diagrammed in the following way:

Figure 6 Model 2 of the Pursuit of Local Remedies: Dispute Settlement Path Diagram



3.2.6 Fork-in-the-road Clause

Treaties tend to confine foreign investors to the dispute settlement mechanism chosen by themselves with a view to forestalling the possibility of a multiplicity of claims regarding the same dispute being brought before different bodies.[60] The fork-in-the-road clause properly manifests itself as a not uncommon clause found in IIAs to fulfil this function. This type of clause signals that foreign investors, whose legitimate rights are derived from IIAs were allegedly violated by host states, must choose between the alternatives of litigating their claims before the competent courts within the jurisdiction of the invested state and international arbitration and that, once made, the decision is final.[61] The existence of a fork-in-the-road clause in a certain investment agreement squarely reflects the fact that such an agreement offers more than one variety of dispute settlement mechanisms for parties to the dispute. In addition, the right to choose is usually conferred upon the side of foreign investor to the effect that the foreign investor is designated as the person to determine the eventual

[60] M. Sornarajah, "The International Law on Foreign Investment", 3rd edition, Cambridge University Press (2010), p. 320.

[61] Christoph Schreuer, "Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Forks in the Road", The Journal of World Investment & Trade, Vol. 5, No.2 (2004), pp. 239-240 (arguing that the fork-in-the-road clause is expressed by the Latin maxim of una via electa non datur recursus ad alteram ("once one road is chosen, there is no recourse to the other")).

approach applied by both disputing parties to end the dispute. However, if the investor elects domestic remedies for dispute settlement, this choice would simultaneously foreclose the future recourse to international arbitration, and *vice versa*. This clause actually places domestic remedies in a conflicting position *vis-à-vis* investment arbitration, ruling out the possibility of foreign investors taking advantage of both approaches in respect of the same dispute.

In the case that a choice under a fork-in-the-road clause precludes international arbitration, foreign investors are then put into a rather adverse situation compared to those covered by IIAs that do not embrace this clause. In addition, from the perspective of the Tribunal in *Maffezini v. Spain*, a third-party agreement (an agreement concluded by the host state and other states other than the home state of the investor) cannot be invoked by the foreign investor, relying on the most-favored-nation (MFN) clause[62], to bypass the hurdle caused by the fork-in-the-road clause. The Tribunal observed that public policy considerations behind the fork-in-the-road clause should not be over-ridden.[63] To clear the possible and unnecessary obscurity surrounding the application of the MFN clause in procedural issues in relation to investment agreements, a trend emerges that some recent IIAs limit the effective scope of the MFN clause to substantive provisions therein.[64]

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[62] ILC defined the MFN treatment as "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State." ILC, "Draft Articles on Most-Favored-Nation Clauses with Commentaries (1978)", available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf (last visited on January 17, 2020). In the context of investment law, UNCTAD construed MFN treatment as it "ensures that a host country extends to the covered foreign investor and its investments, as applicable, treatment that is no less favorable than that which it accords to foreign investors of any third country." UNCTAD, "Most-Favoured-Nation Treatment", UNCTAD Series on Issues in International Investment Agreements II (2010), available at http://unctad.org/en/Docs/diaeia20101_en.pdf (last visited on January 17, 2022), p. 13. Thus, MFN treatment is an indispensable element of non-discrimination treatment, aiming to equalize the treatment of foreign investors from all the other countries other than the host country. Suzy H. Nikiema, "The Most-Favoured-Nation Clause in Investment Treaties", IISD Best Practices Series, February 2017, available at https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf (last visited on January 17, 2022), p. 1 (arguing that the discussions over MFN in investment law and arbitration "accelerated and led to may criticisms, crystallized in one essential point: the latitude given to foreign investors to bring together elements from various treaties made by the host state and to custom tailor a treaty, ignoring the bilateral character of the commitments made by two states in the context of specific negotiations.")

[63] The Tribunal held that: "if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause [MFN clause]. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy." See Emilio Augustin Maffezini v. The Kingdom of Spain, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/7, available at https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf (last visited on Jan. 30, 2022), para. 63.

[64] For example, the Article 9.5.3 of the Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP) reads that: "For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures of mechanisms, such as those included in Section B (Investor-State Dispute Settlement)." See Chapter 9 Investment, Comprehensive and Progressive Agreement for Trans-pacific

In the practice of IIAs, the interpretation of the fork-in-the-road clause often brings intricate controversies because the similarity between the dispute litigated before domestic courts and that which is launched before an arbitral tribunal can be grossly unclear.[65] The jurisprudence on investment arbitration in a sense suggests that the fork-in-the-road clause is not a toothless ornament contained in IIAs. By contrast, it has the potential to become a weapon employed by arbitral tribunals to deny their own jurisdiction or competence over a given case. In *Pantechniki v. Albania* which was initiated pursuant to the Greece-Albania BIT (1991) and the 1993 investment law of Albania, the case was closed on the grounds that the foreign investor's claims were precluded from being heard by an ICSID tribunal due to the fork-in-the-road clause in that treaty.[66] In a more recent case between H&H Enterprises Investments (a California-based enterprise) and Egypt, the Tribunal knocked out the majority of the investor's claims by way of jurisdictional arguments also based on the fork-in-the-road clause contained in the US-Egypt BIT (1986).[67]

Although the fork-in-the-road clause appears to be straightforward as regards its substance, rules formulating this clause can vary not only in wording but also in essence across distinct IIAs. In consequence, for parties to investment disputes covered by different IIAs, their rights and obligations under the fork-in-the-road clause also demonstrate differences. The BIT between South Africa and Zimbabwe provides a good example to illustrate the fork-in-the-road clause, whose Articles 8 (2) and (3) read that:

> "(2) If the dispute has not been settled within six (6) months from the date at which it was raised in writing, the dispute may at the choice of the investor, after notifying the Party concerned of its intention to do so in writing, be submitted-
>
> (a) to the competent courts of the Party in whose territory the investment is made;
>
> (b) to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington DC on 18 March 1965; or
>
> (c) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
>
> (3) If the investor submits the dispute to the competent court of the host Party or to international arbitration mentioned in sub-Article (2), the choice shall be final."

Partnership (CPTPP), available at https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/9.-Investment-Chapter.pdf (last visited on Mar. 6, 2018).

[65] August Reinisch, "The Scope of Investor-State Dispute Settlement in International Investment Agreements", Asia Pacific Law Review, Vol. 21, No. 1 (2013), p. 12.

[66] Pantechniki S.A. Contractors & Engineers v. Republic of Albania, Award, ICSID Case No. ARB/07/21, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C113/DC1133_En.pdf (last visited on January 30, 2022).

[67] H&H Enterprises Investments, Inc. v. Arab Republic of Egypt, Excerpts of the Award, ICSID Case No. ARB/09/15, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C720/DC9652_En.pdf (last visited on January 30, 2022). See also Craig Tevendale and Jennifer Hartzler, "Egypt Prevails on Fork-in-the-road Provision", available at https://hsfnotes.com/arbitration/2014/06/06/egypt-prevails-on-fork-in-the-road-provision/ (last visited on January 30, 2022).

The similar clause of fork-in-the-road could also be found in the Argentina-France BIT, as Schreuer observed.[68] The BITs mentioned above, i.e. the South Africa-Zimbabwe BIT and the Argentina-France BIT, are categorized as belonging to the same group of IIAs due to a common feature of the inclusion of the most typical form of fork-in-the-road clause. Despite the varying wording in the fork-in-the-road clauses contained therein, such clauses would share the same effect as the choice made by foreign investors between litigation via domestic courts and investment arbitration would block the other way around. Therefore, in these circumstances, domestic remedies and investment arbitration are formulated as mutually exclusive methods that cannot be co-existent in a same investment dispute occurring between foreign investors and host states.

3.2.7 Other Relevant Clauses in IIAs

Owing to the formidable number of IIAs in existence across countries and regions, dispute resolution sections of some IIAs affirming domestic courts' authority to adjudicate investment disputes cannot fall into the categories mentioned. Some investment agreements, for instance, take the so-called no-U turn approach in setting up the dispute resolution framework, in which foreign investors are permitted to opt for arbitration of investment disputes after the commencement of litigation before the domestic courts of host states. However, once the foreign investor decides to submit a claim regarding the same complaint to investment tribunals, it must abandon its right to initiate or continue litigation via domestic courts. As an illustrative example, Articles 10(2) and 10(5) of the Netherlands-China BIT stipulate that:

> "(2) An investor may decide to submit a dispute to a competent domestic court. In case a legal dispute concerning an investment in the territory of the People's Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands an investor may choose to submit a dispute to international dispute settlement at any time."

There are also a few treaties providing available dispute resolution mechanisms for foreign investors based on the subject matter of the investor's claim.[69] The Australia-China BIT can be referred to as an ideal example as Article 2 in it contains the following language:

> "2. If the dispute has not been settled within three months from the date either party gave notice in writing to the other concerning the dispute, either party may take the following action:
>
> (a) in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before its competent judicial or administrative bodies; and

[68] Article 8(2) of the Argentina-France BIT (1991) provides that: "Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final." See Schreuer, *supra* note 61, at 240.

[69] Out of the 1, 660 IIAs investigated by Pohl, Mashigo and Nohen at least "forty-four treaties determine the available for a for dispute settlement (domestic courts or international arbitration) in relation to the subject-matter of the investor's claim." Pohl, Mashigo and Nohen, *supra* note 29, at 14.

(b) where the parties agree or where the dispute relates to the amount of compensation payable under Article VIII, submit the dispute to an Arbitral Tribunal constituted in accordance with Annex A of this Agreement."

In view of these provisions, an investor covered under this BIT cannot submit its dispute with the host state to arbitration unless the dispute is related to the amount of compensation regarding expropriation and nationalization carried out by the host state. For other disputes regarding an investment or an activity associated with an investment, the investors concerned can only seek redress by the way of local remedies. This clear allocation of jurisdiction between domestic remedies and investment arbitration is apparently different from the exhaustion or pursuit of local remedies and the fork-in-the-road clause. But provisions like those mentioned in the Australia-China BIT also affirm the judicial role of domestic courts in the context of investor-state dispute resolution.

3.3 Supervisory Role of Domestic Courts

Apart from the judicial role that domestic courts take upon when resolving disputes between foreign investors and host states, domestic courts can also engage in the process of investor-state dispute resolution by monitoring the decisions rendered by investment tribunals. Under the existing institutional arrangements, domestic courts at the seat of arbitration are endowed with legal capacity to review investment awards on a number of grounds as specified, thereby constituting an exterior source of supervision over the work done by arbitral tribunals. The role undertaken by domestic courts *loci arbitri* to conduct a judicial review of the decisions made by arbitral tribunals is defined as a "supervisory role".[70] In other words, the supervisory role of domestic courts means the legal authority, conferred by national arbitration legislation and other legal documents, that domestic courts at the place of arbitration have to review investment awards rendered by investment tribunals. But the role referred to here is not an overarching phenomenon when it comes to the interaction between domestic courts and investment tribunals, because there is no space left for domestic courts to review ICSID arbitral awards. This section aims to put the supervisory role of domestic courts back into the panorama of investment arbitration and measure its legality and limitations against relevant legal instruments.

There is an anecdotal cliché that arbitration has replaced litigation as the leading method in resolving transnational disputes even though it is held that this cliché, like many others, is rather unclear in its empirical basis and broader implications.[71] Notwithstanding the abundance of differences between litigation and arbitration,[72] there is at least a plausible

[70] Notably, previous literature has already seen the use of "supervisory role" to refer to domestic courts loci arbitri reviewing arbitral awards rendered by tribunals. See, *e.g.*, Loukas Mistelis, "Delocalization and Its Relevance in Post-award Review", in Frederic Bachand and Fabien Gelinas, eds, "The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration", JurisNet (2013), p. 169.
[71] Christopher A. Whytock, "Litigation, Arbitration, and the Transnational Shadow of the Law", Duke Journal of Comparative & International Law, Vo. 18, No. 2 (2008), p. 449.
[72] For instance, the seat or place of arbitration is chosen by the disputing parties at their will, however, a court in charge of an international litigation usually derives its competence from the application of international jurisdiction rules (private international law). Similarly, arbitrator(s) in an arbitration case is appointed by the disputing parties, but parties to a dispute barely have the opportunity to designate a judge from the court to adjudicate their case. Billiet, et al., *supra* note 21, at 28-29.

similarity between the pair of dispute resolution methods that neither judges nor arbitrators can be so sure that there could be no errors or lapses in their decisions. As one 19th century Scottish judge remarked, an arbitrator "may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power."[73] Thus, there is little reason that the decision-making of arbitration should go unchecked from the perspective of adjudicative quality.

Whytock observed that transnational arbitration is only partially but not completely autonomous from transnational judicial governance.[74] A piece of evidence for this observation can be drawn from the jurisprudence on investment arbitration in the sense that domestic courts *loci arbitri* in specific circumstances are empowered to review investment awards. The supervisory role of domestic courts in relation to investment awards was regarded as a form of risk management by Park, the then president of the London Court of International Arbitration (LCIA) and a preeminent scholar who is experienced in both commercial and investment arbitration.[75] However, the legal sources of the supervisory role of domestic courts in investment arbitration can be somewhat perplexing in the absence of a clear understanding of the framework of the current investment arbitration regime.

3.3.1 The Dichotomization of Investment Arbitration

Investment arbitration is by no means steeped in history from the perspective of international dispute settlement as the first case of treaty-based investment arbitration did not occur until 1987.[76] Nonetheless, it is anything but an uncommon phenomenon nowadays as the 21st century has seen an exponential rise of the number of investment arbitration cases.[77] This eye-catching development of an innovative form of arbitration is partially due to the establishment of ICSID in 1966 by the ICSID Convention.[78] The prominence of ICSID in this field, however, should not eclipse the participation of other dominant institutions which are qualified to extend jurisdiction to investment disputes. In addition to ICSID, it is identified

[73] Noah Rubins, "Judicial Review of Investment Arbitration Awards", in Todd Weiler, ed, "NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects", Transnational Publishers (2004), p. 359.
[74] Whytock, *supra* note 71, at 470.
[75] Park concluded that "in most countries court may vacate decisions of perverse arbitrators who have ignored basic procedural fairness, as well as those of alleged arbitrators who have attempted to resolve matters never properly submitted to their jurisdiction. In some countries judges may also correct legal error or monitor an award's consistency with public policy." William W. Park, "Why Courts Review Arbitral Awards", Festschrift für Karl-Heinz Böckstiegel 595 (2001), p. 595.
[76] See Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3, available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/87/3 (last visited on Jan. 30, 2022).
[77] According to the Investment Dispute Settlement Navigator organized by UNCTAD, out of the more than 1,100 cases registered there, only 43 cases were initiated before the millennial. There has been a steady increase of investment arbitration cases since 2000 with an annual addition of two-digit new cases without exception since the new century. The data is as of January 2022. See UNCTAD, Investment Dispute Settlement Navigator, available at http://investmentpolicyhub.unctad.org/ISDS (last visited on Jan. 30, 2020).
[78] "ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts." See ICSID, 'About ICSID', available at https://icsid.worldbank.org/en/Pages/about/default.aspx (last visited on Jan. 30, 2022).

that, *inter alia*, the following arbitral institutions also regularly administer investment arbitration cases: the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Court of Arbitration of the International Chamber of Commerce (ICC), the LCIA, the Permanent Court of Arbitration (PCA), and the Swiss Arbitration Association (ASA).[79] The dispute resolution clauses quoted in the previous section also lay bare the truth that contracting states to investment agreements furnish investors with other operable forums for arbitration than ICSID as well, enabling the multiplicity of arbitral institutions in the landscape of investment arbitration.

It should be noted that even within the ICSID framework not all disputes brought up for arbitration are processed pursuant to a set of uniform rules. The ICSID Convention confines the competence of the Centre to administering disputes between one Contracting state to the Convention and an investor from another Contracting State.[80] However, in order to expand the scope of dispute resolution services provided for parties to investment disputes, the ICSID Additional Facility Rules were created to enable the Centre to entertain disputes falling outside the scope of the ICSID Convention. In other words, ICSID also administers arbitration of investment disputes between a Contracting State and a national of a non-Contracting State or between a non-Contracting State and a national of a Contracting State.[81] Unlike investment arbitration cases governed by the ICSID Convention and ICSID

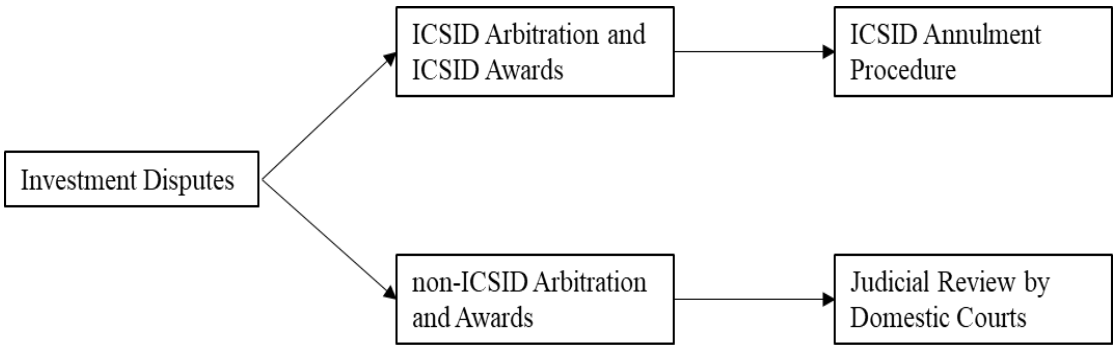
[79] See Georgetown Law Library, "Arbitral Institutions & Procedural Rules", available at http://guides.ll.georgetown.edu/c.php?g=371540&p=2511836 (last visited on January 30, 2022). See also Latham & Watkins, "Guide to International Arbitration", available at https://m.lw.com/thoughtLeadership/guide-to-international-arbitration-2017 (last visited on Jan. 30, 2022), pp. 12-13 (noting that there are more arbitral institutions now becoming eligible forums to hear investor-state disputes by revising their own arbitration rules.) For instance, Shenzhen Court of International Arbitration (SCIA) in October 2016 revised its arbitration rules to include investor-state disputes under its jurisdiction, which would be administered by SCIA in accordance with UNICITRAL Arbitration Rules. Article 2.2 of the SCIA Arbitration Rules provides that: "2. The SCIA accepts arbitration cases related to investment disputes between states and nationals of other states." Article 3.5 of that says: "Where the parties submit their dispute referred to under Article 2, Paragraph 2 of the Rules to the SCIA for arbitration, the SCIA shall administer the case in accordance with the UNCITRAL Arbitration Rules and the 'SCIA Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules.'" SCIA, "Shenzhen Court of International Arbitration Arbitration Rules", available at http://res.cloudinary.com/lbresearch/image/upload/v1477646738/scia_rules_2016_en_289116_1025.pdf (last visited on Nov. 27, 2017). On September 19, 2017, the China International Economic and Trade Arbitration Commission (CIETAC) published "the Arbitration Rules of the China International Economic and Trade Arbitration Commission for International Investment Disputes (for Trial Implementation)", which took effect on October 1, 2017, marking CIETAC a suitable arbitral institution to adjudicate investor-state disputes. See Falk Lichtenstein, "CIETAC Publishes Arbitration Rules for Investor-State Disputes", available at https://www.lexology.com/library/detail.aspx?g=aab8ba4d-2104-426d-864c-9bfdc5db23e2 (last visited on Jan. 30, 2022). For the text of the CIETAC investment arbitration rules (in Chinese), visit http://www.cietac.org/Uploads/201709/59c8d60367bb5.pdf (last visited on Jan. 30, 2022).

[80] Article 25 (1), the ICSID Convention.

[81] Article 2 of the Additional Facility Rules states that: "The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceeding between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories: (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State; …" See Article 2, ICSID Additional Facility Rules, retrieved from https://icsid.worldbank.org/en/Documents/resources/AFR_2006%20English-final.pdf (last visited on Nov. 28, 2017).

Arbitration Rules,[82] those extended arbitration cases are governed by the ICSIDAdditional Facility Rules and the ICSID Arbitration (Additional Facility) Rules. In addition, there are a handful of prevalent arbitration rules beyond the ICSID framework.[83] The part of investment arbitration run according to the ICSID Convention and the Arbitration Rules is often termed as ICSID arbitration, the decisions of which are correspondingly ICSID awards. Investment arbitration conducted pursuant to other forms of arbitration rules, including those administered by ICSID but not governed by the ICSID Convention, is classified into one group as non-ICSID arbitration. This seemingly deliberate dichotomization of investment arbitration is less important in the epistemic sense than in the functional sense because a series of practical implications could arise from the dichotomy. One of those differences is recognizable from the aspect of post-award remedy. As the following figure clearly shows, the main channel of post-award remedy provided for ICSID arbitration and ICSID awards is the self-contained annulment procedure, while that for non-ICSID arbitration and investment awards thereof is judicial review by domestic courts.

Figure 7 Post-award Remedies for ICSID and Non-ICSID Arbitration



3.3.2 The Annulment Procedure for ICSID Arbitration

Finality, efficiency and economy, in Schreuer's opinion, are among the virtues of arbitration. Unlike the usual review mechanism seen within domestic justice systems, the goal of correctness is made to yield to the goal of finality in arbitration.[84] Article 53 of the ICSID Convention makes it clear that, except in the circumstances provided otherwise in the Convention, the award is final and decisive and is not subject to any appeal or any other remedy.[85] Domestic courts, as a result, have no authority to review ICSID awards.

[82] ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), retrieved from https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf (last visited on Nov. 18, 2017), pp. 99-128.
[83] For example, those include the UNCITRAL Arbitration rules, the ICC Arbitration Rules, the SCC Arbitration Rules, the Arbitration Rules of the Common Court of Justice and Arbitration (CCJA) of the Organization for the Harmonization in Africa of Business Law (OHADA). Zachary Douglas, "The International Law of Investment Claims", Cambridge University Press (2009), pp. 4-5.
[84] Christoph Schreuer, "From ICSID Annulment to Appeal Half Way Down the Slippery Slope", Law and Practice of International Courts and Tribunals, Vol. 10, No. 2 (2011), p. 211.
[85] Article 53 (1) of the ICSID Convention provides that: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." Article 53 (1), the ICSID Convention.

Nevertheless, ICSID arbitration, as a self-contained framework, allows post-award remedy for disputing parties in the case where they deem the awards are deficient on the grounds outlined by the Convention. In addition to the opportunity to apply for the revision of ICSID awards,[86] a more drastic form of remedy available for parties to ICSID arbitration is the annulment procedure. Article 52(1) of the ICSID Convention reads as follows:[87]

> "(1) Either party may request annulment of the award by an application in writing addressed to Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based."

Therefore, it is safe to draw an inference that the ICSID Convention lists exhaustive grounds for disputing parties to apply for the annulment of awards, indicating that only in exceptional circumstances can the awards be annulled by the *ad hoc* annulment committee. The annulment procedure is said to be designed to provide relief for egregious violations of a few fundamental principles rather than those substantive errors made by arbitrator(s) as contained in the awards.[88] The annulment procedure is an exclusive feature attributed to ICSID arbitration. The delocalization of post-award remedy reflected by the relevant rules in the ICSID Convention precludes the participation of domestic courts and at the same time distinguishes ICSID arbitration from its counterpart — non-ICSID arbitration.

3.3.3 Authorization by Arbitration Rules

In striking contrast to the post-award remedy of ICSID arbitration, awards generated out of non-ICSID arbitration are usually subject to the jurisdiction of domestic courts at the seat of arbitration. That is to say domestic courts at the seat of arbitration are given the authority to conduct a judicial review of investment awards rendered by arbitral tribunals in the context of non-ICSID arbitration. This form of post-award remedy is also often called proceedings of "setting-aside", "annulment" or "*vacatur*".[89] Undoubtedly, the place of arbitration stands out as an important linkage point in the process of judicial review because it directly determines the specific jurisdiction into which the power of judicial review of investment awards falls.[90]

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[86] According to Article 51 of the ICSID Convention, the award is subject to revision in very specific situation. Article 51 (1) reads that: "(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and the applicant's ignorance of that fact was not due to negligence." Article 51 (1), the ICSID Convention.

[87] Article 52 (1), the ICSID Convention.

[88] Schreuer, *supra* note 84, at 211-212.

[89] Kateryna Bondar, "Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review", Journal of International Arbitration, Vol. 32, No. 6 (2015), p. 628.

[90] For instance, in a case that a non-ICSID arbitration is seated in The Hague, the Netherlands and an award is given by the tribunal, on the occasion that a party to the dispute attempts to appeal against the award which it obviously is not content with, only competent Dutch court(s) is accessible for this applicant.

Investment arbitration, as a dispute resolution method between foreign investors *vis-a-vis* host states, is mainly embedded in the field of international law governance.[91] One might thus consider the origins of the authority possessed by domestic courts at the seat of arbitration to conduct a judicial review of investment awards. As indicated by the discussions above, it is the ICSID Convention and the attached arbitration rules that intentionally remove domestic courts from post-award remedy in relation to ICSID arbitration. In the same vein, whether non-ICSID arbitration rules tolerate or countenance the participation of domestic courts *loci arbitri* in the post-award phase is a question that should be addressed before domestic law elements are examined.

There is no explicit reference to domestic courts' authority of judicial review in the Additional Facility Rules and its attendant arbitration rules. However, it is announced clearly on the official website of ICSID that, for the post-award remedy in relation to ICSID Additional Facility arbitration, "A party can also bring a set aside application before the local courts of the place of arbitration."[92] That is also vindicated by *Metalclad*, an investment arbitration conducted pursuant to the Additional Facility Rules, which involved setting-aside proceedings.[93] On the contrary, the UNCITRAL Arbitration Rules, as widely used in *ad hoc* arbitration,[94] in its text indicates that domestic courts at the seat of arbitration may mount a judicial review of investment awards made pursuant to the Rules. Article 34.2 of the UNCITRAL Arbitration Rules provides that:

> "All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay."

[91] This does not cover up the truth that domestic elements also exist in the domain of international investment arbitration. For example, as illustrated in "3.2.2 Limitations Imposed on the Jurisdiction of Arbitral Tribunals" of this chapter, the consent to arbitration from the part of state can also be relied upon domestic investment codes. In addition, during the course of the adjudication of investment treaty arbitration, there are various sources of applicable law that might come into play, including the domestic law in force of the contracting party concerned. Yas Banifatemi, "Chapter 9 The Law Applicable in Investment Treaty Arbitration", in Katia Yannaca-Small, ed., "Arbitration Under International Investment Agreements A Guide to the Key Issues", Oxford University Press (2010), p. 198.

[92] ICSID, "Post-Award Remedies – Additional Facility Arbitration", available at https://icsid.worldbank.org/en/Pages/process/Post-Award-Remedies---AF-Arbitration.aspx (last visited on Nov. 27, 2017).

[93] The *Metalclad* case was between Metalclad Corporation, an U.S. corporation, and United Mexican States. The claimant attempted to purchase a site in San Luis Potosi, Mexico, to operate as a hazardous waste landfill. The Mexico federal authorities repeatedly assured the claimant that no further permits were required for the construction of the landfill. However, local opposition grew against the project, which pressured the federal and local authorities a lot and finally led to an Ecological Decree by the local governor, making the project discontinued. The claimant thus requested arbitration against Mexico under NAFTA, to be conducted pursuant to Additional Facility Rules. The seat of arbitration was designated as Vancouver, Canada, though most of the proceedings took place in Washington, D.C. By an award of August 2000, the tribunal awarded the claimant $ 16,685,000 as it held that Mexico had breached its obligations under NAFTA. Soon after the awards, Mexico appealed against the award to the Supreme Court of British Columbia, asking it to set aside the award. See Metalclad Corporation v. the United Mexican States, Award, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C155/DC542_En.pdf (last visited on Jan. 30, 2022). See also Rubins, *supra* note 73, at 375-376.

[94] Norton Rose Fulbright, "A Basic Guide to International Arbitration", available at http://www.nortonrosefulbright.com/files/arbitration-a-guide-to-international-arbitration-26050.pdf (last visited on Nov. 29, 2017), p. 8.

This article, at first glance, seems to forbid the disputing parties from challenging arbitration awards before domestic courts at the seat of arbitration, because those awards are said to be final and binding. However, the relevant provisions contained in the Annex to the Rules implies another situation, which would include domestic courts in the potential saga of investment arbitration conducted pursuant to the UNCITRAL Arbitration Rules. That situation is derived from the stipulations regarding a Possible Waiver Statement in the Annex, which reads as follows:

> "Note. If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.
>
> Waiver
> The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law."

What can be drawn from the stipulation above is that the applicable law, namely the domestic law of the seat of arbitration, might provide avenues to challenge arbitration awards for disputing parties while the Rules *per se* do not exclude the recourse that might be invoked. That is to say, the applicable law of the seat of arbitration would determine whether or not it is possible for disputing parties to apply for the judicial review of arbitration awards. The UNCITRAL Arbitration Rules, meanwhile, show deference to the attitude as reflected in the applicable local laws and regulations towards this issue. But the Rules, perhaps in a bid to maintain the finality of the awards made under them, "inspire" disputing parties to waive the right to challenge arbitration awards before domestic courts *loci arbitri* by the addition of a provision to that effect in their arbitration agreements. The drafters of the Rules apparently did not stay oblivious to the possibility that the applicable laws might not allow disputing parties to exclude the right to apply for judicial review as contained by autonomy of will. As a matter of fact, it is said that "Whilst most jurisdictions permit the parties to agree not to appeal to the courts on a point of law, in many jurisdictions the right to appeal on the grounds of serious procedural irregularity is mandatory and cannot be excluded, even by agreement."[95] In sum, according to the UNCITRAL Arbitration Rules, disputing parties can submit investment awards to domestic courts at the seat of arbitration for judicial review unless the parties *ex ante* or *ex post* exclude the specific recourse by contract, which cannot contravene applicable local laws.

The less-used ICC Arbitration Rules and LCIA Arbitration Rules in the domain of investment arbitration show an opposing attitude towards judicial review of arbitration awards by the inclusion of waivers of court review,[96] but they do not fully strike off the review by domestic

[95] *Ibid*, at 4.

[96] Article 35.6 of the ICC Arbitration Rules (2017) provides that: "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." Article 26.8 of the LCIA Arbitration Rules (2014) provides that: "Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately

courts of investment awards rendered under those rules. In a nutshell, arbitration rules that underlie non-ICSID arbitration in general grant leave for domestic courts, even though limited by certain sets of rules, to review investment awards as a form of post-award remedy. However, the destiny for a party initiating the setting-aside proceeding still hinges on domestic laws, usually the arbitration legislation, of the place of arbitration.

3.3.4 Authorization by National Arbitration Acts

The legitimacy of the judicial review of investment awards by domestic courts *loci arbitri* is also derived from national arbitration laws. Since there is an apparent lack of dedicated legislation for investment arbitration in virtually all the jurisdictions, the rules governing judicial review in the context of commercial arbitration also extend their application to cover investment arbitration.[97] Therefore, an analogy between commercial arbitration and investment arbitration can be readily drawn in terms of legal rules applying to the judicial review process. International commercial arbitration nowadays is anything but a novel concept for the general public as it has become a mainstream dispute resolution method for traders across different countries. Actually, arbitration dates back to even before laws were established, or courts were organized, or judges formulated principles of law.[98] Most countries around the world, correspondingly, have enacted their national arbitration laws to satisfy the legal institutional guarantees required by the boom of arbitration.[99] Garnett observed that there is a manifest trend towards the harmonization of national arbitration laws and a single, unified legal system in international arbitration by a three-step analysis of legal convergence in the enforcement of arbitral agreements and awards, convergence in arbitration procedure, and convergence in substantive law.[100] However, the arbitration laws of the jurisdictions across the globe still differ to a greater or lesser extent. As what has been discussed above, despite the leeway made available by arbitration rules to domestic courts *loci arbitri*, they still require legitimacy from a domestic legal framework to uphold their power to exercise a review of arbitration awards. While in theory each jurisdiction could become the seat of investment arbitration, the present landscape of this particular arbitration tells the inconvenient truth that only a few jurisdictions, mostly in the western world, were chosen as the place where investment arbitration was seated. Hence examination of the national arbitration laws of several frequently-used jurisdictions would suffice to help

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and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law." See LCIA, LCIA Arbitration Rules (2014), retrieved from http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx (last visited on Jan. 30, 2022).

[97] Juan Fernandez-Armesto, "Different Systems for the Annulment of Investment Awards", ICSID Review-Foreign Investment Law Journal, Vol. 26, No. 1 (2011), p. 132.

[98] Richard Garnett, "International Arbitration Law: Progress towards Harmonisation", Melbourne Journal of International Law, Vol. 3, No. 2 (2002), p.400. See also Franck D. Emerson, "History of Arbitration Practice and Law", Cleveland State Law Review, Vol. 19, No. 1 (1970), p. 155.

[99] For the verification of this argument, the national arbitration laws of contracting states of "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)" listed on the website of the New York Convention can be quoted as a piece of evidence. See New York Convention, "Contracting States-National Arbitration Laws", available at http://www.newyorkconvention.org/countries/national+law (last visited on Jan. 30, 2022).

[100] Garnett, *supra* note 98, at 400-413.

ascertain whether domestic courts *loci arbitri* have the authority to review non-ICSID awards.

3.3.4.1 The Provisions of the UNCITRAL Arbitration Model Law

UNCITRAL is the primary legal body in the field of international trade law within the UN system, specializing in the modernization and harmonization of rules on international business. To this end, UNCITRAL has made enormous efforts in the formulation of conventions, model laws and rules which are acceptable worldwide.[101] The UNCITRAL Model Law on International Commercial Arbitration,[102] which was adopted in 1985 by the General Assembly with amendments incorporated in 2006, nicely reflects the work of the organization in the unification of rules in relation to international commercial arbitration in an era of globalization. The Model Law aims to provide a template for countries, like the basic function of other types of model law, to help them realize the goal of modernization and harmonization of national arbitration laws with due consideration of the international attributes of commercial arbitration. Before delving into the national arbitration laws of any specific jurisdiction, it would be beneficial to study the provisions contained in the Model Law regarding the domestic courts' authority of judicial review. That is because according to the statistics of UNCITRAL there are at least 85 states and in a total of 118 jurisdictions which have based their own arbitration legislation on the Model Law as of the time of writing.[103] Although countries usually would not accept or adopt this Model Law verbatim, the analysis of the provisions regarding judicial review of arbitration awards contained in the Model Law would to some extent enable us to obtain an understanding of the legality of judicial review within a large number of domestic arbitration laws.

Article 34 of the Model Law deals with the issue of applying for the setting-aside of arbitration awards before domestic courts by stating in the first paragraph that:

> "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraph (2) and (3) of this article."

Paragraph (1) of Article 34 of the Model Law recognizes disputing parties' right to seek post-award remedy before competent domestic courts after an arbitration award is rendered by the tribunal. In other words, domestic courts at the seat of arbitration are hereby conferred with the authority to review investment awards. This setting-aside procedure is not a sure remedy for disputing parties as restrictions in the meantime are laid down, such as the time-limit

[101] UNCITRAL, "About UNCITRAL", available at http://www.uncitral.org/uncitral/en/about_us.html (last visited on Jan. 30, 2022).
[102] UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration, retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last visited on Jan. 30, 2022).
[103] The numbers of states and jurisdictions are not identical here because jurisdictions do not necessarily amount to sovereign states, as they can also refer to states of the United States, and special administrative regions in China, for instance. See UNCITRAL, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited on October 31, 2021).

imposed by paragraph (3).[104] It is anyway safe to calculate that jurisdictions endorsing the Model Law would also subscribe to the perception that domestic courts *loci arbitri* are entitled to conduct a judicial review of non-ICSID awards.

3.3.4.2 Provisions of the Federal Arbitration Act

The US is the largest economy in the world and engages dynamically in cross-border economic activities, contributing to the achievement that it is one of the several well-known worldwide arbitration hubs. This leading role is even reinforced in the context of investment arbitration as ICSID is headquartered in Washington, D.C. It would be tenable to regard a well-designed arbitration law as a catalyst for the prosperity of arbitration in the US. The year 1925 marked the enactment of the United States Arbitration Act by the U.S. Congress, which is also referred to as the Federal Arbitration Act (FAA) by practitioners.[105] One of the primary goals of the FAA was said to be abolishing "by legislation the ouster doctrine – the common law rule requiring courts to refuse to enforce arbitration agreements."[106] The FAA reputedly applies to the arbitration of all the contractual disputes involving interstate commerce. As a result, the FAA actually governs all the commercial arbitration because few transactions can be determined as in no way affecting interstate commerce.[107] In addition, the US Supreme Court by its own jurisprudence has made the FAA a set of standard rules that apply to virtually all the forms of commercial arbitration nationwide despite the existence of state arbitration laws.[108] Considering the analysis above, an observation of the provisions in the FAA related to a judicial review of arbitration awards would help appreciate the overall picture of the United States as a whole.

Not surprisingly, Section 10 (a) of the FAA vests courts with the authority to conduct a judicial review of arbitral awards, including investment awards, upon the application of disputing parties, by providing that:[109]

> "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration— …"

This provision signifies that, notwithstanding the principle of finality in the sphere of arbitration, arbitration awards rendered within the territory of the US are amenable to being vacated by domestic courts upon judicial review. While some degree of discretion is accorded

[104] Article 34 (3) handles the issue of time-limit for disputing parties to apply for the judicial review by saying that: "An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal." Article 34 (3), UNCITRAL Model Law.
[105] Pub.L. 68–401, 43 Stat. 883, enacted February 12, 1925, codified at 9 U.S.C. § 1 et seq.
[106] Teresa Peacocke, "US and UK Arbitrations: Judicial Review of Arbitration Awards", available at https://www.lexology.com/library/detail.aspx?g=aaa4af0a-0e6f-4706-8bbd-d05930dffd9b (last visited on Jan. 30, 2022).
[107] Katherine A. Helm, "The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?", available at http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1124.pdf?sfvrsn=2 (last visited on Jan. 30, 2022), p. 9.
[108] *Ibid*, at 2.
[109] 9 U.S.C. § 10 (2015).

to domestic courts for the judicial review of investment awards, the grounds for *vacatur* on the whole are not left to the judgment of court judges. [110] It is also noted that under this provision only with the pre-existence of the application from any disputing party can the review process be triggered.

3.3.4.3 Provisions of the Dutch Arbitration Act

The Arbitration Act of the Netherlands provides the legal framework for arbitration and related issues within the territory of the country. Thus, an examination of this act will reveal whether or not Dutch courts are empowered to review investment awards in certain circumstances. To start off, the Netherlands is a far-famed centre in the world of international arbitration, the status of which is likely to be further entrenched by the unstoppable tide of interconnection and interaction within the global community. The PCA, as a showcase of the Dutch influence on arbitration, allegedly has become a modern and multi-faceted arbitral institution well situated to satisfy the dispute resolution needs of international society, even though it was initially established for the facilitation of arbitration and other dispute resolution between states.[111] It warrants special attention that the PCA is a prevailing institution for investment arbitration outside the ICSID framework. On account of the mentioned prominence of the Netherlands in investment arbitration, the provisions in relation to the judicial review of arbitration awards in the Dutch Arbitration Act merits analysis.

Indeed, the Dutch Arbitration Act was revised a few years ago with the updated draft entering into force on January 1, 2015, applying to arbitration based in the Netherlands on and from that date. The updated version of the Dutch Arbitration Act is still a constituent part of the Dutch Code of Civil Procedure (DCCP). Although the Dutch Arbitration Act is not based on the UNCITRAL Model Law, the Dutch legislators in the process of preparation for the new act did look to the Model Law.[112] The new act is hailed as a success inasmuch as it reflects an even stronger pro-arbitration stance and shapes the Netherlands as a more attractive venue for international arbitration.[113]

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[110] The issues of the scope of judicial review and the grounds for setting aside arbitral awards would be discussed in further detail afterwards in the specific chapter tailored for the study of domestic courts' supervisory role, i.e. "Chapter 6 Judicial Review of Investment Awards by Domestic Courts Loci Arbitri".

[111] PCA, "About Us", available at https://pca-cpa.org/en/about/ (last visited on Feb. 5, 2022).

[112] Barbara Rumora-Scheltema and Bo Ra Hoebeke, "The New Dutch Arbitration Act 2015", available at http://arbitrationblog.kluwerarbitration.com/2015/02/25/the-new-dutch-arbitration-act-2015/ (last visited on Feb. 5, 2022).

[113] Rumora-Scheltema and Hoebeke argue that "The New Act contains considerable improvements that favour international arbitration and the role of arbitration institutions. This reflects the Dutch legislator's aim to promote the Netherlands as a neutral venue for international arbitrations, especially in view of the international arbitration institutions present in the Netherlands, such as the Permanent Court of Arbitration and P.R.I.M.E. Finance, both located in The Hague. These improvements – combined with the arbitration friendly policy of Dutch courts – will certainly contribute to promote Dutch arbitration practice and to make the Netherlands an even more attractive venue for international arbitrations." *Ibid*. The new act enhances 'the efficiency and flexibility of the arbitral process by avoiding delays through state court proceedings, reducing the administrative burden and maximizing party autonomy'. Kristin Nijburg and Bommel van der Bend, "The European, Middle East and African Arbitration Review 2016: Netherlands", available at https://www.mondaq.com/trials-appeals-compensation/459374/the-european-middle-eastern-and-african-arbitration-review-2016--netherlands?score=63 (last visited on Mar. 15, 2022).

The Dutch Arbitration Act leaves space for domestic courts to set aside (*vernietigen*) or revoke (*herroepen*) an award, but clearly differentiates the two responses by designating them as parallel post-award remedies available for disputing parties.[114] Article 1064(a) of the DCCP provides that:

> "(1) The claim for setting aside should be presented to the Court of Appeal in whose judicial district the place of arbitration is located. …
> (5) Appeal to the Supreme Court may be instituted against the judgment based on the first paragraph. The parties may agree that no appeal to the Supreme Court may be instituted against a judgment based on the first paragraph, unless any of them is a natural person not acting in the conduct of a trade or business."

Apparently under the Dutch Arbitration Act domestic courts at the seat of arbitration are accredited with the authority to review investment awards, but a party to the arbitration can only lodge a setting-aside claim before a Court of Appeal. It is also clear that disputing parties are also entitled to take advantage of the trial class system that is effectively operated in the Netherlands by appealing against the judgment of the court of first instance to the Supreme Court. There are exceptions to the right to appeal to the Supreme Court when disputing parties, satisfying a specific condition, decide not to institute any appeals in agreement.

3.4 Supportive Role of Domestic Courts

In the preceding sections of this chapter, it has been acknowledged that investment arbitration becomes a rather popular method for dispute resolution in international investment law. Whereas domestic courts and arbitral tribunals to some extent can be understood as competitors for investment disputes, it is an erroneous perception that domestic courts and arbitral tribunals exist in disparate space. In contrast, despite delocalization as an intrinsic characteristic embedded into dispute resolution at the international level, domestic courts maintain a moderate scale of presence with respect to the cause of investment arbitration. Factually, domestic courts are in a sense inextricably linked up with international arbitration. It is said that "National court involvement in international arbitration is a fact of life as prevalent as the weather."[115] For instance, in the field of international commercial arbitration, the sway of domestic courts can be identified at least in the following aspects: the arbitration agreement, challenge to arbitrators, interim measures by domestic courts, recognition and enforcement of awards, and assistance with obtaining evidence.[116] Lew listed the stages of arbitration at which courts can and do become involved, covering prior to the establishment

[114] Article 1064 of the DCCP reads that: "Only the legal remedies of setting aside and revocation based on the provisions in this Section shall be open against a final or a partial final arbitral award." Article 1064, Dutch Code of Civil Procedure, retrieved from http://www.nai-nl.org/downloads/Book%204%20Dutch%20CCPv2.pdf.
[115] Julian D M Lew, "Does National Court Involvement Undermine the International Arbitration Processes?", American University International Law Review, Vol. 24, No. 3 (2009), p. 490.
[116] Angualia Daniel, "The Role of Domestic Courts in International Commercial Arbitration", Sep. 10, 2010, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674760 (last visited on Mar. 15, 2022), pp. 15-25.

of a tribunal, at the commencement of the arbitration, during the arbitration process, and during the enforcement stage.[117]

International commercial arbitration brings domestic courts into the picture and so does investment arbitration. Schreuer contends that domestic courts are capable of supporting investment arbitration by way of issuing interim measures or enforcing investment awards.[118] While an uncooperative posture presented by domestic courts with regard to the mentioned issues would frustrate rather than facilitate investment arbitration, the functions *per se* and the underlying institutional designs aim to support the arbitral process. Therefore, it is safe to say that domestic courts can assume supportive roles in relation to investment arbitration. But it stands a good chance that in practice domestic courts may decline to be genuinely supportive by refusing cooperation with the arbitration system. For example, a domestic court in a certain jurisdiction may refuse the recognition or enforcement of an investment award rendered elsewhere; one surely cannot hold the opinion that the domestic court in this case has supported or facilitated the arbitral process.

3.4.1 Recognition and Enforcement of Investment Awards by Domestic Courts

Investment arbitration is a "war without shells" between foreign investors and host states considering the confronting positions and diverging claims of those parties. However, the issue of the final award does not necessarily mark the end of this battle. A winning party in the arbitration, or the award creditor, faces the potential risk of the award debtor refusing to comply with the award. "Effective enforcement of an arbitral award is the most desirable part of the international investment arbitration in case the losing party does not voluntarily comply with the arbitral award."[119] The lack of an appropriate design of recognition and enforcement mechanism will condemn the winning party of an arbitration to an adverse situation where monetary compensation under the award exists only on a sheet of paper. Domestic courts, as a vital broker in the process of recognition and enforcement of arbitral awards, assume great responsibility in assisting investment arbitration for this end.

3.4.1.1 Recognizing and Enforcing ICSID Awards by Domestic Courts

ICSID arbitration is a self-contained arbitral ecosystem, which may have contributed to the achievement of ICSID being the "world leader in investor-state dispute settlement."[120] That, however, does not mean ICSID arbitration is a fully enclosed exercise, shutting out the relevance of all the other established institutions. Instead, as properly illustrated by the mechanism of the recognition and enforcement of ICSID awards, ICSID arbitration may also need assistance from the outside at certain stages. In avoidance of the unnecessary burden of seeking the recognition and enforcement of arbitration awards, the ICSID Convention

[117] Lew, *supra* note 115, at 496-498.
[118] Christioph Schreuer, "Interaction of International Tribunals and Domestic Courts in Investment Law", in Arthur W. Rovine ed., "Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010)", Martinus Nijhoff Publishers (2011), pp.83-86.
[119] Kamal Huseynli, "Enforcement of Investment Arbitration Awards: Problems and Solutions", Baku State University Law Review, Vol. 3, No. 1 (2017), p. 48.
[120] ICSID, "ICSID 2017 Annual Report", available at https://openknowledge.worldbank.org/handle/10986/28558 (last visited on Mar. 15, 2022), p. 3.

explicitly incorporates the obligation of mandatory compliance with arbitration awards as to both parties to investment disputes. Article 53(1) of the ICSID Convention provides that:

> "… Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

Both the winning party and the losing party, especially the latter, to the dispute are accordingly obliged to behave in line with the substantive contents narrated by the award while any failure to do so would constitute a blatant violation of international obligations.[121] The binding force of an award, however, is limited to the parties to the dispute and does not extend to other cases before different tribunals even though tribunals have stated that they would take due consideration of the previous cases in making their own decisions.[122] Before exploring the role of domestic courts in recognizing and enforcing ICSID awards, it should be noted that the record of compliance with ICSID awards has been generally good.[123] This should partially be attributed to the institutional link between ICSID and the World Bank Group as the former is one of the five organizations of the latter,[124] because most states will find it an act of folly to leave a bad impression on the Bank by way of non-compliance with ICSID awards.[125] Moreover, states cherishing their own international reputation should not be ignored as a compelling force for the honest compliance with ICSID awards by state parties.

One may thus hold well-founded optimism about compliance with ICSID awards, but no promises can be made that all disputing parties would faithfully discharge their duties according to such awards. For example, Argentina, as a recurrent respondent state in ICSID arbitration, has often been quoted as an example when it comes to non-compliance with ICSID awards.[126] In the event that the losing party does not comply with the award, the successful party often has to seek established mechanisms for the compulsory execution of arbitration awards if the party still aspires to assert its rights under the award. As to the enforcement of international judicial and arbitral decisions in general, the successful party (including states) usually can seek diplomatic and economic pressures, the attachment of property belonging to the debtor state, enforcement through municipal courts, and/or use of armed force.[127] The enforcement of international binding decisions through domestic courts is

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[121] Aceris Law, "The Enforcement of ICSID Award", available at https://www.acerislaw.com/enforcement-of-icsid-awards/ (last visited on Mar. 15, 2021).
[122] Christoph Schreuer, "International Centre for Settlement of Investment Disputes (ICSID)", available at http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf (last visited on Mar. 15, 2022), p. 9.
[123] *Ibid*.
[124] ICSID, "ICSID and the World Bank Group", available at https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx (last visited on Mar. 15, 2022).
[125] Schreuer, *supra* note 122, at 9.
[126] Schreuer once argued that "Staring 2017 one State has resisted compliance with awards arguing that the investor would first have to seek their enforcement in the host States' courts." In fact, he referred to Argentina by "one State" in that statement. *Ibid*, at 9. See also Tsai-Yu Lin, "Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of The Annulment Committee at Enforcement", Contemporary Asia Arbitration Journal, Vol. 5, No. 1 (2012), pp. 1-22.
[127] Oscar Schachter, "The Enforcement of International Judicial and Arbitral Decisions", American Journal of International Law, Vol. 54, No. 1 (1960), pp. 6-17.

also applicable to ICSID awards to ensure that the benefits accorded to the winning party under those awards can be fulfilled.

The difference between "compliance with ICSID awards" and "recognition and enforcement" thereof, however, should be clarified in the first place lest cognitive ambiguity springs up as to the relevant rules of the ICSID Convention. The obligation of compliance is laid down with disputing parties as the target, while recognition and enforcement of ICSID awards is a universal commitment made by all the Contracting States to the Convention.[128] Provided that the losing party complies with an ICSID award and discharges its duty accordingly, the recognition and enforcement of such award would not be needed. In other words, the recognition and enforcement of an ICSID award only becomes relevant at the request of the winning party when non-compliance, either full or partial, of the award by the losing party took place in advance.[129] Perusal of the ICSID Convention would reveal that in the case of non-compliance with an ICSID award by the state party, the investor may request the intervention of its home country through diplomatic protection.[130] Considering the uncertainty surrounding any request for diplomatic protection,[131] the recognition and enforcement mechanism offered by the Convention stands as a more realistic and reliable way for the award creditor.

ICSID acknowledges that it has no formal role in the process of the recognition and enforcement of an award but could contact the award debtor for information about the steps he has taken and will take to comply with the award if the award creditor informs ICSID of the non-compliance.[132] The ICSID Convention makes it clear that the award creditor can and should pursue the recognition and enforcement of an award through Contracting States to the Convention, in particular the competent courts (or other authorities) of those Contracting

[128] Under Article 53 the obligation is incumbent upon the award debtor. Article 54 is designed for worldwide enforcement against a defaulting award debtor. Shreuer, *supra* note 118, at 86.
[129] "If a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts." There is clear causality between noncompliance of an award and the procedure of recognition and enforcement. See ICSID, "Recognition and Enforcement-ICSID Convention Arbitration", available at https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx (last visited on May 20, 2022). Schreuer also stated that, "Article 54 on enforcement comes into play only after a default has occurred. It applies in situations in which a party to ICSID arbitration has failed in its obligation to abide and comply with the award and is designed for worldwide enforcement against a defaulting award debtor." *Ibid*.
[130] Article 27(1) of the ICSID Convention reads that: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute." Article 27(1), the ICSID Convention.
[131] There is no certainty that the home country of the investor would espouse the claim of the investor because the state also has to weigh up the pros and cons for launching diplomatic protection. It is possible that diplomatic protection would embroil the home country into nasty standoff with the host state and result in an enormous amount of economic loss. Besides, SMEs perhaps have to pay huge money beyond their financial capacity in order to lobby the government for intervention.
[132] ICSID, *supra* note 129.

States,[133] including but not limited to the courts within the state party to the dispute and the home country of the foreign investor. Articles 54(1) and (2) provide that:

> "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation."

These clauses actually vest the role in the recognition and enforcement of those awards rendered by ICSID tribunals in domestic courts (or other designated authorities) of the Contracting States to the ICSID Convention. Therefore, the winning party of an ICSID arbitration should, if necessary, submit the application for the recognition and enforcement of the award to domestic courts located in the relevant Contracting States. The clauses mentioned above do not deter an award creditor from addressing requests for the recognition and enforcement of the award simultaneously to domestic courts of different jurisdictions. Cross noted that there is an increasing trend among ICSID award creditors resorting to judicial organs for the recognition and enforcement of the awards.[134] However, the discretion accorded to domestic courts at the stage of recognition and enforcement of ICSID awards is very much limited. Van Den Berg argues that the ICSID Convention "provides for a comprehensive, self-sufficient system of truly international arbitration in the area of investment disputes" and "there is no ground for refusal of enforcement, not even a public policy defense."[135] That is to say during the process of the recognition and enforcement of an ICSID award, the authority of domestic courts is limited to verifying that the award is authentic.[136] However, the ICSID Convention in a way also largely defers to the authority of its Contracting States when it comes to the recognition and enforcement of arbitration

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[133] ICSID/8-E records the designations of courts or other authorities competent for the recognition and enforcement of awards rendered pursuant to the Convention by the contracting states. Noticeably, a dominant majority of the ICSID contracting states elect domestic courts as the venue for recognition and enforcement of ICSID awards. See ICSID, "ICSID/8-E: Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention", available at https://icsid.worldbank.org/sites/default/files/2020_July_ICSID_8_ENG.pdf (last visited on May 20, 2022). "Some countries have designated a single court or authority. Others have designated certain types of court such as the locally competent district courts. Most designations refer to courts but some refer to executive authorities. Where courts have been designated, these are sometimes the courts of first instance or district courts and sometimes the respective supreme courts." Schreuer, *supra* note 118, at 85.

[134] Karen Halverson Cross, "Upholding Delocalized Enforcement of ICSID Awards", Kluwer Arbitration Blog, 24 April 2015, available at http://arbitrationblog.kluwerarbitration.com/2015/04/24/upholding-delocalized-enforcement-of-icsid-awards/ (last visited on May 20, 2022).

[135] Albert Jan Van den Berg, "Recent Enforcement Problems under the New York and ICSID Conventions", Arbitration International, Vol. 5, No. 1 (1989), pp. 3-4.

[136] Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law", 2nd edition, Oxford University Press, 2012, p. 311.

awards.[137] The specific provision with respect to the execution of an award against a state party is set out in Article 55 as:

> "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

Through this provision the ICSID Convention clearly recognizes that Contracting States may rely on the defense of sovereign immunity to protect their assets from being enforced/executed to the extent allowed by domestic law.[138] That also indicates that domestic courts, during the course of the enforcement/execution of ICSID awards, have to be restricted by the applicable legislation relating to sovereign immunity from execution. It is said that this provision actually makes compliance with ICSID awards largely voluntary, especially for those states without commercial assets abroad.[139] Schreuer contends that according to this provision, in practical terms, execution would be possible only if a debtor state's assets do not serve the state's official purposes.[140]

3.4.1.2 Recognizing and Enforcing Non-ICSID Awards by Domestic Courts

Since the ICSID Convention forges a relatively independent arbitral domain with special internal recognition and enforcement procedure, awards arising out of non-ICSID arbitration cannot benefit from the relevant provisions that facilitate the recognition and enforcement of ICSID awards. However, analogous to the situation of ICSID arbitration, there might also be default on non-ICSID awards, i.e., the award creditor cannot implement its rights under an award due to the non-compliance with the award by the award debtor. In order to genuinely benefit from a favorable award, the award creditor then must avail itself of the mechanism of recognition and enforcement in the case of non-compliance. It is said that non-ICSID awards can only be recognized and enforced under the "normal" regime provided for general international awards, which would primarily be under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[141] That definitely does not signify that the New York Convention[142] represents the whole landscape of recognition

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[137] Ven den Berg, *supra* note 135, at 3.

[138] The distinction between "enforcement" and "execution" has been a moot matter since the creation of the Convention. Despite the efforts by scholars in this regard, there is no consensus that these terms should be treated either synonymously or separately. For instance, Hunter and Olmedo accepted the view that "enforcement" and "execution" are essentially identical in meaning. See J. Martin Hunter and Javier Garcia Olmedo, "Enforcement/Execution of ICSID Awards Against Reluctant States", Journal of World Investment & Trade, Vol. 12, No. 3 (2011), p. 311. See also Billiet, et al., *supra* note 21, at 243-244. For the sake of convenience, "enforcement" and "execution" will be used in this chapter and hereinafter synonymously.

[139] Hunter and Olmedo, supra note 138, at 308.

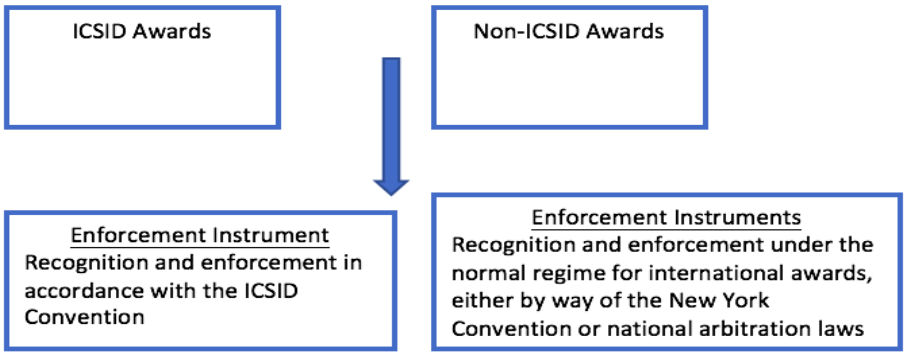
[140] Schreuer, *supra* note 118, at 85.

[141] Billiet, *supra* note 21, at 254.

[142] The New York Convention is arguably the most successful treaty in private international law. As of May 20, 2022, there were 170 state parties to the New York Convention. Recognizing the growing importance of international commercial arbitration as a means of settling international commercial disputes, the New York Convention operates as a tool to ensure the effectiveness of international commercial arbitration. The principal goal of the New York Convention is to require all the contracting states to recognize and enforce foreign arbitral awards and non-domestic awards subject to the grounds for refusal outlined in the Convention. The ancillary goal of that Convention is to pursue widespread recognition of arbitral agreements by requiring domestic courts of the contracting states to deny the parties' access to the court in contravention of their agreement to refer the matter to arbitration. See UNCITRAL, "Convention on the Recognition and Enforcement of Foreign Arbitral

and enforcement of non-ICSID awards. Much to the contrary, a design of multiple layers applies to the recognition and enforcement of those awards, meanwhile making itself distinct from the recognition and enforcement procedure contained in the ICSID Convention. A web of instruments that might be relevant for the recognition and enforcement of non-ICSID awards include the New York Convention, other bilateral or multilateral treaties on the recognition and enforcement of foreign awards,[143] the UNCITRAL Arbitration Model Law, and national arbitration laws.[144]

Figure 8 Recognition and Enforcement Regime of Investment Awards



In case the award debtor does not abide by or comply with a non-ICSID award, the award creditor might file an application for the recognition and enforcement of the award within the jurisdiction of the seat of arbitration. In other words, non-ICSID awards can also be recognized and enforced through domestic courts of the state where the arbitral seat was established.[145] But generally, the New York Convention cannot be utilized by the award creditor for the pursuit of the recognition and enforcement of the award in these circumstances even if the state *loci arbitri* is a Contracting State to the Convention because Article I.1 thereof narrows down the scope of awards to foreign arbitral awards and non-domestic awards.[146] Consequently, the award creditor has to invoke the provisions in relation

Awards (New York, 1958) (the New York Convention)", available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited on May 20, 2022). See also UNCITRAL, "Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)", available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on May 20, 2022).

[143] The New York Convention clearly states that it will not preclude other more liberal or preferential multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards from application. Article VII.1 stipulates that: "1. The Provisions of the present Convention shall not affect the validity of multilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Article VII.1, the New York Convention.

[144] Billiet, et al., *supra* note 21, at 254.

[145] *Ibid*, at 256.

[146] Article 1.1 of the New York Convention provides that: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Article I.1, the New York Convention.

to the recognition and enforcement of domestic arbitral awards contained in the municipal arbitration law of the state *loci arbitri*. Most domestic arbitration laws provide regimes for the recognition and enforcement of awards rendered locally, addressing issues such as the substantive standards for confirming awards made locally, the procedural avenue, and the time-limit of the proceedings.[147] Those regimes of recognition and enforcement of locally-made awards also enable domestic courts within the jurisdiction of the seat of arbitration to play a potentially important role in the recognition and enforcement of non-ICSID awards. For example, Article 35 of the UNCITRAL Arbitration Model Law provides that:[148]

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to **the competent court**, shall be enforced subject to the provisions of this article and of article 36.
>
> (2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, **the court** may request the party to supply a translation thereof into such language." [emphasis added]

To fully take advantage of the wide scope of enforceability of foreign arbitral awards facilitated by the New York Convention, the creditor of a non-ICSID award is likely to seek the recognition and enforcement of an award in Contracting States to the Convention other than the Contracting State where the arbitration was conducted. The creditor can activate the relevant rules of the New York Convention to have an award recognized and enforced in many jurisdictions thanks to the broad adoption of the Convention. Article III of the New York Convention provides that:

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic awards."

Without much controversy Contracting States to the New York Convention are bound to recognize and enforce foreign arbitral awards covered by the Convention but should conduct the process in accordance with their own procedural rules. In detail, the organ or institution within the territory of a Contracting State tasked with the cause of recognition and enforcement of foreign arbitral awards almost always happens to be a specific court or a certain type of court. In the case of the US, the FAA applies both in federal courts and state courts. Federal district courts have original, but not exclusive jurisdiction over matters arising under the Convention.[149] The appropriate Higher Regional Court or the Higher Regional Court Berlin, within the jurisdiction of Germany, is designated for recognizing and enforcing

[147] Billiet, *supra* note 24, at 256.
[148] Article 35, the UNCITRAL Arbitration Model Law.
[149] New York Convention Guide, "Jurisdictions: United States of America", available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=614&opac_view=-1 (last visited on May 20, 2022).

foreign arbitral awards.[150] China also specifies domestic courts, in particular the Intermediate People's Court in the district where the natural person or legal person has its domicile or principal place of business or property, for this purpose.[151] The Court of First Instance of the High Court in Hong Kong, China is eligible for addressing applications for the recognition and enforcement of foreign arbitral awards.[152] Compared with the corresponding arrangements made by the ICSID Convention, the New York Convention does not limit the role of domestic courts in the process of the recognition and enforcement of an arbitral award so stringently because it provides few grounds for domestic courts to refuse the attempted recognition and enforcement.[153]

Still there are a few countries that have not yet acceded to the New York Convention, indicating that the creditor wishing to have a foreign arbitral award recognized and enforced in those jurisdictions may have to rely on their national arbitration laws, if any. But the foreseeable hurdles or even lack of legislation would possibly hamper the creditor trying to fulfil its entitlements under the award.

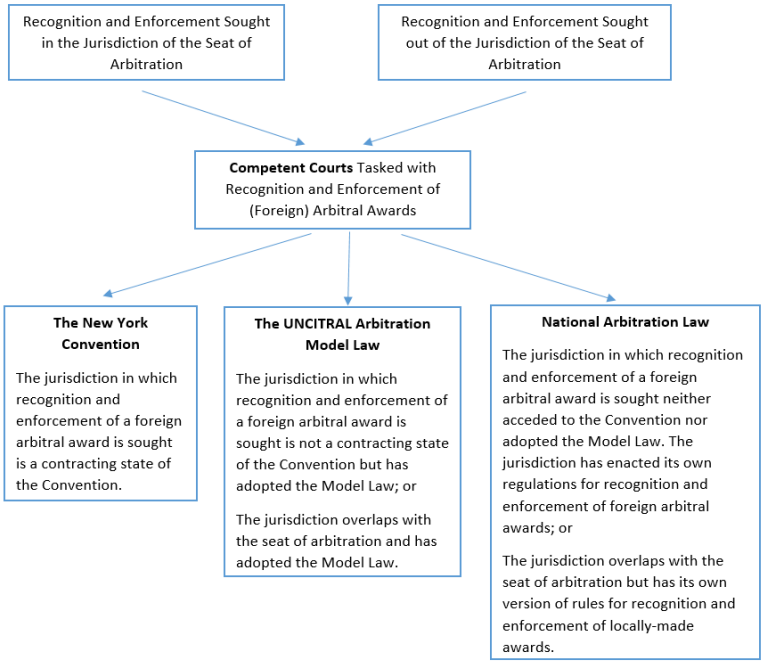
[150] The Oberlandesgericht (Higher Regional Court) in the district where the respondent has (i) its seat, (ii) its usual place of business, (iii) an asset, or (iv) where the object of the arbitral award is located. If none of (i)-(iv) is in Germany, the Kammergericht (Higher Regional Court Berlin). New York Convention Guide, "Jurisdictions: Germany", available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=577&opac_view=-1 (last visited on May 20, 2022).

[151] New York Convention Guide, "Jurisdictions: China", available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=568&opac_view=-1 (last visited on May 20, 2022).

[152] Upon resumption of sovereignty of Hong Kong on 1 July 1997, the Chinese government extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China. New York Convention Guide, "Jurisdiction: Hong Kong", available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=579&opac_view=-1 (last visited on May 20, 2022).

[153] Susan Choi, "Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions", New York University Journal of International Law and Politics, Vol. 28, No. 1&2 (1995&1996), p. 214.

Figure 9 Recognition and Enforcement of Non-ICSID Awards



Source: Billiet, et al. (2016), p.258

3.4.2 Interim Measures in Relation to Domestic Courts in Investment Arbitration

The clear definition of an "interim measure" is omitted from most of the national arbitration laws. Interim measures may take different forms and go under different names. Even the mainstream international arbitration rules and model laws do not refer to "interim measures'"in a consistent way. Prof. Maniruzzaman argues that expressions such as "provisional measures", "interim measures", "conservatory measures", "protective measures", "injunctive relief", or "injunctions", etc., are used in the same sense from the perspectives of the arbitral jurisprudence, arbitration laws and rules as well as juristic views. In this chapter and thereafter, I will use the term of "interim measures".[154]

Litigation and arbitration practitioners may easily reach this consensus that interim measures potentially carry much importance in the dispute resolution process. Problems may emerge

[154] See Association for International Arbitration, "Interim Measures in International Commercial Arbitration", Maklu Publishers (2007), p. 76. See also A F M Maniruzzaman, "Interim Measures of Protection in International Investment Arbitration: Challenge to State Sovereignty?", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472505 (available at May 20, 2022). However, the understanding of interim measures could be bolstered by the examination of Article 17(2) under the UNCITRAL Arbitration Model Law:
"An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute."
Article 17(2), the UNCITRAL Arbitration Model Law.

from, or even before in some cases, the outset of court or arbitral proceedings that can have a major or even determinative influence on the final outcome. For example, accidents (destruction or manipulation) in relation to the evidence of a case would possibly divert the decision to a reverse direction.[155] The immense importance of interim measures for parties to investment arbitration was also observed. The lapse between the commencement of an investment arbitration proceeding and the final award rendered by the tribunal can stretch over several years, and the events which happen in between could threaten the conduct of the arbitral proceeding or even make the final award hollow. Interim measures thus prove to be critical to the preservation of the right of parties pending the final award.[156]

3.4.2.1 Judicial Interim Measures Ordered by Domestic Courts

The role of domestic courts in granting interim measures in investment arbitration can derive inspiration from the case of international commercial arbitration. Although the possibility of arbitral tribunals granting interim measures has been recognized for some decades, the role of arbitral tribunals in this regard has largely remained dormant as parties to arbitration have usually sought interim measures from domestic courts instead of arbitral tribunals. But it is argued by Michelle Grando that since the late 1990s-early 2000s this trend has changed.[157] Serving as a piece of evidence for this change, the data extracted from the 2012 International Arbitration Survey indicated a slight preference of parties for arbitral interim measures than requests addressed to domestic courts.[158] The emergence and expansion of the emergency arbitrator, a mechanism designed to provide interim measures for parties prior to the constitution of an arbitral tribunal, also shows the increasing popularity and maturity of arbitral interim measures.[159]

Similarly, in the context of investment arbitration, both domestic courts and arbitral tribunals are compatible with requests for interim measures. However, the former forum is often neglected and eclipsed by the latter as pertinent scholarly work mostly focuses on arbitral interim measures rather than on judicial interim measures.[160] The authority of arbitral tribunals to order interim measures is rooted in most of the institutional arbitration rules.[161]

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[155] See Raymond J. Werbicki, "Arbitral Interim Measures: Fact or Fiction?", Dispute Resolution Journal, Vol. 57, No. 4 (2002-2003), p. 63. See also Marianne Roth, "Interim Measures", Journal of Dispute Resolution, Vol. 2012, No. 2 (2012), p. 1.

[156] See Benoit Le Bars and Athina Fouchard Papaefstratiou, "Chapter 9 Interim Measures in International Investment Arbitration", in Barton Legum ed., "The Investment Treaty Arbitration Review (Second Edition)", Law Business Research Ltd., London, 2017, p. 90.

[157] See Michelle Grando, "The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop", available at http://arbitrationblog.kluwerarbitration.com/2016/07/20/the-coming-of-age-of-interim-relief-in-international-arbitration-a-report-from-the-28th-annual-ita-workshop/ (last visited on May 20, 2022).

[158] *Ibid.* See also White & Case, Queen Mary University of London and School of International Arbitration, "2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process", available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf (last visited on May 20, 2022), p. 16.

[159] Grando, *supra* note 157.

[160] Maniruzzaman, *supra* note 154. See also Caline Mouawad and Elizabeth Silbert, "A Guide to Interim Measures in Investor-State Arbitration", Arbitration International, Vol. 29, No. 3 (2013), pp. 381-434; Joe Matthews and Karen Stewart, "Time to Evaluate the Standards for Issuance of Interim Measures of Protection in International Investment Arbitration", Arbitration International, Vol. 25, No. 4 (2009), pp. 529-552.

[161] Mouawad and Silbert, *supra* note 160, at 382.

For example, Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules, as well as Article 26 of the UNCITRAL Arbitration Rules all make it clear that arbitral tribunals are in the right position to release interim measures.[162] Being a distinct feature from other institutional arbitration rules, the legal instruments under the ICSID framework (including the ICSID Additional Facility Rules) permit arbitral tribunals to recommend interim measures on their own initiative.

Unlike the pattern of a gradual departure from judicial interim measures to arbitral interim measures observed in international commercial arbitration, the role of domestic courts in ordering interim measures, as Schreuer argues, once caused enormous controversy within the ICSID arbitration system until the 1984 amendment to the ICSID Arbitration Rules clarified the situation.[163] Rule 39(6) of the ICSID Arbitration Rules in some ways indicates that domestic courts also are vested with the authority to address requests for interim measures in assistance with ICSID arbitration by providing the following:

> "(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

This rule enables parties to ICSID arbitration to obtain interim measures from domestic courts, but sets out a precondition by requesting parties to provide consent for this form of judicial interim measures. The arrangement achieved through this rule is said to purposely "engineer compatibility between the interim measures regime and the exclusive jurisdiction that an ICSID tribunal enjoys over a dispute submitted to ICSID arbitration."[164] Article 28 of the ICC Arbitration Rules also sets out the domestic courts' authority in ordering interim measures parallel to such authority enjoyed by arbitral tribunals by providing that:

> "… 2. Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or

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[162] Article 47 of the ICSID Convention provides that: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party." Article 47, the ICSID Convention.
Rule 39 of the ICSID Arbitration Rules reads that: "(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. … (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations. …" Rule 39, the ICSID Arbitration Rules.
Article 26 of the UNCITRAL Arbitration Rules says that: "1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitations, to:
(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute. …" Article 26, the UNCITRAL Arbitration Rules.
[163] Schreuer, *supra* note 118, at 83-84.
[164] Bars and Papaefstratiou, *supra* note 156, at 91.

> for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. …"

In the light of the provision above, parties to ICC arbitration may address a request for interim measures to competent domestic courts either before or after the file is transmitted to the arbitral tribunal. However, if a party wishes to do so after the stated point of time, there must be appropriate circumstances which properly underpin this action by the party. But the actual rules fail to mention the definition or types of the so-called "appropriate circumstances". Similar provisions with varying wording can also be noticed from the Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules (IA Rules).[165] The UNCITRAL Arbitration Rules, by contrast, while permitting parties to apply for interim measures before domestic courts, do not impose such a limitation. Article 26.9 of the Rules provides that:

> "A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

To sum up, domestic courts in general own the authority of ordering interim measures in aid of investment arbitration, which is compatible with the consent to arbitrate in accordance with the most common institutional arbitration rules, covering ICSID arbitration and non-ICSID arbitration. Nevertheless, the authority of domestic courts on this front varies as the restrictions imposed on judicial interim measures, as found in a few sets of arbitration rules, are not uniform.

3.4.2.2 Recognition and Enforcement of Interim Measures by Domestic Courts

While judicial interim measures are accepted in the field of investment arbitration, domestic courts also potentially take on a role in relation to arbitral interim measures. Interim measures are generally recognized as binding by international law,[166] and those ordered by arbitral tribunals in investment arbitration are also considered as binding on the parties.[167] The parties

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[165] "The first edition of the Investment Arbitration Rules of the Singapore International Arbitration Centre (1st Edition, 1 January 2017) (SIAC IA Rules 2017) is a specialised set of rules to address the unique issues present in the conduct of international investment arbitration. The SIAC IA Rules 2017 are effective as from 1 January 2017." See SIAC, "Our Rules", available at http://www.siac.org.sg/our-rules (last visited on May 20, 2022). Article 27.2 of the SIAC IA Rules provides that: "A request for interim relief made by a Party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules." Article 27.2, the SIAC IA Rules.

[166] Mouawad and Silbert, *supra* note 160, at 416.

[167] For instance, the ICSID tribunal of the *Occidental* case argued in the paragraph 58 of the Decision on Provisional Measures that: "The tribunal wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word "recommend", the Tribunal is, in fact, empowered to order provisional measures. This has been recognized by numerous international tribunals, among them the ICSID tribunal in the *Tokios Tokeles* case. The Tribunal states:

> "It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them."'

See Decision on Provisional Measures (August 17, 2007), Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICISD Case No. ARB/06/11, retrieved from

thus are under an obligation to comply with interim measures. In the meanwhile, it has been noted that voluntary compliance is the rule.[168] The parties are very likely to follow the requirements of interim measures released by arbitral tribunals, because they would not like to convey a negative image to arbitrators pending the final award.[169] However, there is a possibility of non-compliance with interim measures in many cases; for example, the non-complying party may aggravate the dispute or maneuver to tamper with evidence.[170] On these occasions, there appears a critical need to put such interim measures into use.

Arbitral tribunals that render these interim measures lack the authority to enforce them in a direct manner and have very limited ability to compel the enforcement of the interim measures granted.[171] Therefore, if the recognition and enforcement of an interim measure is needed, the requesting party must resign itself to recourse to domestic courts for assistance.[172] But this issue still remains thorny because the most commonly-used international convention, in particular the New York Convention, only contains provisions regarding the recognition and enforcement of final and binding "awards" but not "orders".[173] This constitutes a challenge that is not easy to circumvent when a party applies for the recognition and enforcement of an interim measure with domestic courts. But the advantage is that "Numerous jurisdictions, including England, France, Switzerland, Germany, the Netherlands, and the United States, recognize the finality and enforceability of interim awards."[174] The UNCITRAL Arbitration Model Law might to some extent contribute to the harmonization of national legislation in this regard by imposing a general duty on domestic courts to recognize and enforce arbitral interim measures subject to grounds for refusing recognition and enforcement. Article 17H(1) of the Model Law provides that:

> "(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunals, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I."

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http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C80/DC661_En.pdf (last visited on May 20, 2022), para. 58. See also, Bars and Papaefstratiou, *supra* note 156, at 100.

[168] See Anita Alibekova and Robert Carrow, "International Arbitration and Mediation – From the Professional's Perspective", Yorkhill Law Publishing (2007), p. 151.

[169] See Ezgi Babur, "Enforcement of Interim and Conservatory Measures Ordered by Arbitrators", available at https://www.mondaq.com/turkey/arbitration-dispute-resolution/430394/enforcement-of-interim-and-conservatory-measures-ordered-by-arbitrators (last visited on May 20, 2022).

[170] *Ibid*.

[171] It is noted that the tribunal's own coercive power of state courts extend only to costs sanctions, and the drawing of adverse inferences against a party on matters of evidence. See Bars and Papaefstratiou, *supra* note 180, p. 101. See also Mouawad and Silbert, *supra* note 160, at 424.

[172] Bars and Papaefstratiou, *supra* note 156, at 100.

[173] Mouawad and Silbert, *supra* note 160, at 416.

[174] *Ibid*, at 425. For instance, Article 183 of the Swiss Federal Act on Private International Law reads that: "1. Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant interim relief and conservatory measures.

2. If the party so ordered does not comply herewith voluntarily, the arbitral tribunal may request the assistance of the competent court. Such court should apply its own law.

3. The arbitral tribunal or the court may make the granting of interim relief or conservatory measures subject to the provision of appropriate security." (emphasis added) Article 183, the Swiss Federal Act on Private International Law.

3.5 Counter to Investment Arbitration from Domestic Courts

As indicated by the analysis presented in the sections above, investment arbitration is not insulated from domestic courts even though it aspires to the creation of a relatively standalone dispute resolution process. Under certain scenarios of investment arbitration, domestic courts are endowed with the authority to facilitate arbitral proceedings or reinforce the credibility and validity of this genre of arbitration. But the interaction between international arbitration and court involvement is so intricate that Lew argues that the answer to the question of whether or not court involvement would undermine international arbitration processes is that it should be contingent on the nature and circumstances of the involvement.[175] Domestic courts, instead of being conducive to arbitral processes, can also take a toll on investment arbitration by impeding the arbitral proceedings.[176] And this form of negative influence from domestic courts is actually a counter against investment arbitration, with anti-arbitration injunctions being cited here as an illustrative example.

The anti-arbitration injunction, as its name suggests, refers to the restraint imposed by domestic courts on the commencement or continuation of arbitral proceedings.[177] The anti-arbitration injunction is a flexible instrument in that it can be directed at the parties or arbitrators, and it can be issued before the arbitral tribunal has been established to prevent the commencement of arbitration or after the proceedings have begun to stop the proceeding in its tracks.[178] The existence and use of the anti-arbitration injunction stirs up controversies among the theorists and practitioners as this instrument may strike right at the heart of international arbitration.[179] From an empirical point of view, very few domestic courts have actually issued an injunction of this type.[180] But both types of investment arbitration, i.e., ICSID arbitration and non-ICSID arbitration, have witnessed blockage or obstruction from domestic courts by way of issuing anti-arbitration injunctions. It is of importance to clarify here that an anti-arbitration injunction issued by domestic courts is not the same as the judicial review of investment awards which may involve interim awards dealing with

[175] Lew, *supra* note 115, at 535.
[176] Schreuer, *supra* note 118, at 87-88.
[177] Julian D M Lew, "Control of Jurisdiction by Injunctions Issued by National Courts", in Albert Jan Van den Berg ed., "International Arbitration 2006: Back to Basics (International Council for Commercial Arbitration Congress Series No. 13)", Kluwer, 2007, pp. 185-220.
[178] Lew, *supra* note 115, at 499. See also Nicholas Poon, "The Use and Abuse of Anti-arbitration Injunctions: A Way Forward for Singapore", Singapore Academy of Law Journal, Vol. 25, No. 1 (2013), p. 246.
[179] Lew said that common law countries seem to be permissive and thus more willing to become involved in anti-arbitration injunction practice while civil law countries tend to be restrictive and are reluctant to interfere in the process chosen by the parties. Lew, *supra* note 115, at 499. In addition, Strong pointed out that some scholars and practitioners indeed would prefer that these sorts of injunctions be made universally unavailable, however, other people believe that there are times when a court may enjoin arbitral procedures without damaging any of the core principles of arbitration law and practice. See S. I. Strong, "Anti-Arbitration Injunctions in Cases Involving Investor-State Arbitration: British Caribbean Bank Ltd. V. The Government of Belize", Journal of World Investment & Trade, Vol. 15, No. 1-2 (2014), pp. 324-325. Weeramantry put forward four reasons against anti-arbitration injunctions as well as four arguments in favor of anti-arbitration injunctions. For example, from the opposing side, anti-arbitration injunction attacks the very foundations of "competence-competence" – a bedrock arbitral principle. On the other hand, people for anti-arbitration injunction may argue this doctrine is not absolute. See Romesh Weeramantry, "Anti-Arbitration Injunctions: The Core Concepts", available at https://cil.nus.edu.sg/wp-content/uploads/2014/06/Note-on-anti-arbitration-injunctions.pdf (last visited on May 20, 2022).
[180] Strong, *supra* note 179, at 324.

jurisdictional issues though both mechanisms could override the jurisdiction of arbitral tribunals. Judicial review of interim awards dealing with jurisdictional issues can only be conducted by domestic courts within the jurisdiction where the tribunal is seated while the anti-arbitration junctions are normally issued by domestic courts of the host state. Furthermore, judicial review of investment awards only occurs in relation to non-ICSID arbitration when the tribunal has already made an award/decision.

In relation to *SGS v. Pakistan* administered by an ICSID tribunal, the Supreme Court of Pakistan delivered a judgment dated July 3, 2002, enjoining the claimant from taking any steps to participate in the international arbitral proceeding on the grounds that ICSID lacked jurisdiction.[181] However, the Tribunal declined to defer to the court judgment and upheld its power of the determination of its own jurisdiction by reasoning in the procedural order of October 16, 2002 as the following:

> "However, although the Supreme Court Judgment of July 3, 2002 is final as a matter of the law of Pakistan, as a matter of international law, it does not in any way bind this Tribunal. We have already adverted to the requirement of Article 41 of the ICSID Convention that this Tribunal determine whether it has the jurisdiction to consider the claims that have been advanced and that we cannot decline to do so."[182]

The ICSID Convention, as the underlying instrument of ICSID arbitration, rules out the possibility for domestic courts to issue anti-arbitration injunctions to interfere with the jurisdiction of ICSID tribunals, at least those courts within the Contracting States of the Convention. Article 41 makes an anti-arbitration injunction, aiming to invalidate the jurisdiction of ICSID tribunals over a given case, utterly incompatible with the Convention. The Convention, as a legal agreement between a group of countries from the global community, should be binding on all the Contracting States and any breach by those states of the substantive rules contained therein would constitute a violation of their international obligations. Article 41 of the ICSID Convention reads that:

> "(1) The Tribunal shall be the judge of its own competence.
>
> (2) **Any** objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, **shall** be considered by **the Tribunal** which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute." [emphasis added]

In contrast, the relevant rules derived from the UNCITRAL Arbitration Rules are not so decisive on whether or not domestic courts are entitled to challenge the jurisdiction of arbitral tribunals by issuing anti-arbitration injunctions. That is because the rules only empower arbitral tribunals to rule on their own jurisdiction but do not make the power exclusive. Domestic courts are thus left with some latitude to take advantage of this ambiguity to disrupt arbitration by way of anti-arbitration injunctions. As a result, whether to issue anti-arbitration

[181] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, "Procedural Order No. 2 (October 16, 2002)", available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C205/DC621_En.pdf (last visited on May 20, 2022), at 294.
[182] *Ibid*, at 299.

injunctions blocking arbitral proceedings will largely hinge on the willingness of those domestic courts on a case by case basis. Article 23.1 of the UNCITRAL Arbitration Rules reads that:

> "1. The arbitral tribunal **shall have** the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. …" [emphasis added]

On May 5, 2010, British Caribbean Bank (BCB) initiated BIT arbitration against the Government of Belize in accordance with the UK-Belize BIT and the UNCITRAL Arbitration Rules (1976).[183] But on the same day, the Government of Belize sought an injunction from a domestic court prohibiting the BCB from taking any or any further steps in the continuation or prosecution of the arbitration proceedings and the trial court finally issued such an injunction.[184] Similar to the *SGS*, in this case the Tribunal also did not submit to the attempt by domestic courts in Belize to curtail or negate its jurisdiction.[185] As observed by Schreuer, this is actually a routine that investment tribunals would follow when facing challenges from domestic courts in the form of anti-arbitration injunctions.[186] But the probable anti-arbitration injunctions from domestic courts, especially those issued by domestic courts of the host state, would threaten the commencement and development of investment arbitration.

3.6 Concluding Remarks

Domestic courts as a whole, including those of the host state, the jurisdiction where investment arbitrations were conducted and other jurisdictions, have a unique and crucial status in the whole structure of investor-state dispute resolution. The first embodiment is that domestic courts of the host state have the authority, not least confimed by the general international law and especially the large amount of IIAs, to adjudicate investment disputes. Most of the IIAs via their dispute resolution provisions include domestic litigation as a viable method provided for foreign investors to settle their disputes with host states. Those provisions might include but are not restricted to, traditional expropriation and nationalization clauses (directing exclusive jurisdiction to domestic courts), the rule of the exhaustion of local remedies, the rule mandating pursuing local remedies, and the fork-in-the-road clauses, etc. As "arbitration cannot be divorced completely from national courts",[187] domestic courts are inextricably engaged in or even after the process of investment arbitration. Outside the framework of ICSID arbitration, domestic courts *loci arbitri* have the authority, subject to national arbitration laws of the jurisdiction, to conduct a judicial review of investment awards rendered by arbitral tribunals. In addition, domestic courts spanning a lot of jurisdictions may contribute to investment arbitration by assisting the arbitral processes or strengthening the

[183] British Caribbean Bank Limited v. The Government of Belize, PCA Case Bo. 2010-18, available at https://www.italaw.com/cases/177 (last visited on May 20, 2022).
[184] Strong, *supra* note 179, at 326.
[185] British Caribbean Bank Limited v. The Government of Belize, PCA Case Bo. 2010-18, "Award", retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw4190.pdf (last visited on May 20, 2022).
[186] Schreuer, *supra* note 118, at 88.
[187] Choi, *supra* note 153, at 175.

credibility of arbitration. The recognition and enforcement of investment awards by domestic courts could ensure the effectiveness of those awards once defaults by the award debtors arise, thus at the same time preserving the authority and validity of the arbitration system. Judicial interim measures, on the other hand, might in appropriate circumstances facilitate the arbitral processes. Lastly, though sporadically, domestic courts, especially those of the host state, may attempt to interfere in or block arbitral proceedings by issuing anti-arbitration injunctions in relation to both ICSID arbitration and non-ICSID arbitration. Considering the fact that domestic courts are endowed with multiple roles in the domain of investor-state dispute resolution, one can suppose that the examinations, observations and analyses of these roles in practice are of great necessity. If the dispute resolution mechanism between foreign investors and host states is viewed as a whole, then domestic courts must be an integral part to this entirety. Thus, it would be conducive to this mechanism and even the international investment regime more broadly if domestic courts could be placed in appropriate positions and contribute more constructively to the dispute resolution process than they do now.

Chapter 4 The Observed Rise of Domestic Courts in Some Recent Treaty-making Practice amidst Uncertainty of Investment Arbitration

4.1 Introduction

The enactment of the ICSID Convention coupled with the establishment of ICSID in the 1960s ushered in a new era for the resolution of investment disputes between foreign investors and host states as the possibility emerged for aggrieved investors to have a standing directly against host states in international arbitration.[1] This institutional ingenuity was unsurprisingly bound up with the fact that the existing alternatives prior to the creation of ICSID could not meet the ends of resolving investment disputes in an efficient and fair manner. Domestic courts, as one of the alternatives, were perceived to be untrustworthy, although this perception might prove to be a general sentiment which is open to dispute.[2] Despite the slow start of the ICSID with a docket of relatively limited size until the 1990s,[3] investment arbitration subsequently flourished with an exponential increase in the total amount of cases. The overwhelming prevalence of this dispute resolution mechanism is said to be facilitated by the inclusion of investor-state arbitration clauses into modern investment treaties and the rapid expansion of the network of IIAs.[4] However, arbitration of investment disputes does not forge ahead without controversy. On the contrary, investment arbitration has been increasingly subject to a considerable amount of criticism from both scholars and practitioners, implicating almost all the ins and outs of this dispute resolution machinery.[5] As Katselas cogently indicated in an article that aims to explore the exit options and voice opportunities that countries have in the investment arbitration system, there are two likely responses that members of an organization tend to make in the face of unsatisfactory organizational performance. They may abandon their membership of the organization or

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[1] Sergio Puig, "Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law", Georgetown Journal of International Law, Vol. 44, No. 2 (2013), pp. 531-607 (The ICSID framework has played an important role in the development of international investment law, far beyond the feat of establishing a mechanism for the enforcement of investment protection commitments. It has also contributed to "the promotion of a particular understanding of the role of FDI in national economic development, a vision of international economic cooperation, and an idea of 'rule of law' now implanted in international investment law").

[2] UNCTAD, "Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II", New York and Geneva, 2014, available at https://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf (last visited on May 20, 2022), p. 23 (arguing that the problems, such as "domestic sovereign immunity and non-independent judiciary", that foreign investors often encountered in their quest for redress before domestic courts prevent them from obtaining due reparation).

[3] Christoph Schreuer, "The Dynamic Evolution of the ICSID System", available at https://www.univie.ac.at/intlaw/pdf/cspubl_86.pdf (last visited on May 20, 2022), p. 7.

[4] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, "The Political Economy of the Investment Treaty Regime", Oxford University Press (2017), p. 24 (noting the significance that European countries and the United States have featured in boosting the rapid development of investment arbitration). UNCTAD, *supra* note 2, at 18-19 (describing the explosion of investment arbitration cases in conjunction with the expansion of the network of investment treaties across time).

[5] Michael Waibel, et al., "The Backlash against Investment Arbitration: perceptions and Reality", Kluwer Law International (2010) (as a symbolic symposium in this regard aggregating a series of articles that represent the doubt against investment arbitration from a host of aspects). *Cf.*, Charles N. Brower and Sadie Blanchard, "What's in a Meme – The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States", Columbia Journal of Transnational Law, Vol. 52, No. 3 (2014), pp. 689-779 (Some of the criticisms against investment arbitration are "exaggerated, one-sided, and based on inaccurate information". However, many accept them as truth because they have been repeated so often).

register their dissatisfaction with an intention to weight the organization more in their favour.[6] In the context of investment arbitration, states may, for instance, make efforts to press ahead with a problem-oriented approach to address the pressing concerns regarding the arbitral regime, or, in a more systematic manner, pursue the replacement of *ad hoc* arbitration with an investment court system;[7] or, by comparison, states may distance themselves from the arbitral regime, perhaps through the denunciation of the ICSID Convention or termination of investment agreements, thus bringing to light the significance of alternatives to investment arbitration – litigation before domestic courts in this case. Whereas substantial scholarly attention has been directed towards the debates of viable reform proposals regarding the flaws of the investment arbitration system, much less academic enthusiasm has been devoted to local remedy via domestic courts and the dynamics between judicial remedy and investment arbitration.[8]

As an integral and foundational part of an attempt to look into the judicial role of domestic courts in investment dispute resolution and the synergy of domestic courts and investment arbitration in this regard, this chapter aims to highlight the observed decline of the prominence of arbitration in the resolution of investment disputes and the corresponding rise of the role of domestic courts in certain circumstances. However, it is important to bear in mind that this chapter does not claim that investment arbitration has been abandoned by international society at large, nor does it jump to the conclusion that the recent investment treaty-making practice favors litigation via domestic courts in comparison to investment arbitration. Instead, this chapter intends to highlight that, in some recent treaty-making practice by a number of countries, there is a tendency observed in which such countries seem to diminish the application of investment arbitration while elevating the role of domestic courts in resolving investment disputes. I believe that such a tendency is sufficient enough to

[6] Anna T. Katselas, "Exit, Voice, and Loyalty in Investment Treaty Arbitration", Nebraska Law Review, Vol. 93, No. 2 (2014), p. 318 (Katselas transposes Albert O. Hirschman's framework to the setting of investment arbitration, reaching the conclusion that the fragmented nature of investment arbitration regime "complicates the limited exit options that remain and creates opportunities for meaningful voice that do not exist in formal multilateral organizations").

[7] A rich reservoir of literature has detailed potential reforms that could be carried out in response to the criticism that investment arbitration has hitherto attracted. One of the more radical proposals among them has been floated by the European Union, aiming to achieve a transition from the current arbitration mechanism towards a multinational investment court. Since the investment court proposal is still in its infancy, many of the details concerning the organization and structure of the court system are still open to debate. Gabrielle Kaufmann-Kohler and Michele Potestà, "The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards", CIDS Supplemental Report, Geneva Center for International Dispute Settlement (2017), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_supplemental_report.pdf (last visited on May 20, 2022).

[8] There are, however, notable efforts from the academic community to explore the engagement of domestic courts with foreign investment law generally and investment dispute resolution specifically. It is worth noting that under the auspices of Amsterdam Centre for Internal Law, Hege Elisabeth Kjos has been advancing a study on the topic of domestic courts' engagement with foreign investment law. The study purports to "systematize domestic jurisprudence and to draw larger conclusions as concerns the respective roles of the domestic and international judiciary in the field of foreign investment law and the relationship between international, European Union and domestic law". Aspects are said to "include potential for normative synergy and the overlap/division of competence, also from a rule of law perspective". University of Amsterdam, "Domestic courts' engagement with foreign investment law", https://acil.uva.nl/research/research-projects/domestic-courts%E2%80%99-engagement-with-foreign-investment-law/domestic-courts%E2%80%99-engagement-with-foreign-investment-law.html (last visited on May 20, 2022).

call for a serious analysis of the tradeoffs of several different institutional choices facing national states in choosing a suitable method (using litiagation via domestic courts, investment arbitration or both) for the resolution of investment disputes. The argument of an increasing role for domestic courts herein is not evidenced by a round-up of surveys into the investment law jurisprudence accumulated by domestic courts across a range of jurisdictions.[9] By contrast, the supporting evidence presented in this chapter would largely be derived from the investment treaty-making practice of some national states, drawing upon the abundant presence of IIAs (more of a hard law nature) and national FDI-related documents alike (more of a soft law nature). Besides, the thinking behind the argument of a rising role for domestic courts in investment dispute resolution is reflected by not only the fact that local remedies seem to be more favorably confirmed in some more recent investment treaties signed by certain countries compared to their past treaty-making practice, but also the assumption that a decrease in the prominence of investment arbitration would channel foreign investors, who have a determination to pursue the adjudication of investment disputes, to domestic courts.[10]

Investment arbitration was described as "a freight train barrelling down a steep and treacherous hill",[11] with national states on board reeling at the daunting size of pecuniary awards that investment tribunals rendered against some of them.[12] Indeed, since the end of 1980s, national states have engaged in the conclusion of BITs feverishly, which provide a predominant source of instruments for states' consent to arbitrate investment disputes, due to the well-received market ideology and a lack of alternatives to foreign capital.[13] There is, nevertheless, a lag between the heyday when the mania of entering into IIAs swept across much of the globe and the moment when the message spread through the international community that investment arbitration turns out to carry substantial weight.[14] With the conspicuous growth in the number of arbitration filings and the expansion of the list of affected host states, especially rich developed states, attention to investment arbitration from

[9] It is conceded that an examination and a subsequent comparison and contrast of judicial cases on the topic of investment disputes collected from a number of jurisdictions would be conducive to a better understanding of the judicial role that domestic courts are assuming in resolving investment disputes and a more empirics-based evaluation of how domestic courts have discharged their jobs in this regard. The research undertaken by Hege Elisabeth Kjos mentioned above purports to conduct research into domestic jurisprudence.

[10] The means that some states take to bolster the role of domestic courts have been identified to include, *inter alia*, "imposing the requirement that investors first seek a remedy before domestic courts; by narrowing the dispute settlement clause in IIAs; excluding recourse to ISDS in these treaties; or withdrawing from IIAs". University of Amterdam, *supra* note 8.

[11] Katselas, *supra* note 6, at 315.

[12] Jacob A. Kuipers, "Too Big to Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards", Boston College International & Comparative Law Review, Vol. 39, No. 2 (2016), p. 421 (arguing that with the continuing increase in the size of pecuniary awards in investor-state arbitration the problems of execution are correspondingly compounded, with particular reference to the $50 billion award rendered by a Permanent Court of Arbitration tribunal against the Russian Federation in the *Yukos* case).

[13] Kenneth J. Vandevelde, "A Brief History of International Investment Agreements", UC Davis Journal of International Law & Policy, Vol. 12, No. 1, pp. 177-179 (stating that since the end of the 1980s developing states started to reverse their hostile attitude towards foreign investment and vigorously attract cross-border capitals through improved investment environment).

[14] Katselas, *supra* note 6, at 329.

both media and academia intensified to a large extent.[15] Whereas national states might not have fully appreciated the implications when they committed themselves to the obligation of arbitrating certain disputes with covered investors,[16] they have gradually come to realize that, rightly or wrongly, there is a need to recalibrate their policies on investment dispute resolution and impose curbs on investment arbitration to maximize their benefits in the investment treaty regime. To this end, a range of policy adjustments have been introduced by a number of states to put restraints on investment arbitration, correspondingly increasing the likelihood that more investment disputes would be referred to domestic courts and elevating the prominence of domestic courts in the resolution of investment disputes.

As indicated later in this chapter, the observed decline of investment arbitration and corresponding rise of court ligation in some recent investment treaty-making practices by certain countries seem to result from a combination of factors. While some countries may be bothered by the defects and imbalances as reflected by the structure of the current investment arbitration system, other countries may believe that the underlying investment treaty regime fails to deliever expected benefits or imposes excessive burden on their regulatory power. In addition, with developed countries increasingly involved in investment arbitrations as the respondent state, the forces underlying the investment arbitration system have also undergone apparent changes. As shown by some recent state practices in investment treaty-making, developed countries have become more concerned about the impact of investment arbitration. Such change of a mindset among developed countries may have also facilitated the changing equilibrium between the choice of investment arbitration and court litigation.

The rest of this chapter proceeds as follows: (1) Section 4.2 introduces the decisions of some states to distance themselves from the ICSID arbitration system; (2) Section 4.3 sheds lights on the state practice of terminating investment agreements; (3) Section 4.4 focus on the choice made by certain states to exclude investment arbitration as a dispute resolution method from investment agreements; (4) Section 4.5 looks into the introduction of the requirement of prior user of local remedies in investment agreements or model BIT; and (5) Section 4.6 concludes with some recapitualatory remarks.

4.2 Denunciation of the ICSID Convention

ICSID, after decades-long experience in resolving investment disputes between sovereign states and foreign investors, has become the main handler of such disputes and an iconic institution of investment arbitration and even the investment treaty regime at large.[17] While the size of the membership of the ICSID Convention has expanded greatly to cover almost all

[15] Amokura Kawharu and Luke Nottage, "The Curious Case of ISDS Arbitration Involving Australia and New Zealand", University of Western Australia Law Review, Vol. 44, No. 2 (2018), p. 34.
[16] Jan Paulsson, "Arbitration Without Privity", ICSID Review - Foreign Investment Law Journal, Vol. 10, No. 2 (1995), p. 257. Anna T. Katselas, p. 329.

[17] ICSID, "About ICSID", available at https://icsid.worldbank.org/en/Pages/about/default.aspx (last visited on May 20, 2022) (claiming that "States have agreed on ICSID as a forum for investor-state dispute settlement in most international investment treaties and in numerous investment laws and contracts).

the major economies in the world,[18] ICSID has also become the "focus of scrutiny" with sizeable concerns expressed over the arbitral institution lately.[19] In the light of the tremendous storm of backlash against investment arbitration in general and ICSID in particular, one might not be caught off guard by the moves on the part of some national states to dispense with the ICSID arbitration system. Like many of other international institutions and organizations,[20] Article 71 of the ICSID Convention provides contracting states with an opportunity to denounce the Convention and exit the arbitration center.[21]

4.2.1 Withdrawal from ICSID by Latin American Countries

Historically, Latin America has been identified with the Calvo Doctrine – a theory formed by the Argentinian diplomat and legal scholar Carlos Calvo in the mid-nineteenth century in response to the intervention of European powers in South America.[22] The doctrine dictates that, *inter alia*, foreign investors should not be privileged, disputes should be resolved under domestic laws by municipal courts, and foreign investors should not be entitled to diplomatic protection, at least not until local remedies are exhausted.[23] Arguably under the influence of the tenets emanating from the Calvo Doctrine, Latin American countries in a bloc rejected the ICSID Convention at the inception of the multilateral institution. As a result, there were no Latin American countries signed up to the Convention in the early days.[24] It was not until a few decades after the creation of the Convention that Latin American states started to modify their strategy on the matter of foreign investment protection together with the introduction

[18] Notably, Brazil, Russia, India, and South Africa, all but one of the so-called "BRICS" countries, are presently not contracting states to the ICSID Convention, though Russia became a signatory of the convention as early as 16 June, 1992. By comparison, the ICSID Convention started to enter into force for Canada and Mexico, two member states of the NAFTA, respectively on 1 Dec., 2013 and 26 Aug., 2018. ICSID, "Database of ICSID Member States", available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited on May 20, 2022).

[19] Susan D. Franck, "The ICSID Effect? Considering Potential Variations in Arbitration Awards", Virginia Journal of International Law, Vol. 51 (2011), pp. 841-848 (arguing that there is a series of criticisms, respectively relating the procedural aspect and substantive aspect, against ICSID, which may lead to major ramifications for the institution *per se* but also for investment treaty regime at large).

[20] Mariana Durney, "Legal Effects and Implications of the Denunciation of the ICSID Convention on Unilateral Consent Contained in Bilateral Investment Treaties: A Perspective from Latin American Cases", Max Planck Yearbook of United Nations Law, Vol. 17, No. 1 (2013), pp. 247-248 (arguing that it is a general rule that there are rules in treaties, especially multilateral treaties, inserted to regulate their lawful termination, including specific provisions on denunciation or withdrawal).

[21] Article 71 of the ICSID Convention reads that: "Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice." Article 71, the ICSID Convention.

[22] Catharine Titi, "Investment Arbitration in Latin America The Uncertain Veracity of Preconceived Ideas", Arbitration International, Vol. 30, No. 2 (2014), p. 359. Bernardo M Cremades, "Resurgence of the Calvo Doctrine in Latin America", Business Law International, Vol. 7, No. 1 (2006), p. 53.

[23] Titi, *supra* note 22, at 359-360. Cremades, *supra* note 22, at 54 (providing a summary of the substance of the Calvo Doctrine, which includes: "1) international law only requires the host state to confer national treatment to foreign investors, ie no treatment which is more beneficial than that accorded to national investors; 2) national law governs the rights of foreign investor; 3) the courts of the host state have exclusive jurisdiction over disputes involving foreign investors, who may therefore not seek relief through diplomatic protection").

[24] Ignacio A. Vincentelli, "The Uncertain Future of ICSID in Latin America", Law and Business Review of the Americas, Vol. 16, No. 3 (2010), pp. 417-418 (stating that a number of scholars called this hostile posture from Latin American countries as "No-de-Tokyo", which was shown at different regional meetings of the World Bank where Latin American countries, as a bloc, opposed the idea of establishing a specialized forum to resolve disputes between sovereign states and foreign investors).

and widespread acceptance of the Washington Consensus in developing countries. One of the kernels of the Consensus is that an open economy that is intertwined with the rest of the world through trade and investment liberalization is an important driver for economic growth.[25] In the 1980s and 1990s, Latin American countries came round to embrace the international system of investment protection by concluding a substantial amount of BITs, acceding to the Convention establishing the Multilateral Investment Guarantee Agency, and, more strikingly, to the ICSID Convention.[26]

While whether the wholesale conclusion of BITs by Latin American countries succeeded in bringing in a larger flow of inbound FDI to the continent is debatable,[27] a less disputable statement would be that a number of these countries have been exposed to costly investment claims initiated by foreign investors at ICSID with an alarming frequency. Cómez observed that foreign investors, primarily those from the US and Europe, launched a large number of arbitration cases against Latin American countries before ICSID on the heel of the economic crisis in Argentina and a series of nationalizations implemented by young leftist and populist governments.[28] The vicious clashes between the resolute governments upholding changes to the regulatory environment for foreign investment and the risk-sensitive and profit-driven foreign investors seeking reparation at the international level paved the way for the vigorous debates about the legitimacy of ICSID in Latin America. Countries from this continent are said to have rolled out a chain of hostile measures against ICSID,[29] among which is a denunciation of the ICSID Convention and a parallel exit from the arbitration centre.

4.2.1.1 Bolivia

The first country in history that announced its decision to denounce the ICSID Convention turned out to be Bolivia.[30] Since 2005, the Bolivian government started to make drastic changes with regard to the hydrocarbons sector that led to the nationalization of the industry

[25] Katselas, *supra* note 6, at 327 (arguing that the boom of BIT conclusions occurred in the wake of the Washington Consensus). Charles Gore, "The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries", World Development, Vol. 28, No. 5 (2000), pp. 789-790 (summing up the emphasis of the Washington Consensus as: "(a) pursue macroeconomic stability by controlling inflation and reducing fiscal deficits; (b) open their economies to the rest of the world through trade and capital account liberalization; and (c) liberalize domestic product and factor markers through privatization and deregulation").
[26] Titi, *supra* note 22, at 361.
[27] Gordon Sirr, John Garvey and Liam A. Gallagher, "Bilateral Investment Treaties and Foreign Direct Investment: Evidence of Asymmetric Effects on Vertical and Horizontal Investments", Development Policy Review, Vol. 35, No. 1 (2017), p. 94 (noting that a large body of research on the topic of the correlation between BITS and FDI has produced largely contradicting findings in the sense that "some studies find that BITs have a direct positive impact on FDI, others find no evidence of this link, while some show a positive connection that is dependent on institutional conditions in host countries").
[28] Katia Fach Cómez, "Latin America and ICSID: David versus Goliath?", Law and Business Review of The Americas, Vol. 17, No. 2 (2011), p. 197.
[29] *Ibid*, at 227 (presenting a list of initiatives launched by some Latin American countries to eliminate ICSID as a forum for resolving international investment disputes, including: "(1) resorting to the Constitution to ignore ICSID awards, (2) promoting national courts' reaction against ICSID, (3) drafting international contracts that avoid ICSID arbitration, (4)withdrawing from the ICSID Convention, (5)using Bilateral Investment Treaties to combat ICSID, (6) creating national agencies to react against ICSID arbitrations, and (7) developing a regional arbitration center aimed at replacing ICSID").
[30] Titi, *supra* note 22, at 363.

(natural gas and oil fields).[31] In 2006, the then president of Bolivia Evo Morales issued a decree to nationalize the entire hydrocarbons industry, as one of the first measures taken by him after assuming presidency, and sent troops one day after to the oil and gas fields in order to secure the effective enforcement of the decree.[32] During the fifth summit of the Bolivarian Alliance for the People of Our America on April 29, 2007, the member states of the alliance at that time, i.e., Bolivia, Venezuela, Cuba and Nicaragua, agreed to withdraw from the ICSID Convention and denounce all the BITs in force as a concerted effort to "guarantee the sovereign right of countries to regulate foreign investment in their territories".[33] On May 2, 2007, a few days after the consensus was achieved, Bolivia notified the ICSID secretariat of its withdrawal from the ICSID Convention.[34] According to Article 71 of the ICSID Convention, Bolivia's denunciation took effect on November 3, 2007, six months after the receipt of the notice.[35] The reasons enumerated by Bolivia to justify the withdrawal bore the country's dissatisfaction with the ICSID system with respect to "its complexity, opacity, lack of neutrality, high costs, no appeal of the award".[36] President Morales also indicated that ICSID is an international organization that was biased in favor of multinational companies, and the US, where "no country, except perhaps the US, will ever win". He also allegedly made the controversial remark that "Governments in Latin America and I think all over the world never win the cases. The transnationals always win".[37]

4.2.1.2 Ecuador

Ecuador later also became part of the campaign against the ICSID system by fulfilling the required formality of notification for the purpose of withdrawal on July 6, 2009, setting the stage for the official renunciation of its ICSID membership on January 7, 2010.[38] Likewise, Ecuador's denunciation of the ICSID Convention was also largely fuelled by and intertwined with the notable upheaval in the hydrocarbons industry of this resource-rich country. In order to reap more profits from the oil production within the territory of the country, Ecuador enacted a law that enabled the government to unilaterally modify the terms of oil sharing contracts in 2006.[39] The damage suffered by foreign oil companies was increased considerably when the government announced a decision, one year later, to impose a tax on oil companies which required ninety-nine percent of their extraordinary income to be handed over to the government.[40] Perhaps in an attempt to avoid the potential adverse legal repercussions that might ensue from the draconian measures taken by the government in the hydrocarbons sector, Ecuador notified ICSID of its intention to narrow down the scope of

[31] Diana Marie Wick, "The Counter-productivity of ICSID Denunciation and Proposals for Change", The Journal of International Business & Law, Vol. 11, No. 2 (2012), p.245.
[32] Vincentelli, *supra* note 24, at 428.
[33] *Ibid*, at 421-422 (noting that in fact Cuba has never been a contracting state of the ICSID Convention). Cómez, supra note 28, at 209.
[34] Cómez, supra note 28, at 209-210.
[35] Cómez, supra note 28, at 210.
[36] Cómez, supra note 28, at 210.
[37] Susan Franck, "Empiricism and International Law: Insights for Investment Treaty Dispute Resolution", OpinioJuris, available at http://opiniojuris.org/2008/07/03/empiricism-and-international-law-insights-for-investment-treaty-dispute-resolution/ (last visited on May 20, 2022).
[38] Cómez, supra note 28, at 211-212.
[39] Wick, *supra* note 31, at 246.
[40] Vincentelli, *supra* note 24, at 441.

consent to ICSID arbitration in accordance with Article 25(4) of the ICSID Convention in 2007.[41] The notification signalled that Ecuador "will not consent to submit to the jurisdiction [of ICSID] the disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals, or others"[42] Whether the legal effects of a notification under Article 25(4) can be back-dated is highly controversial,[43] but the discussions over this topic in the case of Ecuador soon appeared to fade into insignificance as in 2009 the country decided to have a break with the ICSID system, which is a more drastic move in comparison to the exclusion of a class of disputes from ICSID's jurisdiction.

However, it should be noted that, on August 4, 2021, Ecuador deposited its Instrument of Ratification of the ICSID Convention with the World Bank, formally signalling its intention to rejoin the ICSID regime. In accordance with its Article 68(2), the ICSID Convention entered into force for Ecuador on September 3, 2021.[44]

4.2.1.3 Venezuela

On January 24, 2012, Venezuela became the third and the latest country in history that decided to exit from the ICSID system.[45] Venezuela's bitter experience with ICSID is expressly evidenced by its long inventory of disputes with foreign investors that have been brought to the arbitral forum,[46] and many of them are said to be related to whether the compensation provided by the government to foreign investors for their losses was enough or not.[47] Venezuela's withdrawal from the ICSID came against the background that the then president Hugo Chávez, ever since he gained power in the late 1990s, was determined to reverse the trend of economic liberalization triggered by the several recent governments, including the privatization of major public companies within the country.[48] While President

[41] Article 25(4) of the ICSID Convention reads that: "Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. …" Article 25(4). the ICSID Convention. Xavier Andrade Cadena and Marco Tulio Montañes, "Introductory Note to Ecuador's Notice under ICSID Article 25(4)", International Legal Materials, Vol. 47, No. 2 (2008), p. 154.

[42] Cadena and Montañes, supra note 41, at 154 (noting that only a few states have made such notifications under Article 25(4) of the ICSID Convention).

[43] Emmanuel Gaillard, "Anti-arbitration Trends in Latin America", New York Law Journal, Vol. 239, No. 108 (2008) (commenting that "While Article 72 of the convention sets forth the effect of a state's denunciation in relation to its rights and obligations under the convention, there is no comparable provision addressing the effect of a notification pursuant to Article 25(4). An investor's position is therefore more uncertain, even where the investment was made prior to the state's notification under Article 25(4)"). Vincentelli, *supra* note 24, at 443 (arguing that an affirmation of the retroactive effects of a notification under Article 25(4) would possibly lead up to "the counter-intuitive conclusion that in many situations exclusion is a more radical move than denunciation").

[44] ICSID, "Ecuador Ratifies the ICSID Convention", available at https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention (last visited on May 20, 2022).

[45] Wick, *supra* note 31, at 239.

[46] As of May 20, 2022, there have been 50 cases (both ICSID arbitration and ICSID Additional Facility Arbitration) initiated against Venezuela at ICSID, including those that have been concluded and those pending. The data are available at https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx (last visited on May 20, 2022).

[47] Sergey Ripinsky, "Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve", available at https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/ (last visited on May 20, 2022).

[48] Vincentelli, *supra* note 24, at 445-448.

Chávez was in office, the administration carried out a series of nationalizations and expropriations in a number of industries, including "petroleum, steel, agribusiness, construction, tourism, telecommunications, banking and some other industries". These nationalization measures to reverse privatization harmed the interests of both domestic and foreign companies and dramatically changed the landscape for FDI in the country. [49] This domestic policy context set the scene for Venezuela's withdrawal from the ICSID system, which is said to be the most significant so far as the country carries more economic influence than its two regional neighbors, namely Bolivia and Ecuador.[50]

In recent years, there has been widespread speculation that another country in the region – Argentina, would also extract itself from the ICSID system. There was even a report that Argentina had indeed begun working towards leaving the iconic arbitral forum.[51] Although Argentina remains a contracting state of the ICSID Convention at the time of writing, the concern that its membership might be abandoned is anything but unfounded considering the long list of investment claims brought against Argentina before the ICSID. Notably, a commentator hailed Argentina's moves towards ICSID denunciation as smart with a combination of reasons given, including that there are substantial problems with the ICSID system, that ICSID denunciation would not necessarily bring about a steep drop of FDI in Argentina, and that there are alternative arbitral forums to ICSID.[52]

4.2.2 The Uncertain Effects of ICSID Denunciation

Denunciation of the ICSID Convention conspicuously signals a contracting state's intention to avoid ICSID arbitration from that point onwards, but the implications of this unilateral act for foreign investors may not be as straightforward as it seems to be. In fact, whether foreign investors are able to match the consent of the host state to ICSID arbitration and, by doing so, bring an investment dispute to the arbitral forum, after the denunciation was already made by the host state, remains one of the most controversial issues in foreign investment law scholarship. Article 72 of the ICSID Convention is said to carry a preservative effect in prevention of legal chaos that might be induced by a state's decision to withdraw,[53] but it is the extent of this preservative effect that forcefully divides the opinions of legal scholars.[54] We note that from Article 25(1) of the ICSID Convention, mutual consent from both the investor side and the state side is needed to affirm the Centre's jurisdiction.[55] This means that

[49] *Ibid*, at 447-448. Ripinsky, *supra* note 47.
[50] Wick, *supra* note 31, at 244-245.
[51] MercoPress, "Argentina in the Process of Quitting from World Bank Investment Disputes Centre", available at https://en.mercopress.com/2013/01/31/argentina-in-the-process-of-quitting-from-world-bank-investment-disputes-centre (last visited on May 20, 2022).
[52] Oscar Lopez, "Smart Move: Argentina to Leave the ICSID", Cornell International Law Journal Online, January 7, 2014, available at http://cornellilj.org/smart-move-argentina-to-leave-the-icsid/ (last visited on May 20, 2022).
[53] Durney, *supra* note 20, at 251.
[54] Article 72 of the ICSID Convention reads that: "Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary." Article 72, the ICSID Convention.
[55] Article 25(1) of the ICSID Convention reads that: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State,

temporal jurisdiction of ICSID could be established where a foreign investor managed to offer its consent to ICSID arbitration before the host state commenced the denunciation. However, the fragmented nature of the legal structure of international investment law is liable to give rise to an awkward situation where the host state denounces the ICSID Convention even though its IIAs which contain an offer to arbitrate at ICSID may still remain in force.[56] The separate existence of IIAs from the ICSID Convention provides for a legal context in which the intense debates within the scholarly community about the right interpretation and understanding of the notion of "consent" contained in Article 72 which deals with the effects of denunciation seem to be effective and relevant. The diverging opinions over "consent" would then lead these scholars to envisage different impacts of denunciation of the ICSID Convention on the expectations and interests of foreign investors.

Some scholars maintain that "consent" in Article 72 should be understood in a way that is in line with Article 25(1), holding the opinion that consent therein must be construed as mutual or perfected consent. This opinion produces an outcome that the rights and obligations preserved by Article 72, notwithstanding the denunciation, can only arise from mutual consent by the time of denunciation, rather than from a unilateral consent made by the denouncing state that may be contained in an investment agreement.[57] As a result, if a host state denounced the ICSID Convention before a foreign investor manages to confirm the consent in an effective way, the investor will no longer be able to bring the dispute, or any future disputes, to ICSID.[58] This line of reasoning would likewise send a clear and discouraging signal to foreign investors that the inclusion of an offer of consent to ICSID arbitration made by a host state in an applicable investment agreement does not have relevance anymore should they fail to match the general consent before the state denounced the ICSID Convention. Professor Christoph Schreuer said that, in support of this opinion, "in order to be preserved by article 72, consent would have to be perfected prior to the receipt of the notice of exclusion or denunciation. In order to benefit from continued effectiveness under article 72, consent must have been given before the denunciation of the Convention or exclusion of a territory".[59] The t*ravaux préparatoires* also seem to confirm this view that consent to ICSID arbitration cannot be completed by foreign investors anymore after the denunciation of the ICSID Convention. The main drafter of the Convention and the founding Secretary-General of ICSID Aron Broches said that, in reply to a Spanish delegate, "a general statement of the kind mentioned by Mr. Gutierrez Cano [a general declaration of consent on the part of a state] would not be binding on the State which had made it until it had been accepted by the investor. If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by an investor, no investor could later bring a claim

which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally." Article 25(1), the ICSID Convention.

[56] UNCTAD, "Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims", IIA Issues Note, No. 2, December 2, 2010, available at https://unctad.org/en/Docs/webdiaeia20106_en.pdf (last visited on May 20, 2022), p. 2.

[57] Durney, *supra* note 20, at 252.

[58] Vincentelli, *supra* note 24, at 431.

[59] Christoph H. Schreuer, et al., "The ICSID Convention: A Commentary", 2nd edition, Cambridge University Press (2009), p. 1280.

before the Centre."[60] Among the advantages of this interpretation of "consent" would be the preservation of a consistent understanding of "consent" throughout the text of the ICSID Convention and the provision of an opportunity for a sovereign state to effectively exit from an international institution.[61] By contrast, an aggrieved investor who had invested in the denouncing state, relying on the commitments (the ICSID arbitration clause) embodied in an investment agreement, would not likely appreciate this approach since they would be effectively deprived of access to ICSID arbitration after the denunciation.[62] Likewise, this approach would also render an awkward situation that the ICSID arbitration clause that may be contained in IIAs signed by the denouncing state loses substance without an agreement between/among treaty partners. Notably, Parra, a former Deputy Secretary-General of ICSID, despite his support for this approach, floated an alternative interpretation of Article 72 to the effect that foreign investors may still be able to match the state's consent within the six months before the denunciation takes effect in accordance with Article 70 of the VCLT.[63] In *Venoklim v Venezuela*, the ICSID Tribunal subscribed to this interpretation by rejecting the contention of Venezuela that the investor was not entitled to commence ICSID arbitration after a notice of denunciation.[64] Given the lack of a binding precedent system in investment arbitration regime,[65] the opinion held by that Tribunal does not carry any binding force for the adjudication of the same issue by subsequent investment tribunals. But Fouret dismissed the ability of foreign investors to initiate an arbitration during the waiting period by saying that "It would seem odd and contrary to the principle of good faith in international law for a party, knowing that a state has denounced the Convention, to confirm its consent during that period."[66]

There is, however, another group of scholars and commentators who adopted a more investor-friendly stance and in essence argued that "consent" in Article 72 of the Convention refers to the unilateral consent from the denouncing state, or framed the ICSID arbitration clause contained in IIAs involving the denouncing state as an international obligation. Under this approach foreign investors would still be able to match the denouncing state's consent and initiate an ICSID arbitration even after the denunciation as long as the relevant

[60] ICSID, "History of the ICSID Convention (Vol. II)", available at https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf (last visited on May 20, 2022), p. 1010.
[61] Durney, *supra* note 20, at 254.
[62] *Ibid*.
[63] Antonio R. Parra, "Participation in the ICSID Convention", ICSID Review, Vol. 28, No. 1 (2013), p. 176 (arguing that according to the general rule embodied in Article 70 of the VCLT "denunciation of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty before the denunciation takes effect").
[64] Tania Voon and Andrew D. Mitchell, "Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law", ICSID Review, Vol. 31, No. 2 (2016), p. 417. *Venoklim Holding BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/22, Award (3 April 2015) paras 62–3.
[65] Richard C. Chen, "Precedent and Dialogue in Investment Treaty Arbitration", Harvard International Law Journal, Vol. 60, No. 1 (2019), pp. 47-48 (noting that despite the trend that investment tribunals began citing past awards and decisions as precedent in the late 1990s there is no formal and binding precedent system in place in investment treaty arbitration).
[66] Julien Fouret, "Denunciation of the Washington Convention and Non-contractual Investment Arbitration: 'Manufacturing Consent' to ICSID Arbitration?", Journal of International Arbitration, Vol. 25, No. 1 (2008), p. 84.

investment treaty with an ICSID arbitration clause remains in force.[67] Professor Emmanuel Gaillard notably pointed out that, according to Article 72 of the Convention, "a state's withdrawal from the ICSID Convention does not affect its obligations under the convention when it has given consent to the jurisdiction of the centre before its notice of denunciation is received by ICSID".[68] This interpretation in fact indicates that "consent" in Article 72 represents unilateral consent instead of mutual consent or perfected consent, paving the way for foreign investors to respond to the consent from the denouncing state after the receipt of the state's notice of denunciation only if the consent was made by the state before the critical date. Sourgens stepped into the same line with Gaillard by asserting that the reasonable and common sense reading of Article 72 should be that the consent given by the denouncing state should not be affected by the decision to withdraw from the ICSID Convention regardless of the response or lack of that on the part of the investor before the critical date.[69] Other commentators put more emphasis on the underlying IIAs that contain an ICSID arbitration clause but reach the same conclusion that the implications of ICSID denunciation for foreign investors should be little, if any, should the relevant IIAs still remain in effect after the denunciation. Tietje, Nowrot and Wackernagel argued that the possibility of revoking consent is exclusively determined by the law applicable to the consent given, in particular referring to IIAs, thus the denunciation of the ICSID Convention could not effectively revoke the state's commitment to ICSID arbitration contained in an investment agreement. They went on to insist that "if the respective BIT provides for consent this may only be revoked by bringing to a final end the legal effects of the BIT".[70] In addition, Nolan and Sourgens seem to favor the idea that a state's undertaking to arbitrate investment disputes with foreign investors before ICSID, as a notable clause enshrined in many IIAs, should be deemed as an independent international obligation rather than a simple offer to arbitrate. This, in turn, led them to believe that "denunciation by a state should not necessarily be viewed as immediately putting an end to the investor's ability to invoke ICSID jurisdiction for an arbitration against that state".[71] This approach towards the interpretation of Article 72 of the Convention is apparently more in favor of the interests of foreign investors who aspire to take on a state before ICSID after the denunciation. It would, through downplaying the significance of the denunciation of ICSID, maximize the preservation of foreign investors' arguably legitimate expectations to initiate ICSID arbitration as they were promised at the time of investment and minimize the possibility of a confrontation that may come with the need to seek other

[67] Durney, *supra* note 20, at 256.
[68] Emmanuel Gaillard, "The Denunciation of the ICSID Convention", New York Law Journal, Vol. 237, No.122 (2007).
[69] Frédéric G. Sourgens, "Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements", Vol. 11, No. 2 (2013), p. 391 (dismissing the opinion of Professor Christoph Schreuer that "consent" in Article 72 refers to "mutual consent" by arguing that "Had the drafters intended what Professor Schreuer submits, Article 72 would have had to read 'given by one of them and a national of another Contracting State or another Contracting State'").
[70] Christian Tietje, Karsten Nowrot and Clemens Wackernagel, "Once and Forever? The Legal Effects of a Denunciation of ICSID", Beiträge zum Transnationalen Wirtschaftsrecht (2008), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518451 (last visited on May 20, 2022), p. 27.
[71] Michael D. Nolan and Frédéric G. Sourgens, "The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study", Transnational Dispute Management, Vol. 5, No. 5 (2007), p. 31.

remedies in absence of ICSID arbitration.[72] Conversely, this approach is unlikely to touch a chord with a denouncing state that is eager to sever ties with the ICISD system, because the state would still be exposed to the yokes of ICSID arbitration after the denunciation indefinitely subject to the status of the underlying IIAs to which it is a party. But there is another opinion that this interpretation would also be beneficial for a denouncing state in the sense that the state would be shielded against the conceivable accusation of failing to make good on its promise of ICSID arbitration under an investment agreement.[73]

Despite the bewildering uncertainty of whether foreign investors are able to initiate ICSID arbitration after the host state withdrew from ICSID, the opportunity for aggrieved investors to bring forward investment claims would not necessarily be lost after the denunciation. As briefly mentioned above, the fragmentation of the legal architecture of investment law means that a break with the ICSID system would not affect the legal effects of the underlying investment agreements. This separation lends credibility to Katselas argument that ICSID denunciation is only a partial exit from the investment arbitration club in that it does not effectively insulate the denouncing state from subsequent investment claims completely. She likened ICSID denunciation to the silent marketplace shift in economists' eyes – from the product offered by ICSID to other arbitration products offered by its competitors.[74] The cautious optimism that an affected investor may have in the light of ICSID denunciation is related to the fact that, notwithstanding its prominence in the scene, ICSID is usually not the only option for foreign investors covered by a specific investment agreement which, in turn, is likely to provide for alternatives to ICSID arbitration. To give an example, Article 8(3) of the Bolivia-China BIT, which is still in effect, prescribes that the covered disputes may be submitted to "an *ad hoc* arbitral tribunal".[75] In fact, the vast majority of Bolivia's BITs were said to contemplate the possibility of commencing UNCITRAL ad hoc arbitration.[76] Article 12(4) of the Venezuela-Canada BIT also provides other options for covered investors, i.e. arbitration under ICSID Additional Facility Rules and UNCITRAL ad hoc arbitration, in addition to ICSID arbitration.[77] The broad availability of arbitral forums other than ICSID opens the door for aggrieved investors to proceed with their investment claims against the

[72] Durney, *supra* note 20, at 257-258.
[73] *Ibid*, at 257.
[74] Katselas, *supra* note 6, at 341.
[75] Article 8(3) of the Bolivia-China BIT reads that: "If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph one of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. … " Article 8(3), the Bolivia-China BIT.
[76] Vincentelli, *supra* note 24, at 438.
[77] Article 12(4) of the Venezuela-Canada BIT reads that: "The dispute may, by the investor concerned, be submitted to arbitration under: (a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March.,1965 (lCSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or (b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." Article 12(4), the Venezuela-Canada BIT.

host state at the international level even after ICSID denunciation on the condition that the underlying investment agreements allow for non-ICSID arbitration and remain in force.

4.3 Termination of International Investment Agreements

4.3.1 State Practice on Terminating IIAs

The preceding analysis shows that ICSID denunciation is not able to live up to a denouncing state's expectation of a full exit from investment arbitration because of its uncertain implications for foreign investors and the availability of multiple arbitral forums that can be often seen in IIAs. However, the intended decision of the founding fathers of ICSID to exclude substantive protection of foreign investment from the text of the convention determines that ICSID denunciation is not the sole nor the most effective option for national states that are tempted to exit from investment arbitration.[78] Since ICSID membership in its own right would not draw national states into the menace of investment arbitration, investment agreements, as the main instrument providing for consent to arbitration, are in the crosshairs as well. Facing "the growing tensions between the free trade system that investment agreements are intended to protect and the rise and arguable success, of state capitalism", a few countries opted for termination of their investment agreements as a means to give vent to their despair and doubt over the investment treaty regime in general, and investment arbitration in particular.[79] The termination of investment agreements is generally speaking a more drastic action in comparison to ICSID denunciation insomuch as consent to investment arbitration (including ICSID arbitration and non-ICSID arbitration) would be revoked in its entirety, and, more importantly, the substantive provisions relating to the promotion and/or protection of foreign investment would be abrogated as well.[80] On the other hand, termination of investment agreements is narrower in application since it often involves a pair of countries (as in BITs), standing in marked contrast to ICSID denunciation which entails the severance of rights and obligations under the convention with all the other ICSID contracting states.[81] Termination of investment agreements is to a limited extent thus regarded as another partial exit option for national states to distance themselves from investment arbitration.[82] However, a steadfast national state may pin its hope of a full exit from investment arbitration on termination of its entire collection of investment agreements, but as will be shown below this pursuit of a full exit is almost certain to be an arduous and cumbersome journey.[83] One should also bear in mind that termination of investment agreements does not always curtail or eliminate foreign investors' ability to commence

[78] Andreas F. Lowenfeld, "Investment Agreements and International Law", Columbia Journal of International Law, Vol. 42, No. 1 (2003), p. 125 (as one of the founding fathers of the ICSID Convention explaining that those countries that subscribed to the ICSID Convention at the beginning did so only on the understanding that the convention simply provides an opportunity for investment arbitration with no inclusion of substantive obligations towards foreign investment).
[79] Julia Hueckel, "Rebalancing Legitimacy and Sovereignty in International Investment Agreements", Emory Law Journal, Vol. 61, No. 3 (2012), p. 603. Voon and Mitchell, *supra* note 64, at 425.
[80] Katselas, *supra* note 6, at 341-342.
[81] *Ibid*.
[82] *Ibid*, at 341.
[83] *Ibid*, at 342.

investment arbitration as there are instances where the termination was done in conjunction with the conclusion of updated treaties.[84]

4.3.1.1 Latin American Countries

The three Latin American countries mentioned above have gone beyond ICSID denunciation to further display their hostility towards the broader investment treaty regime by setting a trend of terminating investment agreements. The UNCTAD database for IIAs has shown that Bolivia has been engaged in a systemic and vigorous campaign for the purpose of terminating its BITs signed with economic partners, most of which are unsurprisingly countries from the western world.[85] The termination of the US-Bolivia BIT in 2012 is of vital importance for Bolivia, both economically and politically speaking, given the strong bond between the US and the region at large. There is a view that the decision of Bolivia to terminate the BIT with the US was largely motivated by an investment arbitration initiated by a U.S. investor against Bolivia, which was registered more than two years after Bolivia denounced the ICSID Convention.[86] The evidence was said to be that Bolivia had kept the BIT with the US in place, more than four years after its ICSID denunciation, until 2012 when the ICSID Tribunal in the mentioned arbitration decided to resume the arbitral proceedings.[87] Even if this view on the termination of the US-Bolivia BIT proves to be correct, the underscored influence of investment claims is hardly able to account for all the instances of termination of this kind. In fact, the drivers behind national states' move to terminate their investment agreements have been identified to be myriad and complicated.[88] Interest group pressure, domestic economic performance, global power politics and investor claims, for example, are said to be among the factors that influence the government's attitudes towards investor rights.[89]

Compared to the wholesale and arguably perverse BIT termination pushed forward by Bolivia, Venezuela appears to have taken a much more cautious and restrained approach to addressing the issue of abandoning the investment treaty regime. It is worth noting that Venezuela has hitherto terminated only one BIT with main capital-exporting countries and

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[84] Tania Voon, Andrew Mitchell and James Munro, "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights", ICSID Reviewm Vol. 29, No. 2 (2014), pp. 451-452 (noting the practice of updating treaty provisions concerning foreign investment as between Australia and Chile, Peru and South Korea, Chile and South Korea, and Peru and Singapore).

[85] The database shows that Bolivia has unilaterally terminated 12 BITs in total since 2009 when the BIT with the Netherlands was terminated. In 2012, the BITs with Spain, the US, and Italy were terminated. The year of 2013 has seen the termination of four BITs by Bolivia, respectively in relation to Austria, Sweden, France and Germany. In 2014, Bolivia took further steps to terminate its BITs with Denmark, Argentina and Belgium-Luxembourg Economic Union. The most recent termination of a BIT involving Bolivia is related to its BIT with Ecuador and took place in 2018. UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/24/bolivia-plurinational-state-of (last visited on May 20, 2022).

[86] Katselas, *supra* note 6, at 342. *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8 (the proceedings of this case were discontinued upon mutual consent pursuant to ICSID Arbitration Rule 43(1) in February 2015).

[87] Katselas, *supra* note 6, at 342.

[88] *Ibid* (noting that "A state's decision to terminate a single BIT may be motivated by any number of factors, including disaffection with particular actions taken by the other state or the other state's investors, or both").

[89] Julia Calvert, "Constructing Investor Rights? Why Some States (Fail to) Terminate Bilateral Investment Treaties", Review of International Political Economy, Vol. 25, No. 1 (2018), p. 76.

that BIT happens to be the one between the Netherlands and Venezuela.[90] On 30 April, 2008, Venezuela notified the Netherlands of its intention to terminate the investment treaty between them in a move that reportedly surprised the Dutch.[91] However, with the benefit of hindsight, the Dutch should have braced themselves for this decision by Venezuela considering that a substantial amount of investments had been routed to Venezuela via Dutch corporate entities for the exploitation of the broad protections accorded to Dutch investors under the provisions of this BIT.[92] As of the issuance of the notification of termination by Venezuela, a number of investment claims had been initiated by investors under the Netherlands-Venezuela BIT.[93] Therefore, grave discontent with a specific investment agreement would probably lead to a limited size of termination with no ripple effects for other parallel agreements as reflected by the practice of Venezuela.

Ecuador, unlike Venezuela, was said to be the country that went furthest to pursue a total exit from investment arbitration via a lengthy and tangled process of terminating investment agreements which provide for consent to arbitration.[94] In spite of the limited number of BITs still remaining in force for Ecuador at the time of writing,[95] this Latin American country, as will be shown later, seems doggedly determined to get rid of the investment treaty regime. The campaign against investment agreements in Ecuador was likewise commenced and promoted by the anti-ICSID Correa administration which leveraged social opposition to foreign oil companies to bring an end to investment agreements.[96] As early as in 2008, Ecuador terminated the investment agreements with respectively El Salvador, Cuba, Guatemala, Honduras, Nicaragua, the Dominican Republic, Paraguay, Uruguay and Romania with tremendous support from the National Assembly.[97] Despite the fears of business groups over the termination's adverse impacts on inflows of foreign investments, officials denied any major benefits of these BITs and cautioned the undue risks posed by them.[98] If the end of this bundle of investment agreements carried limited implications for Ecuador given the relatively small economic size of the treaty partners involved, Article 422 of the 2008 Ecuadorian Constitution aiming to disengage the country from the international investment law regime provides a legal basis for the government to continue the termination of other comparatively more economically significant investment agreements in the following years.[99]

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[90] UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/228/venezuela-bolivarian-republic-of (last visited on May 20, 2022).
[91] Sourgens, *supra* note 69, at 361-362. Katselas, *supra* note 6, at 342.
[92] Sourgens, *supra* note 69, at 362. Katselas, *supra* note 6, at 342.
[93] Sourgens, *supra* note 69, at 362.
[94] Katselas, *supra* note 6, at 342-343.
[95] The three BITs that still remain in force for Ecuador include the agreements respectively concluded with Italy, the Netherlands, and Spain. UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/61/ecuador (last visited on May 20, 2022).
[96] Calvert, *supra* note 89, at 86.
[97] *Ibid*, at 89. Katselas, *supra* note 6, at 343.
[98] Calvert, *supra* note 89, at 89.
[99] Article 422 of the 2008 Ecuadorian Constitution reads that: "No international treaties or instruments may be concluded where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities, in disputes involving contracts or of a commercial nature, between the State and natural person or legal entities. […]" Jose Gustavo Prieto Muñoz, "Ecuador's 2017 Termination of Treaties: How Not to Exit the International

The 2008 Constitution also mandated the newly established constitutional court of Ecuador to decide on the compatibility of investment agreements with Article 422 before the executive branch is able to terminate an agreement.[100] Since most of the judgments from the constitutional court negated the compatibility of investment agreements with Article 422,[101] the Correa administration took further steps to terminate the remaining BITs signed with global partners. In addition, at the same time when the last set of decisions was made by the constitutional court, Correa issued an executive decree in May 2013 establishing "the Citizen's Audit Commission" to assess the constitutionality of the remaining BITs.[102] The resolution of the Correa administration to extract Ecuador from the investment treaty regime seemed to gain even more momentum when the Commission released its report of assessment in 2017. The report argues that, among others, the investment agreements entered into by Ecuador include a "biased" adjudication system which has led to various awards rendered on "tendentious" and "unjust" grounds. Thus, the country incurred great economic losses under the agreements while it failed to benefit from the expected increase in FDI.[103] The report therefore advises termination of the remaining investment agreements and negotiation of new agreements with specific features, such as state-state dispute resolution mechanism, investor obligations and a narrower scope of substantive provisions.[104] In addition to the termination of the BITs with Finland and Peru respectively in 2010 and 2017, with the ammunition provided by the court decisions and the report, the year 2018 marks a stunning wave of BIT-termination commenced by Ecuador versus its global partners, including major economies such as the US, China, Germany, France, the UK, Canada, Switzerland and Sweden.[105] The specifc impacts of the recent termination of BITs on Ecuador and foreign investments therein alike remain to be seen. Meanwhile, a comment emerged that the Ecuadorian government was not opposed to the protection of foreign investors but the supremacy of international law and the superiority of investor rights to domestic development goals.[106] Before attention is moved away from Latin America, it is worth noting that according to some reports Argentina may also be considering the possibility of terminating its BITs.[107]

4.3.1.2 South Africa

Investment Regime", Brazilian Journal of International Law, Vol. 14, No. 2 (2017), p. 181. Calvert, *supra* note 89, at 89.

[100] Muñoz, *supra* note 99, at 183.

[101] *Ibid* (noting that the constitutional court failed to produce a uniform line of reasoning in the constitutional analysis of each of the remaining BITs in the process of being terminated).

[102] Muñoz, *supra* note 99, at 184 (noting that the Commission included "nine experts (eight international and one Ecuadorian) along with four high officials of the Executive branch representing the Ecuadorian government"). Calvert, *supra* note 89, at 90 (arguing that the members appointed to the Commission were well-known for their critical attitudes of BITs and ICSID).

[103] Muñoz, *supra* note 99, at 185.

[104] Calvert, *supra* note 89, at 90.

[105] In 2018, Ecuador terminated the BITs with Sweden, Canada, Germany, Bolivia, France, the UK, China, Argentina, Venezuela, Chile, the US and Switzerland. UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/61/ecuador (last visited on May 20, 2022).

[106] Calvert, *supra* note 89, at 90. 91.

[107] Titi, *supra* note 22, at 366.

South Africa, as an emerging economy which may need a substantial amount of foreign capital for domestic development goals, also embarked on a journey to move away from the investment treaty regime by terminating a number of investment agreements in recent years. Despite the notable exception that South Africa has never become a contracting state or a signatory state of the ICSID Convention,[108] the country started to be integrated into the modern treaty regime of investment protection after the end of apartheid. The last years of the 20th century represent a key period for the construction of South Africa's investment protection framework as the country entered into its first BIT in 1994 with the UK, followed by the conclusion of around 20 more treaties of the same type notably with European powers and beyond in the next few years.[109] Although South Africa entered into more BITs after the new millennium, most of them have never come into effect.[110] South Africa allegedly committed itself to investment protection spelt out by the binding terms of investment agreements with much suspicion and distress as the country grappled with the dilemma of choosing between "equality and economic independence in the future" and "funding to support these goals".[111] This dubious attitude over the investment treaty regime in the first place may portend South Africa's thinly-veiled discontent with investment agreements two decades later.

Unlike the instances of several Latin American countries introduced above, the drivers behind South Africa's departure from the investment treaty regime does not seem to include the sheer number of investment claims against the country as the open data from UNCTAD shows that there has only been one case where South Africa is the respondent state.[112] The limited exposure to investment arbitration yet proves to be enough to send an explicit signal to South Africa and many other countries that domestic public policy-making may face outside scrutiny due to investment arbitration, and, as a result, the right to regulate for the sake of public interest may be restricted. *Foresti v. South Africa*, a controversial arbitration

[108] ICSID, Database of ICSID Member States, available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited on May 20, 2022). Engela C. Schlemmer, "An Overview of South Africa's Bilateral Investment Treaties and Investment Policy", ICSID Review, Vol. 31, No.1 (2016), p. 192 (noting that the South African government has made it clear that it is not considering applying for ICSID membership).
[109] In 1995, South Africa signed BITs with Mali, the Netherlands, Switzerland, South Korea, Germany, France, Canada and Cuba. In 1996, two more BITs were concluded with Denmark and Austria. South Africa then continued to sign four BITs with Mozambique, Italy, Iran and China in 1997. The year 1998 has seen a boom of South African BITs concluded with respectively Mauritius, Sweden, Senegal, Ghana, Argentina, Belgium/Luxembourg, Finland, Spain, Egypt, Chile, Greece, Russia and Czech. UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa (last visited on May 20, 2022).
[110] The exceptions are the two BITs with Nigeria and Zimbabwe. UNCTAD, International Investment Agreements Navigator (last visited on May 20, 2022).
[111] Erika George and Elizabeth Thomas, "Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes", Transnational Law & Contemporary Problems, Vol. 27, No. 2 (2018), p. 420 (arguing that South Africa "bent to the will of the western world once again, signing BITs to regain footing in the hopes that it would one day become independent enough to stand without the need for aid from the same nations that had created the apartheid system").
[112] UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/195/south-africa (last visited on May 20, 2022). Schlemmer, *supra* note 108, at 186-187 (noting that there is indeed another undisclosed investment arbitration conducted pursuant to the UNCITRAL Arbitration Rules involving South Africa as the respondent state, where the Swiss investor secured partial victory over its allegation that South Africa failed to provide full protection and security as required by the Switzerland-South Africa BIT).

initiated by foreign investors from Italy and Luxembourg, has provoked heated discussions among scholars, and this brings to light the tension between human rights promotion and investment protection.[113] The dispute arose out of South Africa's 2002 Mineral and Petroleum Resource Development Act (MPRDA) as part of the country's broader Black Economic Empowerment policies which were intended to restore justice in the society that had been destroyed during the apartheid era. The MPRDA, among others, requires mining companies to apply for new order mineral rights and commands those companies to transfer a quota of equities to "Historically Disadvantaged Persons" to satisfy the premise of application.[114] The Tribunal in *Foresti v. South Africa* did not have an opportunity to decide upon the merits of the case because of the parties' agreement to discontinue the proceedings. However, in an award dismissing the investors' claims with *res judicata* effect, the Tribunal managed to exercise discretion in shifting some fees and costs incurred by the respondent state to the claimant parties.[115] Despite the reports of the positive responses to this award by the South African government,[116] the initiation of *Foresti* was said to prompt the country to commence a comprehensive review of its Bilateral Investment Treaty Policy Framework in 2009.[117] The Government Position Paper released in June 2009, which provided the basis for the comprehensive review, already unveiled South Africa's critical attitude towards the

[113] Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice", Corporate Europe Observatory and the Transnational Institute (2012), p. 13 (referring to *Foresti v. South Africa* as evidence for a claim that "Companies can claim compensation for actions by host governments that have damaged their investments, either directly through expropriation, for example, or indirectly through regulations of virtually any kind"). Jason Brickhill and Max Du Plessis, "Two's Company, Three's A Crowd: Public Interest Intervention in Investor-State Arbitration", South African Journal on Human Rights, Vol. 27, No. 1 (2011), pp. 163-166 (dismissing the perception that the outcome of the dispute settlement is a happy ending for all on the basis that, among others, "policies such as the Mining Charter should not be departed from on an *ad hoc* basis without weighty justification and a transparent process"). Annalisa M. Leibold, "The Friction between Investor Protection and Human Rights: Lessons from Foresti v. South Africa", Houston Journal of International Law, Vol. 38, No. 1 (2016), p. 266 (arguing that the case represents a win-win situation for human rights and the stability of international investment law). Marianne W. Chow, "Discriminatory Equality v. Nondiscriminatory Inequality: The Legitimacy of South Africa's Affirmative Action Policies under International Law", Connecticut Journal of International Law, Vol. 24, No. 2 (2009), pp. 354-355 (arguing that the arbitration (pending at that time) has offered "an opportunity to explore the vastly different conceptual frameworks of South African and international law" and "an opportunity [for South Africa] to revisit and clarify the content of their BITs so that the country can learn from its past mistakes", and brings to light the equitable, yet potentially discriminatory nature of affirmative action policies).

[114] Leibold, *supra* note 113, at 245. Katselas, *supra* note 6, at 344.

[115] Foresti v. South Africa, ICSID Case No. ARB(AF)/07/1, Award (August, 2010).

[116] Brickhill Plessis, *supra* note 113, at 164 (noting that the government is happy with the outcome of the arbitration because the claimants' claims were dismissed and a sizeable amount of costs was shifted to the claimants). Leibold, *supra* note 113, at 265 (referring to the joint statement made by two departments of the South African government which noted that they were "pleased to announce the successful conclusion of international arbitration proceedings").

[117] Congyan Cai, "Balanced Investment Treaties and the BRICS", AJIL Unbound, Vol. 112 (2018), p. 219. Sonia E. Rolland, "The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries", Loyola University Chicago Law Journal, Vol. 49, No. 2 (2017), p. 393. Schlemmer, *supra* note 108, at 188-189.

investment treaty regime,[118] setting the scene for the government's 2010 cabinet decision to terminate many of its BITs.[119]

Prior to the termination of the BIT with Argentina in 2017, South Africa moved to put an end to nine BITs involving treaty partners from Europe between 2013 and 2014.[120] In conjunction with the moves to stay away from the investment treaty regime that is believed by the country to favor investors from the North, South Africa created a domestic framework for the promotion and protection of foreign investment in its place.[121]The South African Protection of Investment Act 2015 notably excludes investment arbitration from the dispute resolution provisions; instead, the covered investors are entitled to request mediation or, alternatively, to approach "any competent court, independent tribunal or statutory body within the republic", for the resolution of investment disputes.[122] While the Act foresees the possibility of international arbitration with the home state of the investor, it requires the prior consent of South Africa and is conditioned upon exhaustion of local remedies.[123] Additionally, the Act also "calls for letting lapse current BITs that include investor-state arbitration". [124] While the promulgation of the Act may confirm a South African official's pledge in 2013 that the country was still committed to strengthening its investment protection regime,[125] commentators have expressed their concern over the unfavorable situation that foreign investors would be thrown into due to the lack of investment arbitration in the dispute resolution section.[126] Woolfrey expressed the concern that South Africa might be seeking a dual approach in reconstructing the country's framework of investment promotion and protection. Under this approach, the country aspires to conclude new-generation BITs with countries in which South African companies are significant investors while relying on

[118] The Government Position Paper points out that: "Existing international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries. Major issues of concern for developing countries are not being addressed in the BIT negotiation processes. BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development. There are many who question whether BITs in fact attract FDI at all." Republic of South Africa, "Bilateral Investment Treaty Policy Framework Review Government Position Paper", available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf (last visited on May 20, 2022), p. 11.
[119] Schlemmer, *supra* note 108, at 189.
[120] In 2013, South Africa terminated its BITs with Belgium-Luxembourg Economic Union and Spain. In 2014, South Africa continued to terminate the BITs signed with the UK, the Netherlands, Switzerland, Germany, France, Denmark and Austria. UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa (last visited on May 20, 2022).
[121] Schlemmer, *supra* note 108, at 189.
[122] Tarcisio Gazzini, "Travelling the National Route: South Africa's Protection of Investment Act 2015", African Journal of International and Comparative Law, Vol. 26, No. 2 (2018), p. 248.
[123] *Ibid*.
[124] Rolland, *supra* note 117, at 394.
[125] Rob Davies, "Letter: Termination of Bilateral Investment Treaties Won't Harm Relations", archived and available at http://democracyctr.org/justinvestment_org/2013/07/letter-termination-of-bilateral-investment-treaties-wont-harm-relations/ (last visited on May 20, 2022).
[126] Gazzini, supra note 122, at 263 (arguing that "wiping out investor-state arbitration may prove unnecessary if not counterproductive"). Schlemmer, *supra* note 108, at 192 (noting that foreign investors would be placed in a predicament where "the whole issue of reliance on diplomatic protection has once again been brought to the fore").

domestic framework in regulating investment flows from major capital-exporting countries.[127]

4.3.1.3 Indonesia

Indonesia's decision to terminate some, if not all, of its BITs should also carry much weight for the investment treaty regime and the transboundary investment community as the country stands out as the largest economy in the Association of Southeast Asian Nations (ASEAN) and a Group of 20 state entangled in a large web of investment agreements.[128] The records maintained by UNCTAD show that seven investment claims have been hitherto initiated against Indonesia with five of them proceeding pursuant to the ICSID Arbitration Rules and the other two the UNCITRAL Arbitration Rules.[129] While Crockett maintained that the investment claims against Indonesia have been comparatively few,[130] Yeo and Menon pointed out that the country has the highest number of investment arbitration cases among the member states of ASEAN.[131] In spite of the commentators' perceptions of Indonesia's experience with investment arbitration, the former president of Indonesia, Susilo Bambang Yudhoyono, seemed to be severely irritated by the investment claims that had been initiated against the country.[132]

The Netherlands, as the former colonial overlord of Indonesia, was forced to cut the ribbon for the island country's campaign to terminate BITs.[133] The Dutch embassy in Jakarta announced on 23 March 2014 that the Netherlands had been notified of Indonesia's intention to terminate the Netherlands-Indonesia BIT, which was due to expire on 1 July 2015. The announcement, which is now removed from the Dutch embassy's website, further mentioned

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[127] Sean Woolfrey, "The Emergence of a New Approach to Investment Protection in South Africa", in Steffen Hindelang and Markus Krajewski eds, "Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified", Oxford University Press (2016), p. 267.

[128] Antony Crockett, "Indonesia's Bilateral Investment Treaties: Between Generations?", ICSID Review, Vol. 30, No. 2 (2015), p. 438. The UNCTAD database shows that Indonesia has signed 72 BITs with global partners so far, including six earlier BITs that were replaced by new treaties in the case of Denmark, the Netherlands, Germany, Norway, Singapore and Finland. UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia (last visited on May 20, 2022).

[129] UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/97/indonesia (last visited on May 20, 2022).

[130] Crockett, *supra* note 128, at 438.

[131] Alvin Yeo SC and Smitha Menon, "Indonesia-Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor-State Dispute Settlement", Asia Dispute Review, Vol. 18, No. 3 (2016), p. 126.

[132] David Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?", Asian Journal of International Law, Vol. 7, No. 1 (2017), pp. 137-138 (noting that President Yudhoyono allegedly viewed investment claims initiated by foreign investors as pressuring the country and the decision of an ICSID tribunal as directly impacting Indonesia's sovereignty).

[133] The Netherlands-Indonesia BIT does not seem to be the first BIT that has been terminated by the Indonesian government since the BITs with Belgium and Norway were respectively terminated in 2002 and 2004. The UNCTAD database even shows that the termination of the Egypt-Indonesia BIT appears to be terminated in advance of the termination of the Netherland-Indonesia BIT. However, the Indonesian government's decision to terminate the BIT with the Netherlands seems to send the largestshock waves to the international community. UNCTAD, *supra* note 128. *Ibid*, at 125 (highlighting the symbolic value of the decision to terminate the Netherlands-Indonesia BIT in the Indonesian government's strategy of reviewing all of its existing BITs).

that the Indonesian government actually intended to terminate all of its then existing BITs.[134] This led Crockett to assume that the Indonesian government would denounce all of its BITs in a progressive manner.[135] As of the time of writing, Indonesia has terminated 22 BITs since 2014, to some extent substantiating the assumption that the Indonesian government would take an incremental approach. Interestingly, Indonesia's termination of BITs seems to be "non-discriminatory" in terms of the geographic spread of the affected treaty partners as the moves involved both major European economies and scattered developing countries.[136]
The relatively mass-scale termination of BITs commenced by Indonesia has given rise to strong and mixed reactions locally and beyond. The termination of the Netherlands-Indonesia BIT, for instance, was alleged to be overwhelmingly well received by non-governmental organizations (NGOs) from the Netherlands and Indonesia as they viewed Indonesia's decision as an attempt to achieve a better balance between "investor protections" and "wider social and environmental public interest considerations".[137] A professor of international law from the University of Indonesia argued that, in addition to termination of BITs, Indonesia should take a further step to withdraw from the ICSID system, partially on the basis that "it is investors who need Indonesia" at this moment, unlike the situation in the period between the late 1960s and 1990s.[138] The bold moves made by Indonesia to terminate BITs, on the other hand, raised substantial concern among those who are preoccupied with investor rights and the long-term economic development. Price maintained that Indonesia's large-scale termination of BITs would register an impression that the country is backtracking on its previous commitments of investment protection and adding to the dubious reputation of Indonesia that the country has weak institutions for investor protection.[139] Sefriani opined that considering that Indonesia's competitor states in attracting foreign investment are interlocked with IIAs and investment arbitration, the engagement of Indonesia in the investment treaty regime still remains urgent so long as the country is still in need of foreign capitals.[140] There are other scholars who referred to Indonesia's mixed identity of being both a capital-importing country and a capital-exporting country to highlight the importance for the country to strike a better balance between "these two different and sometimes competing roles and interests in its BITs".[141]

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[134] Crockett, *supra* note 128, at 437. Price, *supra* note 132, at 124. Craig Tevendale and Vanessa Naish, "Indonesia Indicates Intention to Terminate All of Its Bilateral Investment Treaties?", Herbert Smith Freehills, available at https://hsfnotes.com/arbitration/2014/03/20/indonesia-indicates-intention-to-terminate-all-of-its-bilateral-investment-treaties/ (last visited on May 20, 2022).
[135] Crockett, *supra* note 128, at 439.
[136] In 2004, the Egypt-Indonesia BIT was terminated. In 2005, Indonesia terminated the BITs with France, Italy, Malaysia, the Netherlands, Slovakia, Lao People's Democratic Republic, China and Bulgaria. In 2016, more BITs were terminated by Indonesia, implicating Switzerland, Vietnam, Hungary, Spain, Argentina, Pakistan, Turkey, Romania, India, Cambodia and Singapore. Indonesia further terminated the BITs with Germany and Kyrgyzstan respectively in 2017 and 2018. UNCTAD, *supra* note 128.
[137] Price, *supra* note 132, at 141.
[138] Hikmahanto Juwana, "Indonesia Should Withdraw from the ICSID!", The Jakarta Post, available at https://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html (last visited on May 20, 2022).
[139] Price, *supra* note 132, at 140.
[140] Sefriani, "The Urgency of International Investment Agreements (IIA) and Investor-State Dispute Settlement (ISDS) for Indonesia", Journal of Dinamika Hukum, Vol. 18, No. 2 (2018), p. 248.
[141] Price, *supra* note 132, at 151. Michael Ewing-Chow and Junianto James Losari, "Indonesia Should Not Withdraw from the ICSID", The Jakarta Post, available at

With regard to the drivers behind the Indonesian government's decision to terminate BITs, Magiera suggested that the recent investment claims initiated against Indonesia seem to be the main reason,[142] while Price added that the rising tide of economic nationalism observed in Indonesia also contributed to the termination.[143] In addition, one should bear in mind that the instance of Indonesia's experience of drifting away from the investment treaty regime is very different from those of the countries mentioned above, i.e. the Latin American countries and South Africa. First of all, there was some indication from the government that the country was not obsessed with the extreme idea of outright cancellation of the entirety of BITs, but instead some necessary upgrades of the outdated treaties to meet the needs of modern times.[144] The former Indonesian ambassador to Belgium rejected the criticisms made by international lawyers against Indonesia's decision to cancel the BITs that had been signed in the 1970s, 1990s and 2000s and argued that it was "loud protestations against changing the BITs were signed in the previous century" [*sic*], rather than Indonesia's intention to "update, modernize and balance its BITs", that should come as a shock.[145] The then chairman of Indonesia's investment coordination agency, Mahendra Siregar, reportedly stated that "the government's aim was not to weaken investor protection but to ensure there was consistency between local and international laws and regulations."[146] Indeed, unlike the time when Magiera suggested that "it [Indonesia] has not renegotiated any of the treaties",[147] the UNCTAD database shows that Indonesia signed a renewed BIT with Singapore in 2018.[148] However, as Crockett convincingly claimed, it would seem relatively unlikely that Indonesia would be interested in the intensive renegotiation of such a large amount of BITs,[149] thus only time would tell in which direction the Indonesian government is willing to steer its investment protection framework.

Second, Indonesia seems to be engaged in a binary course of action when it comes to investment treaty-making, effectively preventing the country from completely breaking away from the modern investment treaty regime. As noted by the UNCTAD World Investment Report 2013, regionalism is on the rise in the practice of investment treaty-making as a result of the fact that the conclusion of BITs has been in steady decline in recent years while

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https://www.thejakartapost.com/news/2014/04/24/indonesia-should-not-withdraw-icsid.html (last visited on May 20, 2022).

[142] Stephen L. Magiera, "International Investment Agreements and Investor-State Disputes: A Review and Evaluation for Indonesia", ERIA Discussion Paper Series, ERIA-DP-2016-30, Economic Research Institute for ASEAN and East Asia, January 2017, available at http://www.eria.org/ERIA-DP-2016-30.pdf (last visited on May 20, 2022).

[143] Price, *supra* note 132, at 139-140.

[144] Magiera, *supra* note 142, at 16.

[145] Arif Havas Oegroseno, "Revamping Bilateral Treaties", The Jakarta Post, July 7, 2014, available at https://www.thejakartapost.com/news/2014/07/07/revamping-bilateral-treaties.html (last visited May 20, 2022).

[146] Ben Bland and Shawn Donnan, "Indonesia to Terminate More Than 60 Bilateral Investment Treaties", Financial Times, March 26, 2014, available at https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0 (last visited on May 20, 2022).

[147] Magiera, *supra* note 142, at 16.

[148] UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia (last visited on May 20, 2022).

[149] Antony Crockett, "The Termination of Indonesia's BITs: Changing the Bathwater, But Keeping the Baby?", Journal of World Investment & Trade, Vol. 18, No. 5-6 (2017), p. 842.

regional negotiations of IIAs have gained more ground.[150] ASEAN as a regional economic bloc happens to be one of the prominent actors that have been involved in the conclusion of mega-regional agreements.[151] The last decade has witnessed the signature of the ASEAN Comprehensive Investment Agreement and a few other regional agreements between ASEAN and, respectively, Australia-New Zealand, South Korea, China, India, and Hong Kong Special Administrative Region (SAR).[152] Furthermore, Indonesia reportedly has shown interest in joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership which includes rather strong investment protections, in conjunction with the country's participation in the ongoing negotiation process of the Regional Comprehensive Economic Partnership (RCEP) which is bound to include investment arbitration.[153] This boom of regionalism recalls the view of Crockett that the Indonesian government's termination of BITs may ultimately prove to be insignificant for foreign investors from a number of states since those investors would still be able to gain access to investment arbitration via the existing mega-regional agreements.[154] However, in default of the renegotiation of BITs or the conclusion of new investment agreements, some investors in Indonesia, for instance, those from certain European countries, would be deprived of treaty-based investment protection in due time. Crockett, in addition, managed to read more positive news for foreign investors in Indonesia's investment protection framework that is undergoing a transformation as he believed that the provisions in the regional agreements would serve to "encourage more transparent administrative processes and, generally, to promote the rule of law".[155]

4.3.1.4 The EU

The termination of investment agreements, however, does not seem to be confined to developing states, since a large number of BITs are very likely to be brought to an end in relation to the EU member states.[156] The ambiguity surrounding the compatibility of intra-EU BITs with EU law had been "a time bomb" in the EU constitutional structure for decades

[150] UNCTAD, "World Investment Report 2013", available at https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf (last visited on May 20, 2022), pp. 103-107.
[151] Wolfgang Alschner, "Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?", Journal of International Economic Law, Vol. 17, No. 2 (2014), pp. 278-279 (describing the "noodle bowl" of investment treaty protection within ASEAN which refers to the complex treaty overlap in relation to the region as a result of the conclusion of a number of regional agreements which is likely to further increase in the future).
[152] Notably, the investment agreement between the ASEAN and Hong Kong SAR does not specify the dispute resolution mechanism for disputes between foreign investors and host states, rather indicates that the relevant parties shall discuss the arrangement of the institutions in due time. UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia (last visited on May 20, 2022).
[153] Magiera, *supra* note 142, at 29.
[154] Crockett, supra note 149, at 841.
[155] Crockett, *supra* note 128, at 442.
[156] Declaration of the Representatives of the Governments of the Member State, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (last visited on May 20, 2022), p. 5 (spelling out that "In light of the Achmea judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally").

until recently the accession of Central European countries to the bloc brought the problem to the fore.[157] The incompatibility of intra-EU BITs with EU law was put forward by EU member states in their objections to jurisdiction in a few arbitral proceedings, where, however, the investment tribunals consistently ruled against the respondent EU member states.[158] The intra-EU BITs, on the other hand, have been viewed by the European Commission as a thorn in the flesh that must be removed at a certain point of time.[159] According to a press release dated on 18 June 2015, the Commission initiated pilot infringement proceedings against five member states, i.e. Austria, the Netherlands, Romania, Slovakia and Sweden, requesting them to terminate the intra-EU BITs *inter se*. In addition, the Commission also commenced an administrative dialogue with the other member states – except Ireland and Italy, which had already terminated all their intra-EU BITs – to have all those treaties terminated.[160]

Parallel with, and closely related to, the debates regarding the need and legitimacy of intra-EU BITs, it emerged from within the European scholarship that investment arbitration is on a slippery slope to an imminent "downfall" in relation to the EU and its member states.[161] In addition, Bermann identified the tensions/hostilities between EU law and international arbitration, the emergence of which is widely attributed to the advent of investment arbitration as an altogether different species of arbitration.[162] Although it might be an over-statement arguing that there is an "imminent downfall" of investment arbitration in the EU, the landscape for the resolution of intra-EU investor-state disputes is bound to go through major transformation. More precisely, arbitration of intra-EU investor-state disputes is very likely to give way to other dispute resolution mechanisms, especially domestic courts within the EU member states. The dynamic behind this upcoming transformation partially lies with a

[157] Csongor István Nagy, "Intra-EU Bilateral Investment Treaties and EU Law After *Achmea*: 'Know Well What Leads You Forward and What Holds You Back'", German Law Journal, Vol. 19, No. 4 (2018), pp. 982-983 (noting that the older member states of the EU refrained themselves from concluding BITs with each other while Central European countries concluded numerous BITs with the older member states). Dominik Moskvan, "The Clash of Intra-EU Bilateral Investment Treaties with EU Law: A Bitter Pill to Swallow", Columbia Journal of European Law, Vol. 22, No. 1 (2015), p. 104 (noting that the discussions over the compatibility of intra-EU BITs with EU law were "amplified by the fact that the newly acceded EU Member States bring with them an even larger number of investment treaties").
[158] Nagy, *supra* note 157, at 986-988.
[159] Nagy, *supra* note 157, at 988 (noting that "the European Commission – in its *amicus curiae* opinions – has been vigorously rejecting the validity of intra-EU BITs"). Dominik Moskvan, supra note 157, at 104 (noting that the Commission has affirmed its view since 2006 that there is no need for intra-EU BITs to exist as the most content contained therein is superseded by Community law). Voon and Mitchell, *supra* note 64, at 428 (noting that "the EU has been encouraging mutual termination of intra-EU BITs on the basis that such protections are not needed between EU Member States").
[160] European Commission, "Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties", available at http://europa.eu/rapid/press-release_IP-15-5198_en.htm (last visited on May 20, 2022).
[161] Krzysztof Wierzbowski and Aleksander Szostak, "The Downfall of Investment Treaty Arbitration and Possible Future Development", Dispute Resolution International, Vol. 13, No. 1 (2019), p. 67 (arguing that the "imminent downfall of investment treaty arbitration in the EU highlights the necessity for the modernization of the framework of investment protection treaties and, most importantly, the system for the settlement of investment disputes"). Alan Uzelac, "Why Europe Should Reconsider Its Anti-Arbitration Policy in Investment Disputes", Vol. 2, No. 1 (2019), p. 28 (noting that "the prospects for investor-state arbitration surviving in the short and medium run as the dominant method of investor-state dispute resolution are far from certain, at least as regards the European Union and its Member States").
[162] George A. Berman, "European Union Law and International Arbitration at a Crossroads", Fordham International Law Journal, Vol. 42, No. 3 (2019), p. 969.

preliminary ruling from the European Court of Justice (ECJ) in *Achmea*, in which the Court opined that the investor-state arbitration mechanism under the Netherlands-Slovakia BIT is incompatible with Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) and undermines the autonomy of the EU legal order.[163] This judgment came as a surprise to many as it unusually dismissed the opinion of Advocate General Wathelet that the relevant articles of the TFEU "must not be interpreted as precluding the application of an investor/State dispute settlement mechanism" under the BIT in question and like treaties.[164]

Despite the compliance of the German Federal Court of Justice with the ECJ judgment by setting aside the *Achmea* award,[165] the reception of this judgment by future investment tribunals disposing of intra-EU investor-state disputes remains uncertain. Notably, in *Masdar v. Spain* and *Vattenfall v. Germany*, both were initiated on the basis of the Energy Charter Treaty (ECT) instead of intra-EU BITs, the investment Tribunals respectively rejected the invocation of the *Achmea* judgment by Spain and Germany in a move to deny the Tribunals' jurisdiction. Both Tribunals determined that the *Achmea* judgment cannot directly apply to arbitration under the ECT because the underlying treaty is not a bilateral one between EU member states.[166] Furthermore, the *Achmea* judgment is not well received by at least part of the academic community. Nagy, for instance, argued that, in terms of the implications of the judgment for intra-EU BITs, the conclusion of the Court should be interpreted in a narrow manner with a view to maintaining the arguably high level of investor protection accorded by BITs between EU member states.[167] He thus argued that despite the obvious anti-arbitration attitude thinly disguised in the judgment, the status of intra-EU BITs is still not certain after the *Achmea* judgment. Burger, in addition, pointed out that both investors and member states have to be particularly cautious after *Achmea*, not only because of the unclear reactions by investment tribunals to the judgment, but also the likely obstacles that may have been generated by *Achmea* to the recognition and enforcement of investment awards in the EU.[168] However, the pieces of the jigsaw puzzle about the fate of intra-EU BITs and arbitration of intra-EU investor-state disputes seem to fall into place as member states made clear their views on this issue. The suggestion from Pohl that "the *Achmea* ruling may finally spur

[163] Case C-284/16, Slowakische Republik v. Achmea BV, Judgment of the Court (Grand Chamber) of 6 March 2018, EU:C:2018:158. Cristina Contartese and Mads Andenas, "A. Court of Justice EU Autonomy and Investor-State Dispute Settlement under *inter se* Agreements between EU Member States: *Achmea*", Common Market Law Review, Vol. 56, No. 1 (2019), p. 157.
[164] Opinion of Advocate General Wathelet, EU:C:2017:699. Nagy, *supra* note 157, at 992.
[165] Contartese and Andenask, *supra* note 163, at 158.
[166] Uzelac, *supra* note 161, at 14-15.
[167] Nagy, *supra* note 157, at 993-996 (arguing that: first, the dispute settlement clause embedded in Article 8 of the BIT in question refers to only *ad hoc* arbitration, thus institutional arbitration, such as ICSID arbitration, of intra-EU investor-states should not be precluded; second, the judgment only concerns the dispute resolution mechanism in the BIT without touching upon the substantive provisions, thus the majority of the BIT seem to have remained valid; third, considering that the dispute that the Court addressed is indeed "one of the very rare cases where a BIT and EU internal market law actually overlapped", or in other words, where the relevant provisions dealt with by the tribunal "closely paralleled the EU internal market's rules on freedom of establishment and free movement of capital", thus the judgment may not apply to arbitration of intra-EU investor-state disputes that center around investment protection provisions that have no counterpart in EU law).
[168] Simon Burger, "Arbitration Clauses in Investment Protection Agreements after the ECJ's *Achmea* Ruling: A Preliminary Evaluation", Yearbook on International Arbitration, Vol. 6, No. 1 (2019), pp. 147-148.

Member States to terminate their intra-EU BITs" proves to be correct as EU member states declared at the beginning of 2019 that they would terminate intra-EU BITs between them, by means of either a bilateral or multilateral treaty.[169] Burgstaller, the lead counsel for Slovakia in the *Achmea* case before the ECJ, indicated that "ultimately all EU countries undertook to terminate these treaties (intra-EU BITs) by the end of this year (2019)".[170] Should EU member states make good on their promise by terminating all the remaining intra-EU BITs by the end of 2019, that would nullify substantive provisions and dispute resolution mechanism contained in those treaties immediately or in due course, depending on the choice made by those states. Since termination of those treaties would necessarily entail the revocation of states' consent to arbitration, investment arbitration on the basis of intra-EU BITs is likely to be lost in the mists of time ultimately. The impact of the looming termination of intra-EU BITs on the global landscape of investment dispute resolution should not be underestimated, since the termination "would do away with the overwhelming majority of investment arbitration cases" involving Central European states.[171] It is for this reason safe to argue that more prominence would likely be attached to the domestic courts across EU member states in terms of the resolution of intra-EU investment disputes sooner or later – probably sooner rather than later.

4.3.2 Survival of Investor Rights

By saying "exit is difficult", Katselas referred to the substantial inconvenience and complexity that national states must overcome in the course of breaking away from investment arbitration.[172] Her statement proves to be correct in the domain of terminating investment agreements because even cancellation of the underlying binding instruments would not necessarily secure immediate insulation for states from treaty commitments in general, and investment arbitration in particular. The difficulty that national states may have to face in this regard, however, should not be counter-intuitive if an essential characteristic of this sort of international instrument is taken into account. Despite the indisputable fact that investment agreements are negotiated and concluded between/among sovereign states/regions, Roberts maintained that these agreements "should be reconceptualized as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries".[173] In addition, the commonly long-term nature associated with investment projects reveals that the degree of stability and predictability of the regulatory environment of the host state holds great importance for the protection of foreign investors' legitimate expectations and trust interests.[174] Thus, in view of

[169] Jens Hillebrand Pohl, "Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?", European Constitutional Law Review, Vol. 14, No. 4 (2018), p. 791. Declaration of the Representatives of the Governments of the Member State. Wierzbowski and Szostak, *supra* note 161, at 68.
[170] Markus Burgstaller, "Investment Disputes in the EU", Letters, The Economist, June 29th – July 5th 2019, p. 17.
[171] Nagy, *supra* note 157, at 983.
[172] Katselas, *supra* note 6, at 346.
[173] Anthea Roberts, "Triangular Treaties: The Extent and Limits of Investment Treaty Rights", Harvard International Law Journal, Vol. 56, No. 2 (2015), p. 353.
[174] Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law", Oxford University Press (2012), p. 4 (noting that "Often, the business plan of the investor is to sink substantial resources into the project at the outset of the investment, with the expectation to recoup this amount plus an acceptable rate of

stability for investors as an objective of international investment law, a number of substantive provisions are introduced to investment agreements for the establishment and maintenance of a stable and secure environment for foreign investors.[175] However, the sole existence of these substantive treaty obligations is not adequate to anchor foreign investors' expectations of stability and legal security, so long as treaty partners still retain the power to unilaterally terminate the bonds between them with immediate effect.[176] In the light of the protective characteristic of investment agreements and the demands of foreign investors for solid treaty-based rights, the international investment treaty regime has witnessed the inclusion of two kinds of clause which aim to ensure the stability of a state's investment protection framework at the international level, in a move that at least partly addresses the predicament mentioned above.

The first kind of clause relates to the minimum period of application, or, in other words, the initial validity period of an investment agreement.[177] This clause spells out that once an investment agreement starts to take effect, it would remain in force for a minimum period of time.[178] Within this period, treaty partners are, on a provisional basis, deprived of the power to terminate the treaty, at least in the case of no mutual consent.[179] Foreign investors covered by the treaty would thus be able to have a grip on the minimum period of time that their investments would be under the protection of the substantive and procedural provisions of the treaty with little need to worry about a peremptory revocation of vested rights. This clause in fact seems to have witnessed the evolution of modern investment treaty regime as the first BIT in history signed by Germany and Pakistan already included such a clause,[180] coupled with the fact that a vast majority of investment agreements have been found to establish a minimum of application.[181] Although the precise minimum periods of application vary across investment agreements, Gordon and Pohl established that most of these treaties (72% of the sample) set the period at 10 years.[182] While the minimum period of application would be able to provide foreign investors with a level of stability in terms of the entitlement to treaty-based rights, it also has an apparent shortcoming, as pointed out by Harrison, that those who make

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return during the subsequent period of the investment, sometimes running to 30 years or more"). James Harrison, "The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties", The Journal of World Investment & Trade, Vol. 13, No. 6 (2012), p. 931 (noting that the risks for foreign investors "largely occur because of the long-term nature of investment projects").

[175] Harrison, *supra* note 174, at 931-933 (noting that a number of provisions in investment agreements "seek to protect investors from radical changes of policy in the host state which may undermine their investment").

[176] *Ibid*, at 933.

[177] *Ibid*. Kathryn Gordon and Joachim Pohl, "Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment 2015/02, available at http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf, p. 19 (last visited on May 20, 2022).

[178] Harrison, *supra* note 174, at 933.

[179] Harrison, *supra* note 174, at 934. Gordon and Pohl, *supra* note 177, at 19.

[180] Article 14(2) of the Germany-Pakistan BIT (1959) reads that: "…… It shall remain in force for a period of ten years and shall continue in force thereafter for an unlimited period unless notice of termination is given in writing by either party one year before its expiry. After the expiry of the period of ten years, the present Treaty may be terminated at any time by either Party giving one year's notice." Article 14(2), the Germany-Pakistan BIT (1959).

[181] Harrison, *supra* note 174, at 933. Gordon and Pohl, *supra* note 177, at 19.

[182] Gordon and Pohl, *supra* note 177, at 19.

decisions to invest in the host state at a later stage of the minimum period of application would have less assurance.[183]

The shortcoming mentioned above would thus call for compensation from the second type of clause, i.e., the survival clause or the sunset clause, which deals with the legal effects of termination of investment agreements.[184] The survival clause is aimed to extend the treaty protection accorded to covered investments usually for a fixed period beyond termination, insofar as the investments were made prior to the termination of the treaty.[185] Consequently, established investments would be protected against "an overnight change of the legal regime that covers them", and the treaty's protection continues to apply to them for a fixed period of time beyond termination.[186] This fixed period is a notable variation in the drafting of survival clauses across investment agreements, as states in practice seem to have their own preferences over the length of the period of survival rights.[187] Scholars furthermore have identified that the effects of a survival clause usually last for between five and around twenty years.[188] Another important feature of the survival clause is its broad scope of coverage in the sense that the clause applies to both the substantive and the procedural provisions under an investment agreement, thus qualified investors would still be able to initiate international arbitration against the host state over breaches of the treaty commitments in spite of the termination of the treaty.[189] In addition, it seems that the survival clause indeed holds much sway in maintaining the holistic stability of the investment treaty regime because this clause is said to be ubiquitous in BITs while it also appears in some multilateral agreements, such as the ECT.[190] By contrast, Roberts observed that investment chapters in free trade agreements often do not feature the inclusion of the survival clause.[191] In view of the large presence and recognized potency of the survival clause, more stability is added as a result to the treaty protection framework of established investments. However, at the same time, the survival clause may also be seen as a formidable threat to sovereign states' ability to pursue a prompt exit from investment agreements as they would be held hostage to their previous promises for extra years that could be up to more than two decades. In the same vein, Titi argued that a long survival clause in investment agreements may generate a disruptive impact on a state's efforts to renew its investment treaty framework.[192]

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[183] Harrison, *supra* note 174, at 935.
[184] Harrison, *supra* note 174, at 935.
[185] Gordon and Pohl, *supra* note 177, at 19.
[186] Catharine Titi, "Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law", Journal of International Arbitration, Vol. 33, No. 5 (2016), p. 434.
[187] Harrison, *supra* note 174, at 937.
[188] Titi, *supra* note 186, at 434. Gordon and Pohl, *supra* note 177, at 19.
[189] Harrison, *supra* note 174, at 935-936.
[190] Article 47(3) of the ECT reads that: "The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investor of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date." *Ibid*, at 936. Gordon and Pohl, *supra* note 177, at 19 (noting that 97% of the sample treaties in their research include a survival clause which extends some or all effects of the treaty beyond termination to established investors for a fixed period).
[191] Roberts, *supra* note 173, at 403.
[192] Titi, *supra* note 186, at 434.

A question that may arise from the preceding analysis is whether treaty partners are able to jointly terminate an investment agreement with immediate effects and thereby dismiss the lingering effects produced by the survival clause. A number of commentators that have touched upon this issue hold the opinion that sovereign states can neutralize the survival clause when terminating their investment agreements with mutual consent. Roberts, for instance, argued that foreign investors are entitled to some treaty-based rights only as a result of the expression of consent from sovereign states and these rights, unlike certain human rights deriving from the notion of being a human, are not inherent in the notion of being an investor.[193] This opinion resonated with Voon and Mitchell who believed that sovereign states may extinguish the effects of the survival clause when they agree to terminate an investment treaty because investment agreements are concluded by sovereign states and thus their operation hinges on the continuing consent of these states. They further claimed that sovereign states may also terminate an investment agreement within the minimum period of application so long as mutual consent is achieved between/among the treaty partners for similar reasons.[194] State practice in this respect also shows that rescinding the survival clause upon joint termination is an existent occurrence.[195] However, treaty partners are advised to make clear their common intention to deprive the survival clause of its legal effects when they decide to terminate the investment agreement so as to avoid creating confusion for foreign investors and investment tribunals.[196]

4.4 Exclusion of Investment Arbitration from Treaties

ICSID denunciation and the termination of investment agreements may be framed as representing the two ends of a spectrum of national states' disenchantment with the investment treaty regime. The previous analysis shows that ICSID denunciation is analogous to a shift of market-place insofar as the investment agreements of the denouncing state offer other options of arbitration forums to foreign investors apart from ICSID arbitration. Despite the loss of advantages associated with the ICSID system, for instance, the effective recognition and enforcement mechanism customized by the ICSID Convention,[197] all is not lost because there is a good chance that foreign investors continue to have alternative legal recourse at the international level. The large-scale termination of investment agreements, on the contrary, seems to be much more drastic as this move goes far beyond lashing out at the arbitration center under the auspices of the World Bank to straightforwardly shrug off the

[193] Roberts, *supra* note 173, at 406.
[194] Voon and Mitchell, *supra* note 64, at 430.
[195] Voon, Mitchell and Munro, *supra* note 84, at 467-468 (noting that: 1) Australia and Chile decided to reduce the period of application of the survival clause in their investment agreement from 15 years to 3 years when terminating the agreement; 2) Korea and Chile deprived the survival clause incorporated in their original investment agreement of legal effects when they decided to replace the original investment agreement with a new preferential trade agreement). Voon and Mitchell, *supra* note 64, at 430-431 (noting that: 1) in the practice of Czech Republic of terminating intra-EU BITs with other EU member states by mutual consent, many instances were accompanied by an agreement to modify the survival clauses therein to prevent them from further application; 2) Argentina and Indonesia agreed to terminate their BIT and at the same time to extinguish the survival clause).
[196] Voon, Mitchell and Munro, *supra* note 84, at 468.
[197] Wick, *supra* note 31, at 274-286 (claiming that there are unique advantages to ICSID arbitration through a comparative analysis between ICSID arbitration and non-ICSID arbitration).

added values of the investment treaty regime. It usually represents an outright and relentless revocation of both procedural prerogatives and substantive protection originally vested in foreign investors. The termination of investment agreements, if taken to the extreme by a much broader range of countries, would very likely rock the foundations of the modern legal protection framework of transboundary investment activities. As made clear by Rolland, many national states "are pursuing a variety of tactics to bypass investor-state arbitration in the hope of gaining better control over the process and substantive law".[198] Although her focus when making the statement was the practice of developing countries, the analysis below would suggest that developed countries and developing countries alike have more or less joined hands in an effort to avoid investment arbitration. In addition to ICSID denunciation and the termination of investment agreements, the exclusion of investor-state arbitration from investment agreements is another one of the tactics that have been notably deployed by national states. The exclusion of investment arbitration in fact lies somewhere between ICSID denunciation and the termination of investment agreements on the spectrum. On the one hand, the exclusion of investment arbitration removes the possibility for foreign investors to engage host states directly in legal proceedings at the international level altogether, implicating both ICSID arbitration and non-ICSID arbitration. On the other hand, the exclusion of investment arbitration would not entail the elimination of substantive provisions that provide some protection and national states are required to discharge their duties under the treaty in accordance with the negotiated provisions in them in spite of the lack of investment arbitration as an enforcement mechanism.[199] While investment arbitration continues to be an essential element of the contemporary investment treaty regime, a number of states have mounted a campaign to remove investment arbitration as a legal remedy for investors, sometimes on a selective basis.[200]

4.4.1 Brazil

Brazil has never been a "silent follower" in terms of its approach to the protection of foreign investment versus the dominant paradigm of investment protection that is currently prevailing around the world.[201] Unlike the twist that has been seen in other Latin American countries' attitude towards the ICSID Convention, Brazil has been consistent in holding out its resistance to become a member state of ICSID since the very beginning.[202] At the preliminary

[198] Rolland, *supra* note 117, at 390.
[199] David Gaukrodger and Kathryn Gordon, "Investor State Dispute Settlement A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment 2012/03, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/ISDS_Scoping_Paper.pdf (last visited on Jan. 6, 2022), p. 10 (noting that "ISDS is both an enforcement mechanism that promotes compliance and a means of compensating victims of harm caused by breaches of investment treaty provisions").
[200] Hugo Perezcano, "Risks of a Selective Approach to Investor-State Arbitration, Centre for International Governance Innovation", Investor-State Arbitration Series, Paper No. 3, April 2016, available at https://www.cigionline.org/sites/default/files/isa_paper_no.3.pdf (last visited on May 20, 2022), p. 3 (noting that the general trend is that national states continue to negotiate and conclude IIAs with both substantive protection and investment arbitration despite the fact that "a few states have begun to exclude ISA from certain IIAs").
[201] Nitish Monebhurrun, "Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investment as a Different International Investment Agreement Model", Journal of International Dispute Settlement, Vol. 8, No. 1 (2017), p.80.
[202] ICSID, Database of ICSID Member States, available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited on May 20, 2022).

stage of the establishment of the ICSID system, Brazil opined that investment arbitration was at odds with Brazilian constitutional requirements, including that "the judiciary holds the monopoly of justice", and the dispute resolution mechanism would put foreign investors and domestic investors on an unequal footing.[203] In addition, although Brazil negotiated and concluded 14 BITs in the 1990s, mostly with developed countries, none of them have ever come into force.[204] One of the key reasons for Brazil's refusal to ratify those BITs seems to be precisely the concerns associated with the investment arbitration clauses in them.[205] Two protocols for the promotion and protection of investments negotiated and concluded among South Common Market members (Brazil, Argentina, Uruguay and Paraguay) were equally never ratified by Brazil because of, *inter alia*, the reference to investment arbitration in the grievance procedure.[206] The conceivable outcome of Brazil's reluctance to be integrated into the investment treaty regime with investment arbitration as the defining character is that there have been no publicly known investment arbitration cases involving Brazil as the respondent state or Brazilian investors as the claimant side.[207] However, as widely recognized by commentators, the long-time disengagement with the investment treaty regime did not seem to dampen foreign investors' enthusiasm for sinking capital into Brazil. Indeed, it turns out that Brazil has always been a hotspot for FDI as the country attracts foreign investors for a lot of reasons.[208] The unique experience of Brazil in turn provided ammunition to some critics of the investment treaty regime in their dismissal of the effectiveness and necessity of investment agreements in the effort to boost inward capital flows.[209] Notwithstanding the country's glorious track of FDI injection, commentators pointed out that the time was ripe for Brazil to recalibrate its approach to investment protection, i.e., to embrace the globally accepted investment treaty regime. Kalicki and Medeiros referred to the fact that, among others, Brazil was facing stronger competition in attracting FDI both regionally and internationally speaking and an increasing number of Brazilian companies invest

[203] Jean Kalicki and Suzana Medeiros, "Investment Arbitration in Brazil Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration", Arbitration International, Vol. 24, No. 3 (2008), p. 432 (noting that other reasons behind Brazil's reluctance towards ICSID include: 1) investment arbitration would contradict the practice of state-to-state arbitration; 2) investment arbitration would be unnecessary as Brazil had consistently resolved the aggrievances of foreigners via diplomatic channels or judicial proceedings; 3) investment arbitration would cast doubt on Brazilian courts' ability to adjudicate investments in a fair and impartial manner; 4) it would be against Brazilian law to force foreign investors to waive their right to diplomatic protection).
[204] UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil (last visited on May 20, 2022).
[205] Kalicki and Medeiros, *supra* note 203, at 433-434.
[206] *Ibid*, at 434.
[207] UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/27/brazil (last visited on May 20, 2022).
[208] Geraldo Vidigal and Beatriz Stevens, "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?", Journal of World Investment & Trade, Vol. 19, No. 3 (2018), p. 486 (noting that "Brazil consistently ranks among the top 10 recipients of foreign direct investment (FDI) worldwide"). Monebhurrun, *supra* note 201, at 81 (arguing that such factors as "the local Brazilian market, the abundance of natural and human resources, the relative economical, political and financial stability, the existing legal structure" are enough to attract foreign investors around the world).
[209] Joaquim P. Muniz, Kabir A.N. Duggal, and Luis A.S. Peretti, "The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change", ICSID Review, Vol. 32, No. 2 (2017), pp. 404-405.

substantially abroad in support of the argument that Brazil needs to reconsider its attitude towards investment agreements in general and investment arbitration in particular.[210] Welsh, Schneider and Rimpfel likewise mentioned that there is a need for Brazil to take into account the interests of Brazilian companies investing abroad when restructuring its investment protection framework in response to the changes of circumstances as the country has become a capital exporter.[211]

The Brazilian government evidently echoed the concerns expressed by some commentators and made a significant adjustment with respect to its policy towards investment protection of late. After years of collaboration and coordination among multiple government agencies and especially consultations with representatives from the private sector,[212] Brazil rolled out a new template in 2015 for BIT negotiations and so far has concluded ten Cooperation and Facilitation Investment Agreements (CFIAs) with mostly Latin American and African countries.[213] While traditional investment agreements are largely anchored by investor protection and investment arbitration, Brazil's CFIAs are more concerned with cooperation and investment facilitation.[214] Among the distinctive features of CFIAs are the notable absence of certain common provisions in investment agreements, such as the Fair and Equitable Treatment, and the insertion of corporate social responsibility and investor obligations into the texts.[215] However, the most striking feature of CFIAs appears to be the notable lack of investment arbitration and the introduction of mechanisms of risk mitigation and dispute prevention to take its place.[216] The dispute prevention mechanism contemplated

[210] Kalicki and Medeiros, *supra* note 203, at 438-443.
[211] Nancy A. Welsh, Andrea Kupfer Schneider and Kathryn Rimpfel, "Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties", Journal of Law & Policy, Vol. 45 (2015), p. 143.
[212] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, "Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi", Transnational Dispute Management, Vol. 13, No. 2 (2016), p. 1 (noting that the Brazilian Ministry pf Development, Industry and Commerce led the preparatory work for a model BIT, in collaboration with the Ministry of Foreign Relations, the Ministry of Labour and Employment, the Central Bank of Brazil, the National Confederation of Industries and the Federation of Industries of the State of São Paulo, and that consultations were held with private sector representatives). Robert G. Volterra and Giorgio Francesco Mandelli, "India and Brazil: Recent Steps towards Host State Control in the Investment Treaty Dispute Resolution Paradigm", Indian Journal of Arbitration Law, Vol. 6, No. 1 (2017), pp. 105-106 (noting that consultations were held with the private sector to ensure that interests and concerns of investors would be well taken care of notwithstanding the equally important mandate to safeguard the regulatory framework of the host state).
[213] Muniz, Duggal and Peretti, *supra* note 209, at 405 (noting that Brazil "made public the Cooperation and Facilitation Investment Agreement, which provides the template for Brazil's Model BIT" in 2015). Brazil has entered into CFIAs with ten countries so far, including Mozambique, Angola, Mexico, Malawi, Colombia, Chile, Ethiopia, Suriname, Guyana and United Arab Emirates. UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil (last visited on May 20, 2022).
[214] Bernasconi-Osterwalder and Brauch, *supra* note 212, at 1.
[215] Muniz, Duggal and Peretti, *supra* note 209, at 412 (noting that the provisions in relation to Fair and Equitable Treatment, Full Protection and Security and Observance of Undertakings, or the Umbrella Clause were excluded from the texts of CFIAs). Vidigal and Stevens, *supra* note 208, at 487 (noting that CFIAs are different from other IIAs in the sense that the former institutionalizes efforts to ensure corporate social responsibility by which foreign investors are required to contribute to the extent possible to the "sustainable development of the Host Country by adopting a high degree of measures of corporate social responsibility").
[216] Rodrigo Polanco, "The Return of the Home State to Investor-State Disputes Bringing Back Diplomatic Protection?", Cambridge University Press (2019), p. 59 (noting that Brazil deliberately made a decision not to

by CFIAs is constructed through the institution of ombudsmen or national focal points, and the creation of a Joint Committee comprising governmental representatives from the signatory states.[217] Ombudsmen are governmental agencies in the host state that serve as the first point of contact for foreign investors with a mandate to support those investors, hear their complaints and make recommendations to them after consultations with competent authorities.[218] The treaty drafters obviously expect ombudsmen to play a "central and active" role in prevention of the emergence of formal disputes between foreign investors and host states.[219] If the ombudsmen fail to appease the tensions at their infancy, the conflict may escalate to the second stage where a state party, and only a state party, may submit the concern to the Joint Committee.[220] The Joint Committee would then have 60 days, "extendable by mutual agreement and upon justification for another 60 days", to try to resolve the concern through dialogue and consultation.[221] The noteworthy characteristic of the process before the Joint Committee is that foreign investors, as well as representatives of governmental and non-governmental entities could all be able to provide their insights.[222] The Joint Committee would wrap up the procedure with the issue of a summary report but whether the Joint Committee can make recommendations remains unclear.[223] Upon the exhaustion of dialogue and consultation before the Joint Committee, either state may initiate arbitration against the other state if the concern was not resolved by the mentioned amicable procedure.[224] Despite the possibility of the commencement of inter-state arbitration, Brazilian public officials noted that it should not be the foremost mechanism for dispute settlement.[225]

The exclusion of investment arbitration from CFIAs reveals that Brazil has been consistent in its skeptical view of this controversial dispute resolution mechanism. As argued by Monebhurrun, this strategic choice was made by the Brazilian government for "practical political reasons", otherwise the Brazilian Congress would "assuredly" not ratify the agreements.[226] However, the deprivation of the possibility of direct participation in international proceedings may curtail the significance of the substantive protection that CFIAs have to offer for foreign investors. Cai, for instance, argued that the dispute settlement mechanism envisaged by CFIAs means that "investors have no control over whether a proceeding is initiated and how it is conducted". This in turn led him to take the view that

include ISDS in their investment agreements, opting for a mechanism that is focused on risk mitigation and dispute prevention instead). Vidigal and Stevens, *supra* note 208, at 487 (arguing that the biggest difference between CFIAs and most of other contemporary investment agreements is that the former does not contain ISDS and establishes "a number of institutions and procedures aimed at preventing differences from escalating into litigious disputes").

[217] Polanco, *supra* note 216, at 59 (pointing out that from the perspective of dispute prevention, CFIAs "adopt two different and interrelated levels for the settlement of any 'issue of interest of an investor'", including the creation of ombudsmen or national focal points, and the establishment of the Joint Committee).

[218] Vidigal and Stevens, *supra* note 208, at 488. Monebhurrun, *supra* note 201, at 87-88.

[219] Monebhurrun, *supra* note 201, at 87.

[220] Polanco, *supra* note 216, at 60-61. N Bernasconi-Osterwalder and Brauch, *supra* note 212, at 15.

[221] Polanco, *supra* note 216, at 61. Bernasconi-Osterwalder and Brauch, *supra* note 212, at 15.

[222] Polanco, *supra* note 216, at 61. Bernasconi-Osterwalder and Brauch, *supra* note 212, at 15-16. Monebhurrun, *supra* note 201, at 89.

[223] Bernasconi-Osterwalder and Brauch, *supra* note 212, at 16.

[224] Polanco, *supra* note 216, at 61-62. Bernasconi-Osterwalder and Brauch, *supra* note 212, at 17.

[225] Polanco, *supra* note 216, at 62.

[226] Monebhurrun, *supra* note 201, at 90.

"Brazil does too little to promote investor protection" in this respect.[227] In the context of limited activism on the part of foreign investors in terms of dispute resolution allowed by CFIAs, whether, and if yes, how, may those investors engage host states directly in the resolution of investor-state disputes? Two American professors considered that except the diplomatic recourse enshrined in CFIAs, foreign investors are only provided with domestic judicial and administrative remedies to have their disputes with host states resolved.[228] It may be inferred that due to the availability of investor-state arbitration, litigation before domestic courts of the host state would become a mainstream avenue of dispute resolution for aggrieved Brazilian investors in other countries, and *vice versa*. However, the jury is still out on whether or not foreign investors would be able to refer to the substantive protection provided by CFIAs to vindicate their cases, or whether or not domestic courts would take the initiative to apply CFIAs upon their entry into force in the adjudicative process.

4.4.2 Australia

In a recent article that aims to countenance arbitration of investor-state disputes and pose challenges to the EU's proposal of a permanent investment court, Judge Brower and Ahmad tagged the "strongest rule-of-law states", i.e., Canada, the US, and the EU, as the main sponsors of the "Demolition Derby" against investment arbitration.[229] "Demolition Derby", motor-sport jargon, was transposed to the investment law domain to highlight the series of measures that have been taken by national states to suppress the continuing prevalence of investment arbitration.[230] Judge Brower and Ahmad somehow did not devote much attention to the unique experience of Australia, as another western country with good reputation on the rule-of-law traditions, with respect to national policies towards investment arbitration. But the way Australia has dealt with investment arbitration in recent years demonstrates that radical responses to the arbitration of investment disputes are likely to transcend the traditional North-South divide and national politics is a notable element that is likely to boost the volatility of the investment treaty regime. Meanwhile, Australia's recent experience may further indicate that investment arbitration is facing a severe crisis of trust as surprisingly few constituencies nowadays are willing to argue in favor of reforms in a more moderate form in comparison to the drastic measures taken by some states.[231] With that said, this section is dedicated to an analysis of Australia's erstwhile hostile attitude towards investment arbitration notwithstanding the full recognition that the approach endorsed by the current administration is already different.

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[227] Cai, *supra* note 117, 220.
[228] Sonia E. Rolland and David M. Trubek, "Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries", University of Pennsylvania Journal of International Law, Vol. 39, No. 2 (2017), p. 378.
[229] Charles N. Brower and Jawad Ahmad, "Why the 'Demolition Derby' That Seeks to Destroy Investor-State Arbitration", Southern California Law Review, Vol. 91, No. 6 (2018), p. 1144.
[230] *Ibid* (enumerating several forms that "Demolition Derby" may take, including: 1) interpretation of investment treaties in a manner that effectively removes an essential protection; 2) ICSID denunciation; 3) termination of investment treaties; 4) narrow down the scope of protection offered by investment treaties; 5) greater control of national states over investment arbitration mechanism).
[231] Luke Nottage, "Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and Its Impact in Asia", Asian Studies Review, Vol. 37, No. 2 (2013), p. 254.

Nottage argued that unlike other developed countries in the Asian region, Australia has a history of around two decades over which public concerns were raised about investment arbitration.[232] The latest explosion of public opposition to investment arbitration emerged after 2010 against the backdrop of the negotiations of the Trans-Pacific Partnership Agreement, and was amplified by the first ever investment arbitration initiated against Australia in 2011.[233] The opponents to investment arbitration feared that the inclusion of this mechanism in the TPP Agreement would expose Australia to mammoth risks of legal burden ensuing from investment claims by foreign investors, especially by gigantic multi-national companies from the US.[234] In view of the intense policy debates over an Australian approach to arbitration of investment disputes at that time, it is not surprising that at the government level the then Gillard Government made a bold move to accommodate the prevailing critical and suspicious opinions on investment arbitration. Although other developed countries were recalibrating their own policy stance towards investment treaty commitments as well, Kurtz noted that the Australian practice is a notable departure from the preferred strategy adopted by those other countries.[235] He thus held the opinion that, philosophically speaking, the policy shift made by the Australian government is more consistent with "a hard exit from the regime" chosen by the few Latin American countries discussed above.[236] Trakman, though taking the view that the position taken by the Gillard Government was more moderate than that of several Latin American countries, stated that Australia is the first developed country that openly announced that it would not consider the inclusion of investment arbitration in future Bilateral and Regional Trade Agreements (BRTAs).[237]

It is in its 2011 Trade Policy Statement which is now seemingly unavailable from the Australian government's website that the Gillard Government pledged that Australia would not contemplate the inclusion of investment arbitration in the negotiations of future BRTAs.[238] The Government signalled that they support the doctrine of national treatment which promises foreign investors the same treatment that domestic investors enjoy under local laws. On the contrary, it "does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses" nor "provisions that would restrcit the ability of Australian Governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses…"[239] The Gillard Government was obviously of the view

[232] Luke Nottage, "Investment Treaty Arbitration Policy in Australia, New Zealand and Korea?", Journal of Arbitration Studies, Vol. 25, No. 3 (2015), p. 188.
[233] *Ibid*, at 192.
[234] *Ibid*.
[235] Jürgen Kurtz, "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication", ICSID Review, Vol. 27, No. 1 (2012), p. 66 (noting that the US and Canada tended to narrow down the substantive protections accorded to foreign investors and introduce clauses of exceptions modelled on the law of the WTO in a bid to reduce their risks of exposure to investment arbitration).
[236] *Ibid*, at 66.
[237] Leon E. Trakman, "Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo", UNSW Law Journal, Vol. 35, No. 3 (2012), p. 981.
[238] Leon E. Trakman, "Resolving Investor-State Disputes: Australia's Dilemma and Choices", in Nye Perram edited, "International Commercial Law and Arbitration: Perspectives", Ross Parsons Centre of Commercial, Corporate and Taxation Law (2014), p. 37.
[239] Nottage, *supra* note231, at 255.

that treaty provisions in relation to investment arbitration fall into the scope of the provisions that they would not support. Thus, this led the Government to make the statement that it would discontinue the practice of past Australian governments of seeking "the inclusion of investor-state dispute resolution [especially ISA] procedures in trade agreements with developing countries at the behest of Australian businesses".[240] Trakman noted that the statement made clear that Australia was adopting an all-encompassing position in its rejection of investment arbitration, regardless of whether the involved treaty partner is known for strong rule-of-law traditions or not.[241]

With regard to the drivers behind Australia's policy shift that could have deeply influenced the resolution of investor-state disputes in relation to the country and its outbound investors, a few commentators referred to the findings of the Australian Productivity Commission regarding investment arbitration, the absence of a strong business lobby, and the arbitration case initiated by Philip Morris against the country as the key factors.[242] While the recommendations relating to investment arbitration included in the Productivity Commission's 2010 Research Report on BRTAs were challenged,[243] it seems that there is "a direct causal nexus" between those recommendations and Australia's policy shift.[244] The Report belittled the possible benefits that may be produced by investment arbitration. In addition to the argument that reputational effects would deter governments mishandling their relationship with foreign investors, it dismissed the systematic bias that foreign investors may face in comparison to local investors.[245] More importantly, the Report reached the conclusion that a country's choice to incorporate investment arbitration in its treaties has "no statistically significant impact on foreign investment into that country" by reference to some existing econometric research.[246] At the same time, the Report went further to enumerate the various risks that were believed to be associated with investment arbitration. Among these risks are, allegedly, the "regulatory chill" that could be felt by the host government, the threats posed to democratic (legislative and other) processes, and the not-so-level playing field between foreign investors and local investors.[247] The Report notably further referenced the widespread concerns surrounding investment arbitration *per se*, including, among others, the large costs that may be incurred by Australia and the problems identified with the arbitral procedures, as part of broader efforts to discourage the inclusion of the dispute resolution mechanism by the

[240] *Ibid*, at 256.
[241] Trakman, *supra* note 238, at 45.
[242] Kurtz, *supra* note 235, at 66-73. Kyla Tienhaara and Patricia Ranald, "Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors", International Institute for Sustainable Development, available at https://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/ (last visited on May 20, 2022).
[243] Kurtz, *supra* note 235, at 74 (noting that the Commission's Report ignored the large amount of literature on the topic of the relationship between investment treaties and the increase of inbound FDI but selected one particular study to rush to the conclusion that "committing to ISDS provisions does not influence foreign investment flows into a country"). Nottage, *supra* note231, at 259 (challenging the findings of Commission's Report in relation to investment arbitration by arguing that "putative 'reputational effects' were obviously insufficient to deter the behaviour in such cases" that are related to indirect or "creeping" expropriation).
[244] Kurtz, *supra* note 235, at 73.
[245] Nottage, *supra* note231, at 258-259.
[246] *Ibid*, at 259.
[247] *Ibid*, at 261.

Australian government.[248] Closely related to the research conducted by the Productivity Commission, the second driver often mentioned is that those commercial actors that would benefit the most from investment arbitration failed to respond to the Commission's call for feedback. Kurtz argued that the failure to respond by the industry did not arise from the lack of opportunity but the fact that Australian businesses at that time had not fully realized the benefits of investment arbitration.[249] In addition, the highly controversial *Philip Morris v. Australia*, which subjected the Australian Tobacco Plain Packaging Act 2011 to review by an *ad hoc* investment Tribunal, met with a myriad of concerns about investment arbitration interfering with states' right to regulate in public interests,[250] further contributing to Australia's sudden hostility towards the dispute resolution mechanism over the course of 2010-11.[251] Nottage further considered the anticipation of "the mining boom continuing into the medium term" and the perception that "marginal efficiency gains from further investment are likely to be small and diminishing" as other possible factors behind the Gillard Government's decision.[252] Also noteworthy is that in addition to, and comparatively less discussed than, the executive branch's once hostile attitude, there was also a series of campaigns against investment arbitration going on within the Australian Parliament in recent years.[253] Most strikingly, the Senator for Tasmania, Peter Whish-Wilson of the Australian Greens Party introduced The Trade and Foreign Investment Bill 2014 which sought to prevent the Australian government from concluding any further treaties with investment arbitration as a dispute resolution mechanism.[254]

As indicated by Trakman, the policy shift made by the Gillard Government demonstrated that it was of the view that domestic courts are the apt places for the resolution of investor-state disputes and that the general availability of the judiciary would contribute to a level playing field between foreign investors and their local counterparts.[255] Trakman also commented that the renunciation of investment arbitration shows that the Australian government may seek to replace arbitration of investment disputes with litigation before domestic courts in future treaty negotiations, which would arguably boost the role of domestic courts in investor-state dispute resolution while diminishing that of investment tribunals.[256] Meanwhile, he stated in another contribution that "Australia's position in favor of domestic litigation applies to all future BITs and FTAs that it may negotiate, regardless of the destination of Australian

[248] *Ibid*, at 262.
[249] Kurtz, *supra* note 235, at 68-69. Nottage, *supra* note231, at 264-267 (noting, however, that both public and private interest groups have few incentives to press for a moderate reform of investment arbitration instead of the drastic approach taken by the Gillard Government).
[250] Michael Nolan, "Challenges to the Credibility of the Investor-State Arbitration System", American University Business Review, Vol. 5, No. 3 (2016), p. 430 (noting the existence of arguments that the cases (Philip Morris v. Australia and Philip Morris v. Uruguay) "created a 'chilling effect' on other states that were considering similar tobacco regulation").
[251] Kurtz, *supra* note 235, at 70.
[252] Nottage, *supra* note231, at 262.
[253] Nottage, supra note 232, at 195 (noting that "Since late 2013, opposition parties have contested the Abbott Government's conclusion of FTAs containing ISDS protections through multiple parliamentary inquiries, especially in the Senate where the Government again lacks an absolute majority").
[254] Luke Nottage, "The 'Anti-ISDS Bill' Before the Senate: What Future for Investor-State Arbitration in Australia", International Trade and Business Law Review, Vol. 18 (2015), p. 246.
[255] Trakman, *supra* note 237, at 981-982.
[256] *Ibid*, at 981.

outbound investors and without differentiating between so called 'rule of law' and other jurisdictions". [257] That would effectively mean that, under investment agreements concluded by Australia *ex post*, foreign investors in Australia may have to rely more heavily on domestic courts to resolve disputes with Australian authorities while outbound investors from Australia may likewise have to mainly pin their hope on the trial system of the host state. In his analysis of the implications of the policy shift made by the Australian government, Kurtz argued that the Statement carried no retrospective force, which means that the then existing agreements concerning rights to investment arbitration would continue to be binding on Australia and its treaty partners.[258] He continued with anticipation of the possibility of a stricter interpretation of this policy shift, for instance, that rejection of investment arbitration would only be applicable to negotiations of FTAs with investment chapters rather than that of BITs. But he admitted to his own the limited real-life relevance of this sort of narrower interpretation.[259] Nottage, nevertheless, reflected on the new policy stance on investment arbitration taken by the Gillard Government on a broader canvas. He maintained that what happened in Australia with respect to the arbitration of investment disputes is likely to produce ripple effects within the region and beyond in the sense that economies like China, Japan, South Korea and even the US, would probably follow suit and back away from investment arbitration.[260] These ripple effects, if they emerged in reality, were said to be certain to undermine the framework on treaty protection of foreign investors that had been established in past decades through the "bottom-up" or "step-by-step" approach.[261]

With the benefit of hindsight, one may be tempted to conclude that the authorities from the Australian academia were "overstating" the repercussions of the Policy Statement that renounced investment arbitration for the purpose of negotiations of future BRTAs. The reason is that soon after the Gillard Government lost power the new Australian government reverted to the case-by-case approach in assessment of the need for investment arbitration in treaty negotiations. Consequentially, investment arbitration is still an integral part of the FTAs between Australia and, respectively South Korea (2014) and China (2015), but is omitted from the FTA with Japan (2014).[262] Perhaps a more recent example to show that Australia's sudden hostility towards investment arbitration has been reversed is that the major trade agreement in the Asia-Pacific region – CPTPP to which Australia is a treaty partner, still features investment arbitration.[263] Smith and Mercurio pointed out that although the 2015 Productivity Commission Review continued along the line of opposition to investment arbitration, recent Australian administrations have been willing to include investment

[257] Trakman, *supra* note 238, 45.
[258] Kurtz, *supra* note 235, at 82.
[259] *Ibid*, at 82-83.
[260] Nottage, *supra* note231, at 267-268.
[261] *Ibid*, at 269.
[262] Luke Nottage, "Investor-State Arbitration Policy and Practice in Australia", Centre for International Governance Innovation, Investor-State Arbitration Series, Paper No. 6, June 2016, available at https://www.cigionline.org/sites/default/files/isa_paper_series_no.6oct6web.pdf (last visited on May 20, 2022).
[263] Özlem Süsler and Therese Wilson, "The Phoenix Rises: Is the CPTPP A New Breed of Trade Partnership or More of the Same?", Transnational Dispute Management, Vol. 5 (2019), pp. 5-6 (noting that the ISDS mechanism in the CPTPP would instill confidence into foreign investors "to invest in in parts of the globe where there may be great investment opportunity, but, also high sovereign risk, a weaker legal system and political instability").

arbitration in the agenda for the negotiations of the CPTPP and RCEP.[264] However, the more recent reversal of the blunt rejection of investment arbitration should not be understood to entirely wipe out the longer-term implications of the Gillard Government's hostile attitude. Kurtz, for instance, considered that the greatest impact of the policy shift may prove to fall upon the contest between proponents and opponents of the investment treaty system and particularly investment arbitration in its current form. He added that, owing to what had happened in Australia in relation to investment arbitration, those "self-interested" advocates of the system would not be able to roughly discount the growing concerns over investment disciplines as confined to a handful of developing countries, especially those countries from Latin America.[265] Meanwhile, in view of the lack of motivation to defend investment arbitration and even not uncommon fierce opposition against the mechanism among public and private constituencies, the further evolutionary trajectory of the Australian approach to investor-state dispute resolution over an even longer-term remains in the air. For the purpose of further clarification, Shirlow for instance made clear that Australia's opposition party signalled that it would "seek to remove ISDS provisions from existing free trade agreements and legislate so that a future Australian government cannot sign an agreement with such provisions" if elected in 2019.[266] Thus, calls for domestic litigation as the main avenue for resolution of investor-state disputes in Australia are unlikely to die out in Australia in the short-to-medium term.

4.4.3 A Selective Approach?

Perera and Demeter suggested that the general approach of Australia in dealing with arbitration of investment disputes before the Gillard Government was split as demonstrated by its investment treaty practice. Australia sought to include the investment arbitration mechanism in treaties with those partners that were believed to have no advanced legal system. By contrast, it generally did not insist on provisions relating to investment arbitration in agreements with developed countries as they were regarded as states with a reliable court system.[267] Perhaps the most notable example to confirm the credibility of this claim of a split approach turns out to be Australia's FTA with the US (AUSFTA) which was signed on May 18, 2004, and entered into force on January 1, 2005.[268] Dodge convincingly stated that "AUSFTA's failure to provide for direct investors claims does not represent a rejection of such claims more generally by either the United States or Australia". Both countries were found to have a relatively consistent practice of including the investment arbitration mechanism in their IIAs, especially those signed with developing countries, by the time of

[264] Kyle Dylan Dickson-Smith and Bryan Mercurio, "Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples", Sydney Law Review, Vol. 40, No. 2 (2018), p. 223.
[265] Kurtz, *supra* note 235, at 85.
[266] Esme Shirlow, "2018 in Review: Australia and New Zealand", Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2019/01/21/2018-in-review-australia-and-new-zealand/ (last visited on May 20, 2022).
[267] Thilini Perera and Dalma Demeter, "A Balancing Act: Retaining Investor-State Dispute Settlement Provisions in Investment Agreements and Balancing Stakeholder Interests", Australian Year Book of International Law, Vol. 31 (2013), p.77.
[268] UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/11/australia (last visited on May 20, 2022).

AUSFTA.[269] This US law professor further opined that a solid explanation for the omission of investment arbitration from AUSFTA is that, unlike the comparatively limited investment flows covered by those other investment agreements, the substantial amount of bi-directional capital movements between Australia and the US could potentially give rise to a troubling number of direct investment claims against both countries should the dispute resolution mechanism be included.[270] In reality, conceivably, neither Australia nor the US admitted that it was a fear of direct investment claims that drove them to remove investment arbitration from AUSFTA.[271] Instead, the official reason given for the omission was that each country had adequate confidence in the level of protection accorded to foreign investors by the other's domestic institutions.[272] The Australian government for instance allegedly explained that "[t]his outcome recognizes the fact that both countries have robust and sophisticated domestic legal systems that provide adequate scope for investors, both domestic and foreign, to pursue concerns about government actions".[273] Nottage yet argued that more factors were at play. On the Australian side, he referred to the disproportionate impact that was imposed on the Australian political scene by a few individuals and civil society groups and their concerns about allowing investment arbitration in AUSFTA.[274] The US likewise had little incentive to press ahead with the dispute resolution mechanism due to concessions that could have been made consequentially in other regards which were less palatable for domestic constituencies, and the local concerns over investment arbitration that were brewing at home as a result of *Loewen v. U.S.A.*[275] As already shown above (*ii*. Australia), after the reversal of the Policy Statement made by the Gillard Government, this split approach to the inclusion of investment arbitration seemingly continues to feature in Australia's investment treaty practice. Smith and Mercurio argued that "a case-by-case approach without any underlying guiding principles inevitably leads to confusion and uncertainty in any subsequent negotiations".[276]

In a contribution aiming to shed light on the risks that are associated with a selective approach to investment arbitration, Perezcano addressed the proposition that the dispute resolution mechanism is needed in investment agreements with developed countries on the one hand, and developing countries on the other hand, but that it is not the case for IIAs entered into among developed countries.[277] He considered that, among others, "the argument that developed countries having robust domestic frameworks and institutions is flawed in many respects".[278] The very intent to conclude investment agreements with provisions according absolute protection to investors of the treaty partners in the first place signals a lack of (full) confidence in a country's legal system or in each other's, reciprocally.[279] Thus,

[269] William S. Dodge, "Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement", Vanderbilt Journal of Transnational Law, Vol. 39, No. 1 (2006), p. 23.
[270] *Ibid*, at 24.
[271] *Ibid*.
[272] Nottage, *supra* note 262, at 5.
[273] Dodge, supra note 269, at 24.
[274] Nottage, *supra* note 262, at 6-7.
[275] *Ibid*, at 7.
[276] Dickson-Smith and Mercurio, supra note 264, at 215.
[277] Perezcano, *supra* note 200.
[278] *Ibid*, at 3.
[279] *Ibid*, at 6.

it renders exclusion of investment arbitration from IIAs between/among developed countries on the basis of mutual trust in domestic frameworks and institutions doubtful. Moreover, and perhaps more importantly, the selective approach towards investment arbitration is likely to trigger unwanted responses from developing countries which are already dissatisfied with the current investment treaty regime.[280] Developing countries' perception of a lopsided investment treaty regime, true or not, is bound to be deepened if a selective approach secures prevalence among the Northern countries. That is linked with the debatable assumption that the selective approach is devised to limit developed countries' exposure to direct investment claims while preserving the ability of foreign investors from those wealthier countries to sue developing countries at the international level.[281] If developing countries follow suit by backing away from arbitration of investment disputes, the jury is out on the extent to which investment agreements would still be effective and protective.

This presumption of probable corresponding resistance from developing countries against investment arbitration invites us to look past the experience of Australia and pay attention to the recent dismissal of investment arbitration by another developed economy in the region – New Zealand, especially in relation to the CPTPP. Indeed, the election of a new centre-left Labour-led coalition government in New Zealand in 2017 brought about a strong sense of déjà vu in the domain of investor-state dispute resolution as the new government soon officially unveiled its hostile attitude towards investment arbitration. The incumbent prime minister of New Zealand, Jacinda Ardern, announced in October 2017 that "[w]e remain determined to do our utmost to amend the ISDS provisions of TPP. In addition, Cabinet has today instructed trade negotiation officials to oppose ISDS in any future free trade agreements". Ardern was also reported to liken the investment arbitration mechanism to a "dog".[282] Although the UNCTAD data shows that there has yet been no treaty-based investment claims against New Zealand,[283] investment arbitration was subject to public and parliamentary debates in recent years in the context of negotiations of important FTAs.[284] There were fears that the TPP Agreement would consign New Zealand to an adverse situation where the country would be susceptible to direct claims initiated by "litigious American

[280] *Ibid*, at 11. Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime", Harvard International Law Journal, Vol. 50, No. 2 (2009), p. 492 (noting that a large number of growing critiques of "substantive bias, procedural shortcomings, and political consequences" in relation to the investment treaty regime originate from developing countries, particularly Latin American countries). Olivia Chung, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration", Virginia Journal of International Law, Vol. 47, No. 4 (2007), p. 962 (noting that "[t]he jury is still out on whether foreign investment has actually helped the economies of developing countries, but what is clear is that the unequal obligations and upcoming flood of litigation … have put developing countries in a dilemma").

[281] Perezcano, *supra* note 200, at 11.

[282] Amokura Kawharu and Luke Nottage, "NZ Renounces ISDS: Déjà vu?", Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2017/12/06/booked-luke-nottage/ (last visited on May 20, 2022).

[283] UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/150/new-zealand (last visited on May 20, 2022). Kawharu and Nottage, *supra* note15, at 43 (noting that in as early as 198t, New Zealand was involved in a contract-based investment claim before ICSID where "Mobil initiated proceedings against the Government in respect of a dispute arising under an energy project contract between them though).

[284] Kawharu and Nottage, *supra* note15, at 37 (noting that media attention towards investment arbitration in New Zealand increased dramatically in 2015 as the negotiations of the FTA with South Korea, and the TPP Agreement were under the way).

investors".[285] Despite the hardline attitude towards investment arbitration shown by the Ardern Government, New Zealand became a signatory of the CPTPP Agreement which notably contains provisions relating to investment arbitration. Apart from the minimal changes to the investment arbitration mechanism introduced by the CPTPP Agreement, in comparison to the original TPP text,[286] New Zealand worked out another approach to significantly limiting investment arbitration under the trade agreement. Despite failure to utterly eliminate arbitration of investor-state disputes from the text of the investment chapter, New Zealand signed side letters with five signatories to the CPTPP – Brunei, Malaysia, Peru, Vietnam, and Australia, to exclude compulsory investment arbitration *inter se* alongside the signature of the trade agreement in the early 2018.[287] These side letters signed by New Zealand, according to the government, would significantly lower the risk of the country facing direct investment claims under the CPTPP, as "[t]hese letters cover more than 80% of our [New Zealand's] overseas investment from CPTPP countries as a whole".[288] However, these side letters notably take two different approaches to imposing limitations on investment arbitration, though the common outcome is that the dispute resolution mechanism enshrined by the CPTPP is (almost) extinct for relevant investors. The side letters with Australia and Peru represent the first approach by which investment arbitration is completely removed between New Zealand, and Australia and Peru respectively and covered investors would correspondingly have no right to initiate direct claims against the states under the trade agreement.[289] The second approach, as shown by the side letters with the remaining three countries, represents a rare departure from national states' standard treaty practice regarding consent to investment arbitration. Foreign investors, to whom the second approach is relevant, are still entitled to investment arbitration in theory, but are in fact left to the host states' tender mercies. In the situation that the requisite amicable dispute resolution failed to deliver a settlement between the disputing parties, the host state may decide at its discretion whether it would consent to arbitration in accordance with the investment chapter or not. Thus, the states concerned are given much greater control over arbitral proceedings against them under the second approach due to the lack of a standing offer or consent to arbitration which is nonetheless commonly seen in IIAs that include the investment arbitration mechanism.[290] Another intriguing observation from New Zealand's decision to exclude compulsory investment arbitration with several signatories to the CPTPP is that not only is Australia unsurprisingly involved but developing countries in the region are equally likely to

[285] *Ibid*.
[286] *Ibid*, at 37-38. Heng Wang, "The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?", Journal of World Trade, Vol. 53, No. 2 (2019), p. 337 (noting that compared with the TPP text, the CPTPP Agreement restricts access to investment arbitration for claims in relation to investment screening, investor authorization, private investment contracts, and financial service).
[287] Brenda Horrigan and Vanessa Naish, "New Zealand Signs Side Letters with Five CPTPP Members to Exclude Compulsory Investor State Dispute Settlement", Herbert Smith Freehills, available at https://hsfnotes.com/arbitration/2018/05/09/new-zealand-signs-side-letters-with-five-cptpp-members-to-exclude-compulsory-investor-state-dispute-settlement/ (last visited on May 20, 2022).
[288] New Zealand Foreign Affairs & Trade, Investment and ISDS, available at https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/investor-state-dispute-settlement/ (last visited on May 20, 2022).
[289] Horrigan and Naish, *supra* note 287.
[290] *Ibid*.

agree to or pursue the removal/restriction of investment arbitration versus developed countries. Thus, again, it may be inferred that a selective approach employed by developed countries is liable to bring about a domino effect among the developing countries as well, which would then probably add up to investment arbitration being discarded and investor-state dispute resolution going back to the pre-BIT era.

In a recent contribution to take stock of the freshly concluded United States-Mexico-Canada Agreement (USMCA or NAFTA 2.0), a Polish scholar considered that its approach to investor-state dispute resolution reflects two general trends of the ongoing transformation of the investment treaty regime. While one of the characteristics is "limitation of access of individuals to ISDS in modern IIAs practice by favouring domestic courts", the other refers to "the emergence of enhanced flexibility and the readiness of states to simultaneously apply different methods and procedures among diverse instruments in order to settle foreign investment disputes".[291] Thus, in an effort to confirm the claim of emerging acceptance of a selective approach towards investment arbitration, the investor-state dispute resolution mechanism contemplated by the USMCA should be explored as it offers a crucial glimpse into the policy choice made by the largest economy in the world. The former U.S. President Donald Trump has been known for his relentless reprimand of "bad trade agreements" agreed by past administrations.[292] The NAFTA is one, maybe the most notorious one, of those trade agreements which were attacked, and it was consistently labelled by President Trump as "perhaps the worst trade deal ever made".[293] Against the background of a nationalistic government in power in the US, the USMCA was concluded in late 2018 after more than a year's worth of negotiations among the parties. The negotiations of this new deal were initiated at the request of the Trump Administration with a view to replacing the original text of the NAFTA.[294]

Puig commented that the USMCA is practically, albeit not technically, two bilateral trade deals signed by the US.[295] This claim is well substantiated from the perspective of the design of investor-state dispute resolution embodied in this trade agreement as the United States opted to take different approaches to investment arbitration versus Canada and Mexico respectively. Notwithstanding the huge differences involved, both of the approaches add up to the outcome that the trade agreement significantly reduces the relevance of investment arbitration.[296] This move notably departs from policies promoted by past U.S. administrations

[291] Łukasz Kułaga, "ISDS during a Period of Transformation. Favouring Domestic Courts and Selective Judicialization in USMCA", Transnational Dispute Management, June 2019, p. 2.
[292] Richard O. Cunningham, "Leverage Is Everything: Understanding the Trump Administration's Linkage between Trade Agreements and Unilateral Import Restrictions", Case Western Reserve Journal of International Law, Vol. 51, No. 1/2 (2019), p. 50 (noting that according to the Trump Administration, those "bade trade agreements" contributed to the substantial trade deficit that threatens the US and drove good jobs in the manufacturing sector away from the US to other countries).
[293] Meg Wagner and Brian Ries, "Trump Gives Remarks on US-Mexico-Canada Deal", CNN, available at https://edition.cnn.com/politics/live-news/trump-us-mexico-canada-remarks-oct-18/h_2c0a8c6bad4dc7a2f98acda7c57ea454 (last visited on May 20, 2022).
[294] Molly O'Casey, "Analysis: How the USMCA Changes Investor-State Dispute Resolution", Alternatives to the High Cost of Litigation, Vol. 36, No. 10 (2018), p. 152.
[295] Sergio Puig, "The United States-Mexico-Canada Agreement: A Glimpse into the Geoeconomic World Order", AJIL Unbound, Vol. 113 (2019), p. 57.
[296] *Ibid*, at 58.

dating back to Ronald Regan which had consistently favoured substantive protection backed by investment arbitration.[297] Allegedly, the Trump Administration's hostility towards investment arbitration is not derived from the potential legal risks facing the government but the fact that it would provide an incentive for U.S. companies to move production abroad.[298] Professor Gantz argued that the Trump Administration appeared to believe that investment arbitration would encroach upon U.S. sovereignty and damage American manufacturing industry.[299] Consequently, the investment arbitration mechanism is removed from the investment relationship between the US and Canada with a few exceptions for Legacy Investment Claims and Pending Claims, which means U.S. investors would ultimately not be able to initiate arbitration against Canada under the USMCA, and *vice versa*.[300] U.S. investors in Canada and Canadian investors in the US would then have to largely resort to domestic courts for resolution of investment disputes with authorities, while the good news for them is that the courts within the two countries are generally believed to be "competent, unbiased, and free of corruption" with a few exceptions.[301]

While Landicho and Cohen argued that the USMCA triggered "a veritable sea change" for resolution of investor-state disputes in the region,[302] the new trade agreement should also send sweeping shock waves to the much broader community of investor-state dispute resolution. After all, it was recognized that the NAFTA-based investment claims contribute much to arbitral jurisprudence on investor-state disputes and "have influenced the development of investment arbitration toward a more open method of resolving international investment disputes".[303] The UNCTAD data shows that all the sixteen publicly known treaty-based investment arbitrations against the US were founded upon the NAFTA, while all of them but one were brought forward by investors from Canada.[304] Similarly, twenty-seven out of twenty-eight treaty-based investment arbitrations against Canada were initiated by U.S. investors pursuant to the investment chapter of the NAFTA.[305] Owing to a lack of investment arbitration mechanism between the US and Canada under the USMCA, the total amount of

[297] David A. Gantz, "The United States-Mexico-Canada Agreement: Settlement of Disputes", Baker Institute, available at https://www.bakerinstitute.org/media/files/files/d14a5a86/bi-report-050219-mex-usmca-3.pdf (last visited on May 20, 2022), p. 2.
[298] Cunningham, *supra* note 292, at 51.
[299] Gantz, *supra* note 297, at 2.
[300] Puig, *supra* note 295, at 58.
[301] Gantz, *supra* note 297, at 2.
[302] Robert Landicho and Andrea Cohen, "What's in a Name Change? For Investment Claims under the New USMCA Instead of NAFTA, (Nearly) Everything.", Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2018/10/05/whats-in-a-name-change-for-investment-claims-under-the-new-usmca-instead-of-nafta-nearly-everything/ (last visited on May 20, 2022).
[303] Sergio Puig and Meg Kinnear, "NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration", ICSID Review, Vol. 25, No. 2 (2010), p. 267 (arguing that "Chapter Eleven (of NAFTA) will continue to be a benchmark for the design of other investment treaties, while decisions, awards and pleadings applying Chapter Eleven will inform the complex and growing BIT jurisprudence").
[304] UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america (last visited on May 20, 2022).
[305] UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/35/canada (last visited on May 20, 2022).

investment arbitration cases would be less, if not much less, than it could have been, and the global trend away from this dispute resolution mechanism could be forcefully facilitated. In contrast to the utter elimination of investment arbitration between the US and Canada perhaps to the two neighbours' liking,[306] the dispute resolution mechanism remains to be applicable to the investment relationship between the US and Mexico. However, as will be shown later, the availability of investment arbitration for U.S. investors in Mexico and Mexican investors in the US would be largely conditioned upon the prior use of litigation before domestic courts. In conclusion, the U.S. approach to investment arbitration under the USMCA signals the country's enhanced flexibility and readiness to apply different methods to resolve investor-state disputes, perhaps depending upon the specific profile of the treaty partner in question. But surely it remains to be seen whether the US would carry out this selective approach consistently in the following trade/investment negotiations.

4.5 Prior Use of Local Remedies

We note that, from the brief discussions of the Calvo Doctrine in the preceding text, investment disputes are expected to fall into the exclusive jurisdiction of domestic courts under this doctrine. Around 2005, Professor Schreuer made an interesting analogy between "the return of local remedies" and Carlos Calvo's children and grandchildren. Through this analogy he meant to argue that just as Calvo's children and grandchildren would bear striking resemblance to this famous Argentinian diplomat, the old rule of exhaustion of local remedies seemed to have found its way back to the investment law domain in other legal disguises.[307] By mentioning "the return of local remedies" at that time, he was referring to three phenomena in the investment treaty practice and arbitral jurisprudence, including "the requirement to use domestic remedies for a certain period of time", "domestic forum selection clauses in contracts", and "resort to domestic courts as a substantive requirement of international standards".[308] Where do local remedies stand now? The answer to this follow-up question would seem to be that local remedies are back in the game more confidently even seeing no need for the backdoor route through other legal disguises any longer. Indeed, Foster argued that the relevance of local remedies is one of the most important and controversial issues that have not been settled yet in the field of investment arbitration.[309] Sattorova likewise highlighted the ambivalence about the role of domestic courts and arbitral tribunals in the resolution of investor-state disputes which is shared by national states, especially among developed countries.[310] The EU's discussions of a new external investment policy after the Lisbon Treaty, for instance, happened to highlight the controversies surrounding the

[306] Gantz, *supra* note 297, at 2 (noting that evidently both the Canadian and U.S. governments welcomed the decision to eliminate ISDS from the USMCA).
[307] Christoph Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration", The Law & Practice of International Courts and Tribunals, Vol. 4, No. 1 (2005), p. 3.
[308] *Ibid*, at 3-16.
[309] George K. Foster, "Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration", Columbia Journal of Transnational Law, Vol. 49, No. 2 (2010-2011), p. 204.
[310] Mavluda Sattorova, "Return to the Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law", Legal Issues of Economic Integration, Vol. 39, No. 2 (2012), p. 225.

relevance of domestic courts in investor-state dispute resolution. While the European Commission and the European Council ultimately steered a course to favour the system of investment arbitration after the apparent initial reluctance, the European Parliament seemed to be more concerned about the far-reaching implications of the dispute resolution mechanism, especially about its possible adverse effects on the right to regulate.[311] In its 2011 resolution on the future European international investment policy, the European parliament expressed its view that "changes must be made to the present dispute settlement regime, in order to include greater transparency, the opportunity for parties to appeal, *the obligation to exhaust local remedies where they are reliable enough to guarantee due process*, the possibility of using *amicus curiae* briefs and the obligation to select one single place of investor-state arbitration" (emphasis added).[312] However, in more recent years, the Parliament seemed to have toned down its demand on the re-introduction of exhaustion of local remedies and stepped into line with the Commission in favour of the establishment of a multilateral court system.[313]

The hesitation of national states in determining the relevance of local remedies in resolving investor-state disputes, in combination with a growing backlash against investment arbitration, have led to an even more conspicuous return of local remedies in recent years. In the context of the ongoing transformation of the global landscape of investor-state dispute resolution, an emerging policy choice is that arbitration of investment disputes is retained in investment agreements but foreign investors' access to arbitral tribunals is conditional on the prior use of domestic courts. Litigation via local judiciaries as a prerequisite for the availability of investment tribunals also serves to downgrade the relevance of investment arbitration and elevate the prominence of domestic courts in resolving investor-state disputes. In addition, it is worth noting that this policy choice seems to be unique in a number of initiatives to reform the current system of investment arbitration. In a recent article that aims to chart the panorama of the continuing global campaign to seek improvements in resolving investor-state disputes, Roberts identified three camps among national states and other stakeholders by the standard of their visions for investment arbitration in its current form. These three main camps have emerged to be incrementalists, systemic reformers and paradigm shifters.[314] She, however, noted that the policy choice of re-introducing domestic courts while retaining investment arbitration does not seem to neatly fit in any of the three

[311] August Reinisch, "The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements", Santa Clara Journal of International Law, Vol. 12, No. 1 (2014), pp. 132-133.
[312] European Parliament, European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy, 2010/2203(INI), para. 31.
[313] Vid Prislan, "European Perspectives on the Role of National Courts in the Resolution of Investor-State Disputes", in Yuwen Li, et al., eds, "China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement", Routledge (2019), pp. 141-155.
[314] Anthea Roberts, "Incremental, Systemic, and Paradigmatic Reforms of Investor-State Arbitration", American Journal of International Law, Vol. 112, No. 3 (2018), p. 410 (noting that: 1) incrementalists advocate for moderate reforms in relation to the current system of investment arbitration to address specific concerns; 2) systemic reformers view investment arbitration as a mechanism that is deeply flawed, thus champion a much more comprehensive and significant reform; 3) paradigm shifters do not see merits in foreign investors' ability to initiate direct claims against host states at the international level and thus advocate for other alternatives, such as domestic courts and state-to-state arbitration).

camps,[315] alluding to the fact that this approach centered on the relevance of domestic courts may shed some new light on the common pursuit of a better path for resolving investment disputes. Apart from the emerging scholarly interest in this approach,[316] it was championed by India in its latest version of model BIT and notably adopted by the US and Mexico in the USMCA.

4.5.1 The USMCA

While the system of investment arbitration is notably not applicable to the investment relationship between the US and Canada under the USMCA, it continues to be relevant for U.S. investors in Mexico and Mexican investors in the US. However, one should bear in mind that even in the context of investment disputes between U.S. investors and Mexico (and vice-versa), the availability of investment arbitration for the investors has been substantially limited by the USMCA provisions.[317] Feighery also made clear that "the USMCA significantly curtails ISDS", but he seems to overly simplify the investor-state dispute resolution system put in place between the US and Mexico.[318] He suggested that "[w]ith respect to disputes between US and Mexican investors [sic]", investment arbitration is limited only to foreign investors from a number of sectors.[319] But Annex 14-D (Mexico-United States Investment Disputes) and Annex 14-E (Mexico-United States Investment Disputes related to Covered Government Contracts) to the investment chapter (Chapter 14) of the USMCA have constructed a far more complicated and innovative dispute resolution system than Feighery suggested.[320] The system may be divided into two regimes, respectively regulating general investment disputes and investment disputes related to covered government contracts.

In relation to general investment disputes, Annex 14-D introduces major hurdles for U.S. and Mexican investors to resort to investment arbitration, making the dispute resolution provisions in the USMCA more restricted in comparison to the NAFTA.[321] For one thing, aggrieved investors may only base their investment claims against the host state on alleged violations of provisions with regard to national treatment or most-favored-nation treatment (except with respect to the establishment or acquisition of an investment), or expropriation and compensation (except with respect to indirect expropriation).[322] By specifying the

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[315] *Ibid*, at 417.
[316] Matthew C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?", The Yale Journal of International Law Online, Vol. 41 (2015), p. 12 (arguing that incorporation of local remedies into investor-state dispute resolution would significantly reduce the opposition to investment arbitration). Douglas Wong, "From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration", Singapore Law Review, Vol. 35 (2017), p. 114 (discussing how the relevance of local remedies might be a means to appease the recent backlash against investment arbitration and examining how an expanded role of local remedies might help counter the claim of investment arbitration as a threat to state sovereignty).
[317] Landicho and Cohen, *supra* note 302.
[318] Timothy J. Feighery, "Investor-State Arbitration and Human Rights", Vanderbilt Journal of Entertainment & Technology Law, Vol. 21, No. 2 (2018), p. 434.
[319] *Ibid*, at 434-435.
[320] Chapter 14 Investment, Agreement between the United States of America, the United Mexican States, and Canada, Office of the United States Trade Representative, available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited on May 20, 2022).
[321] O'Casey, *supra* note 294, at 153.
[322] Article 14.D.3, Annex 14-D, Chapter 14 Investment, the USMCA.

substantive provisions upon which investors may rely for the purpose of dispute resolution, this provision imposes a significant limitation on the investors' ability to frame their investment claims. Clearly, the investors would not be able to sue host states on the basis of failure to provide for fair and equitable treatment or allegation of an indirect expropriation.[323] This restriction is bound to deal a mighty blow to the investors' likelihood of securing a victory given that the provisions relating to fair and equitable treatment and indirect expropriation were said to be "the most frequently invoked investment provisions in ISDS and potentially the most successful".[324] Industry lawyers seemed to disagree with the exclusion of indirect expropriation for the reason that direct and outright expropriations are almost extinct from state practice these days with the exception of few countries.[325] For another thing, prior to bringing forward investment claims against the host state, the investors must "first initiate a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures" in question. The dispute may proceed to the stage of investment arbitration only after the investor "obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date" the domestic proceeding was initiated.[326] This limitation on consent to arbitration obviously gives much preeminence and preference to domestic courts in resolving investment disputes, rendering investment arbitration a complementary mechanism to domestic proceedings instead of a substitute. Nevertheless, prior use of local remedies in the USMCA is not absolute in that the investors may get away from this requirement if the local remedies mentioned are "obviously futile or manifestly ineffective".[327] In addition, in relation to U.S. investors initiating proceedings before Mexican courts or administrative tribunals, Appendix 3 to Annex 14-D provides that a U.S. investor "may not submit to arbitration a claim that Mexico has breached an obligation under this Chapter […] if the investor or the enterprise, respectively, has alleged that breach of an obligation under this Chapter, as distinguished from breach of other obligations under Mexican law, in proceedings before a court or administrative tribunal of Mexico".[328] Kułaga suggested that this provision is inconsistent with the requirement to first initiate domestic proceedings, thus creating a Catch-22 situation for U.S. investors.[329] However, this suggested internal inconsistency is not accurate because U.S. investors would still be able to reach arbitration after domestic proceedings if only their claims before domestic courts were not based on the investment chapter but other obligations under Mexican law. Considering that the USMCA, like the NAFTA, would be a self-executing treaty in Mexico,[330] the provision of Appendix 3 seems to be meant to avoid the duplicate applications and interpretations of the investment chapter by Mexican domestic courts and investment tribunals.

[323] Kułaga, *supra* note 291, at 5. Puig, *supra* note 295, at 58.
[324] Kułaga, *supra* note 291, at 5.
[325] Gantz, *supra* note 297, at 3 (noting that industry lawyers have criticized the exclusion of indirect arbitration by arguing that "Most governments these days, maybe with the exception of a few I can think of, don't just issue a federal government decree saying they're going to expropriate your property. It's more sophisticated and it's more complicated than that. For heavily regulated industries it often is through regulation that they lose the value of their investment, often with a discriminatory element").
[326] Article 14.D.5, Annex 14-D, Chapter 14 Investment, the USMCA.
[327] Footnote 24, Article 14.D.5, Annex 14-D, Chapter 14 Investment, the USMCA.
[328] Appendix 3, Annex 14-D, Chapter 14 Investment, the USMCA.
[329] Kułaga, *supra* note 291, at 6.
[330] O'Casey, *supra* note 294, at 154.

The second regime, as contemplated by Annex 14-E, is applicable to investment disputes related to covered government contracts. Although investors whose disputes fall into the scope of this special dispute resolution regime would be insulated from the limitations discussed above, this regime is confined to a specific number of covered sectors which include oil and natural gas, power generation services, telecommunications services, transportation services, and infrastructure (roads, railways, bridges, or canals).[331] Once qualified, investors would be entitled to investment arbitration after a period of six months from the events giving rise to the claim without the need to submit the claim to domestic courts in advance.[332] Furthermore, they would be allowed to initiate a claim against the host states based on allegations of a violation of any obligations under the investment chapter.[333] Gantz thus commented that under the second regime of dispute resolution, the qualified investment claims would enjoy protections like those provided for by chapter 11 of the NAFTA.[334]

Kułaga suggested that from the perspective of investor-state dispute resolution, the USMCA, compared to the NAFTA, should be regarded as an "identity change" or a "new paradigm" rather than a simple "shift". He noted that favouring domestic courts in such a prominent manner represents a remarkable departure from the U.S. traditional approach to investment arbitration, especially taking into consideration the fact that U.S. investors are the most active users of this powerful yet controversial mechanism.[335] The responses to the investment protection provisions in the USMCA from U.S. industries do not sound upbeat. The U.S. Chamber of Commerce, for instance, viewed the investment chapter of the USMCA as "a notable step back" from the NAFTA's Chapter 11 and asserted that it should not become a template for future U.S. trade agreements.[336] It remains to be seen whether the US would carry forward this combination of a selective approach and an emphasis on domestic courts with respect to the issue of investor-state dispute resolution, as reflected in Chapter 14 of the USMCA, to its future treaty practice.

4.5.2 Indian Model BIT 2016

In recent years, the traditional divide between capital-importing countries and capital-exporting countries is becoming blurred,[337] providing an impetus for national states to have a re-examination of their FDI policies. India notably joined the worldwide campaign for a reconstruction of the investment treaty regime of late by providing its own insights into an improved institutional design of investment agreements via the release of an updated version of model BIT. Rajput asserted that, as compared to the 2003 Model BIT, the 2016 Model BIT marked a "structural, philosophical and fundamental shift" in India's vision of investment

[331] Article 6, Annex 14-E, Chapter 14 Investment, the USMCA.
[332] Articles 2 & 4, Annex 14-E, Chapter 14 Investment, the USMCA.
[333] Articles 2, Annex 14-E, Chapter 14 Investment, the USMCA.
[334] Gantz, *supra* note 297, at 2.
[335] Kułaga, *supra* note 291, at 16.
[336] Gantz, *supra* note 297, at 4.
[337] Nishith Desai Associates, "Bilateral Investment Treaty Arbitration and India with Special Focus on India Model BIT, 2016", available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf (last visited on May 20, 2022), p. 2.

treaty design.[338] However, this is not the first major change that has happened to India's approach towards foreign investment and investor protection since its independence in 1947. From 1947 to the end of the 1980s, the Indian economy was to a large extent insulated from the rest of the world, though the government's attitude towards foreign investment within the period reflected nuanced differences.[339] The ideology of economic nationalism dominated India's economic policies in these decades, resulting in the precedence given to national law over international law when it comes to the protection and regulation of foreign investment.[340] Conceivably, India refused to enter into any investment agreements during this stage.[341] The Indian approach towards FDI and investment protection started to change at the beginning of the 1990s when the government decided to launch a series of macro-economic reforms to integrate into the global economy.[342] It is around that time that India's attitude to foreign investment gradually transformed from reluctance, if not hostility, to embracement.[343]

Against the backdrop of the overall strategy of economic liberalization, India signed its first ever BIT with the United Kingdom in 1994.[344] The text of this BIT allegedly became a template for India to carry out BIT negotiations with other economic partners in the following two decades. Even the Indian 2003 Model BIT was said to bear striking resemblance to the UK-India BIT.[345] While the period from 1994 to 2000 witnessed India concluding BITs with almost all the major European economies, India continued to build up its BIT architecture by entering into treaties of this kind with many developing countries and even least developed countries since 2000.[346] These BITs were said to have distinct "capital-exporting country features", which means the treaties place little emphasis on the reservation of the host state's right to regulate, in order to project India as a country that is committed to investment protection on the world stage.[347] Meanwhile, the continuous treaty-making practice culminated in India's reputation that the country boasts one of the largest BIT programmes

[338] Aniruddha Rajput, "India's Shifting Treaty Practice: A Comparative Analysis of the 2003 and 2015 Model BITs", Jindal Global Law Review, Vol. 7, No. 2 (2016), p. 202.
[339] Prabhash Ranjan, "India and Bilateral Investment Treaties – A Changing Landscape", ICSID Review, Vol. 29, No. 2 (2014), pp. 423-425.
[340] *Ibid*, at 425.
[341] Nish Shetty and Romesh Weeramantry, "India's New Approach to Investment Treaties", Asian Dispute Review, Vol. 18, No. 4 (2016), p. 189.
[342] Ranjan, *supra* note 339, at 425-426 (enumerating the measures taken by the Indian government at that time to reform the economy, including "gradually dismantling quantitative restrictions on imports, bringing down tariff rates from a peak of 300 percent to a record low of 35 percent; comprehensive reform of the exchange control regime; and introducing measures aimed at liberalizing FDI and Foreign Institutional Investment (FII) inflows to overcome the problem of over-dependence on debt").
[343] *Ibid*, 427.
[344] UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india (last visited on May 20, 2022).
[345] Nishith Desai Associates, *supra* note 337, at 2. Prabhash Ranjan and Pushkar Anand, "The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction", Northwestern Journal of International Law & Business, Vol. 38, No. 1 (2017), p. 11.
[346] Ranjan, *supra* note 339, at 420.
[347] Ranjan, *supra* note 339, at 429-430 (arguing that these treaties contain "elaborate substantive and procedural assurances for protection of foreign investment, except the right to establishment, with scant exceptions, reservations and carve-out provisions").

around the world, at least until a few years ago.[348] In stark contrast to India's switch from apathy about treaty protection of foreign investment to close-knit engagement with the investment treaty regime, the consistency of the country's distrust and repulsion towards the ICSID system has been reflected by its insistence on not signing the ICSID Convention.[349] The lack of ICSID membership, however, did not manage to insulate India from repeated investment claims from foreign investors for long. After the initial marginal involvement in investment arbitration from 1994 to 2010,[350] a number of foreign investors put India on the defensive challenging a wide range of regulatory measures.[351] India, according to the UNCTAD data, has the dubious pleasure to be crowned as the country that has had by far the most investment arbitration cases against it in the Asian region with 24 cases recorded.[352] Thus, after 2011, India's confidence in its investment treaty-making practice which lasted for around two decades started to rock, marking the beginning of the third phase of the country's approach towards investment protection.[353]

At the same time, India's exposure to more investment claims, especially *White Industries v. India*, brought to the fore the demand to revisit BITs by different actors in India and the internal debates within the Indian government about BITs.[354] The increasing number of investment arbitrations against India, in combination with public backlash against the country's previous investment treaty-making practice, climaxed with a systemic review of BITs by the government which began in 2012.[355] The review process later gave rise to three outcomes, according to Ranjan and Anand,[356] that not only altered the course of India's approach towards investment protection but also injected more momentum and complexity into the ongoing transformation of the investment treaty regime. First, India adopted the updated version of Model BIT in January 2016 which is expected to serve as a template for the country's re-negotiations of existing BITs and negotiations of future IIAs.[357] Second, soon after the approval of the 2016 Model BIT, the Indian government served notices to 58 countries, among which are 22 EU states, to terminate the BITs between them.[358] Third, as

[348] Saurabh Garg, Ishita G. Tripathy and Sudhanshu Roy, "The Indian Model Bilateral Investment Treaty: Continuity and Change", in Kavaljit Singh and Burghard Ilge edited, "Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices", Both Ends, Madhyam and Centre for Research on Multinational Corporations (2016), p. 69.
[349] Won Kidane, "China and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa", Loyola University Chicago Law Journal, Vol. 49, No. 2 (2017), p. 445.
[350] Shetty and Weeramantry, *supra* note 341, at 191 (noting that although nine investment arbitrations were brought against India in 2003-2004, they were all related to one project, the Dabhol power project in Maharashtra, and were all ultimately settled).
[351] Ranjan and Anand, *supra* note 345, at 13-14 (noting that these challenged regulatory measures include "the imposition of retrospective taxes, cancellation of spectrum licenses, revocation of telecom licenses, and others").
[352] UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement?id=96 (last visited on May 20, 2022).
[353] Shetty and Weeramantry, *supra* note 341, at 189.
[354] Ranjan and Anand, *supra* note 345, at 14-16.
[355] *Ibid*, at 16.
[356] *Ibid*, at 17.
[357] Matei Purice and Sandra Azima, "The Changing Landscape of Investment Treaty Protection in India", Transnational Dispute Management, Vol. 15, No. 2 (2018), p. 3.
[358] Prabhash Ranjan, et al., "India's Model Bilateral Investment Treaty Is India Too Risk Averse?", Brookings India Impact Series No. 082018, August 2018, available at https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf (last visited on May

for the remaining countries with which India has BITs, for example, China and Finland, the country requested joint interpretative statements to "prevent expansive interpretations by arbitral tribunals on key substantive principles".[359] While Ranjan and Anand said that there was no information available as to how these countries responded to India's demand for joint interpretation except Bangladesh,[360] this strategy of joint interpretative statements may be not as successful as anticipated since the India-China BIT was unilaterally terminated in 2018 anyway.[361]

The Indian 2016 Model BIT aims to "provide appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of relevant international precedents and practices, while maintaining a balance between the investor's rights and the Government obligations".[362] The observed changes embodied in the text of the 2016 Indian Model BIT to this end include stricter definition of investment and investor,[363] narrower scope of the BIT,[364] the lack of a number of conventional treatment standards,[365] and the addition of "general exceptions for measures to protect public morals, maintain public order, protect human, animal or plant life or health, protect and conserve the environment and protect national treasures or monuments".[366]

Perhaps more significant for aggrieved investors are the changes made to the investment arbitration system introduced by the Indian 2016 Model BIT which indeed do not reflect (many) "institutional changes at the international level" but "hurdles for investors' access to international review".[367] India revives the exhaustion of local remedies rule by request the investors to first "submit its claim before the relevant domestic courts or administrative

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20, 2022), p. 10. Nicholas Peacock and Nihal Joseph, "Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries", Herbert Smith Freehills, available at https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/ (last visited on May 20, 2022).

[359] Ranjan, et al., *supra* note 358, at 10. Shetty and Weeramantry, *supra* note 341, at 192 (providing an example that should the treaties remain silent on whether tax measure are within their scope, the joint interpretative would unequivocally exclude these tax measures from the application of the treaties).

[360] Ranjan and Anand, *supra* note 345, at 18-19.

[361] UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india (last visited on May 20, 2022).

[362] Government of India, Ministry of Finance, Press Information Bureau, "Model Text for the Indian Bilateral Investment Treaty", December 2015, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=133412 (last visited on May 20, 2022).

[363] Aniruddha Rajput, "Safeguarding India's Regulatory Autonomy: Analysis of the New Model Bilateral Investment Treaty", Manchester Journal of International Economic Law, Vol. 14, No. 3 (2017), pp. 283-288 (noting that, for example, the 2016 Indian Model BIT adopts an enterprise-based definition for "investment" and requires "in addition to constitution under the laws of the home state", qualified investors "should have substantial business activities in the home State").

[364] *Ibid*, at 289-291 (noting that, for example, the 2016 Model BIT excludes the actions taken by local governments).

[365] Shetty and Weeramantry, *supra* note 341, at 192 (noting the lack of a most-favored-nation provision, a fair and equitable treatment provision, and a full protection and security provision that relates to non-physical security of investors and investments in the 2016 Model BIT).

[366] *Ibid*.

[367] Stephan W. Schill and Geraldo Vidigal, "Cutting the Gordian Knot: Investment Dispute Settlement à la Carte", International Centre for Trade and Sustainable Development and Inter-American Development Bank, 2018, available at https://www.ictsd.org/sites/default/files/research/rta_exchange_-_investment_dispute_settlement_-_schill_and_vidigal.pdf (last visited on May 20, 2022), p. 15.

bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed".[368] The 2016 Model BIT further imposes a temporal requirement to the effect that such claims must be submitted before the relevant domestic courts or administrative bodies within one year from when the investors first acquired, or should have acquired, the knowledge of the measure in question, and the knowledge that the investment or the investors had incurred loss or damage as a result.[369] For the purpose of more clarity, it adds that "the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action".[370] However, an investor does not need to exhaust local remedies "if the investor or the locally established enterprise can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of Treaty is claimed by the investor".[371] Subsequently, an investor may proceed from the resort to local remedies to the next phase of dispute resolution only after at least a period of five years has elapsed since "the investor first acquired knowledge of the measure in question".[372] This rigid requirement of time to be spent on domestic remedies can be fairly cumbersome for aggrieved investors in the sense that it seems to suggest that "the investor must wait for at least five years even if judicial remedies are exhausted earlier".[373] This is also a notable difference between the dispute resolution mechanism that is applicable between the US and Mexico under the USMCA introduced above (*i.* The USMCA) and one that is envisaged by the 2016 Indian Model BIT. Hanessian and Duggal suggested that the underlying rationale of the five-year period requirement might be related to the fact that "the Indian judiciary is heavily backlogged and operates slowly".[374] However, after the exhaustion of local remedies, there is still a long way ahead for an investor to ultimately reach investment arbitration.[375] In accordance with Article 15.4 of the Model BIT, the disputing parties are then required to try their best to resolve their disputes in an amicable manner, such as meaningful consultation, negotiation or other third party procedures for no less than six months.[376] Should this amicable approach fail to result in an effective settlement between the disputing parties, the investor is then entitled to submit the dispute to ICSID arbitration (though so far practically impossible) or arbitration pursuant to the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules.[377] However, this can happen only if more conditions set by the Model BIT were satisfied. For instance, the

[368] Article 15.1, the 2016 Indian Model BIT.
[369] Article 15.1, the 2016 Indian Model BIT.
[370] Article 15.1, the 2016 Indian Model BIT. Ranjan and Anand, *supra* note 345, at 50 (arguing that this addition "intends to plug any attempt on the part on investors to circumscribe the mandatory requirements of exhausting the local remedies by resorting to technicalities and to reduce the arbitral discretion which may be exercised in this regard" [sic]).
[371] Article 15.1, the 2016 Indian Model BIT.
[372] Article 15.2, the 2016 Indian Model BIT.
[373] Grant Hanessian and Kabir Duggal, "The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?", ICSID Review, Vol. 32, No. 1 (2017), p. 222.
[374] *Ibid*, at 222.
[375] Nishith Desai Associates, *supra* note 337, at 48.
[376] Article 15.4, the 2016 Indian Model BIT.
[377] Articles 15.5 and 16.1, the 2016 Indian Model BIT.

investor would not be able to initiate arbitration if more than six years "have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the disputing investor with respect to its investment, had incurred loss or damage as a result".[378] The investor would equally be deprived of the right to arbitration if more than twelve months have elapsed since the conclusion of the domestic proceedings mentioned above.[379]

Ranjan and Anand indicated that the combined reading of the qualifications introduced by the 2016 India Model BIT makes it very difficult, if possible at all, for foreign investors to resort to investment arbitration for the resolution of investor-state disputes.[380] Schill and Vidigal argued that the re-introduction of exhaustion of local remedies by the Model BIT would ramp up the prominence of domestic courts in investor-state dispute resolution by mandating national judiciaries as the first line of remedy for aggrieved investors. In their opinion, domestic courts would be incentivized to "exercise stronger control over the other branches of government" and "the democratic accountability of investment dispute settlement on the whole" would be stressed. But they equally cautioned that the investment arbitration system contemplated by the Model BIT would be "expensive and perhaps ineffectual" due to the temporal and procedural requirements imposed by the text.[381] Some Indian commentators suggested that the 2016 Model BIT, especially the investor-state dispute resolution mechanism, has a myopic vision because it fails to take into consideration that India is also a capital-exporting country these days with Indian investors increasingly making use of the investment arbitration mechanism.[382] Rajput seems to be more sympathetic to the changes brought about by the Model BIT as he considers India as "still a heavily capital importing country".[383]

Another related question would be, in the light of the conservative attitude demonstrated by the 2016 Model BIT, to what extent countries around the world would agree with the Indian approach and thus to what extent the Model BIT be able to reshape the investment treaty regime and the global landscape of investor-state dispute resolution. Should the 2016 Indian Model BIT be well received by other countries, it "could shape the future course of investment arbitration", and India "would shift from being a rule taker to a rule giver" in the investment law domain.[384] Almost beyond dispute is that "the views of India cannot be ignored",[385] considering that the country is "a critical player in the developing world",[386] "the highest recipient of foreign investment in the world", and "the fastest growing economy".[387]Raijput takes the view that presently India is a more significant player in trade

[378] Article 15.5, the 2016 Indian Model BIT.
[379] Article 15.5, the 2016 Indian Model BIT.
[380] Ranjan and Anand, *supra* note 345, at 51.
[381] Schill and Vidigal, *supra* note 367, at 16.
[382] Ranjan and Anand, *supra* note 345, at 53-54.
[383] Rajput, *supra* note 363, at 300 (making reference to the increasingly supportive attitude of China, another emerging economy in Asia, towards investment arbitration as the country became "a dominant capital exporter").
[384] *Ibid*, at 300.
[385] Hanessian and Duggal, *supra* note 373, at 226.
[386] *Ibid*.
[387] Rajput, *supra* note 338, at 225.

negotiations compared to its status when the 2003 Model BIT was introduced thus having the ability to influence the international treaty-making practice.[388] The good news for India is that, in addition to the signature of a BIT with Cambodia on the basis of the new Model,[389] the Belarus-India BIT (2018) also has an uncanny resemblance to the 2016 Indian Model BIT.[390] However, insofar as information is available, (re)negotiation of investment agreements with major economies around the world based on the new Model is nothing but a difficult and protracted road for India.[391] The country's negotiations of investment agreements with the US, Canada, and EU member states were said to be stalled due to disagreements over the new Model BIT.[392] Moreover, the global community seems to be upset by the 2016 Indian Model BIT, with particular reference to the reduced investment protection, protectionist measures and the requirement to exhaust all local remedies.[393] The U.S. Ambassador to India noted that the Model departs from the high standards that had been seen in other treaties that India had concluded, for instance, with South Korea and Japan.[394] All in all, while it is unclear whether the 2016 Model BIT will be embraced by more countries in the future through India's treaty-making exercise, the Indian approach towards investment protection, especially the philosophy behind the precedence given to domestic courts in resolving investment disputes, offers unique insights into the ongoing vigorous debates about treaty protection of foreign investment in general and resolution of investment disputes in particular.

4.6 Concluding Remarks

Against the backdrop of the legitimacy crisis facing investment arbitration, many national states have been upgrading their investment treaty-making practices by not least recomposing the design of investor-state dispute resolution. As indicated in the analysis above in this chapter, a shift of preference from investment arbitration to litigation via domestic courts has been trending upwards in the recent practices of some of the major economies. Driven by dissatisfaction with investment arbitration, particularly ICSID arbitration, some countries have chosen to denounce the ICSID Convention and exit the ICSID arbitration system. There are also countries which hold an apparent grudge against the overall international investment regime. They decided to distance themselves from the regime by terminating at least some of the investment agreements previously concluded, effectively announcing the demise (though often not immediate) of not only the substantive rights granted to foreign investors but procedural arrangements contained in them. Short of the extremity reflected by the termination of investment agreements, some countries have kept their IIA program in place but cut out investment arbitration as a dispute resolution method. That would mean foreign

[388] *Ibid.*
[389] Ranjan and Anand, *supra* note 345, at 53.
[390] Treaty between the Republic of Belarus and the Republic of India on Investments (2018).
[391] Purice and Azima, *supra* note 357, at 17.
[392] Ranjan and Anand, *supra* note 345, at 53. Nishith Desai Associates, *supra* note 337, at 51 (suggesting that in terms of the renegotiations of investment agreements between India and EU member states, the stagnation is more likely the result of that competence over trade negotiations has been transferred from member states to the EU).
[393] Nishith Desai Associates, *supra* note 337, at 51.
[394] *Ibid.*

investors can only avail themselves of other means for the resolution of investment disputes, including for example state-to-state arbitration (if available) and court litigation. The preference for litigation via domestic courts may also be demonstrated by another approach towards investor-state dispute resolution in which national states condition the initiation of investment arbitration upon the prior use of court litigation. Besides, in the specific investment treaty-making practices, a number of national states adopted a dual approach, which means they opt for a different dispute resolution method *vis-à-vis* different treaty partners. The recent design of investor-state dispute resolution recomposed by some major economies signals that the prominence of investment arbitration may be increasingly accompanied by the growing relevance of litigation via domestic courts. Thus, in the light of the relentless attacks against investment arbitration, the reform of investor-state dispute resolution invites serious consideration about how to allocate jurisdiction over investment disputes between investment tribunals and domestic courts or, in other words, where to place investment arbitration and court litigation within the overall framework.

Chapter 5 The Adjudicative Role of Domestic Courts in Investor State Dispute Resolution

5.1 Introduction

Although investment arbitration has been acclaimed as the defining feature of international investment law,[1] previous analysis (Chapter 3) shows that domestic courts have not been edged out of the international investment law regime. On the contrary, they are likely to be involved in the process of investor-state dispute resolution at different stages. Even in the case that investment arbitration is chosen as the avenue for dispute resolution, the involvement of domestic courts in assisting the process may at times be required, to a greater extent in non-ICSID arbitration and to a lesser extent in ICSID arbitration. Among other rather common forms of engagement, the judiciaries of host states may be called upon to adjudicate investment disputes and domestic courts *loci arbitri* may take up the judicial review of investment awards.

The positive analysis of national practice concerning investor-state dispute resolution in Chapter 4 shows that resolving investment disputes via domestic courts is preferred by at least some countries of late. The policy stances of these countries converge in the promotion of domestic courts as a forum for dispute resolution but diverge in the extent to which domestic courts are favored relative to investment arbitration. The most drastic approach seems to be abandoning recourse to investment arbitration altogether and vesting domestic courts with the nearly exclusive authority to resolve investment disputes.[2] Against the background that investment arbitration has been viewed by many stakeholders with suspicion, a shift from international arbitration to litigation before domestic courts and any attempt to do so appear to be justified intuitively. However, that nation states have employed differing approaches to investor-state dispute resolution in recent treaty-making practice suggests that the choice between domestic courts and investment arbitration has become an arguably more divisive issue. Thus, alongside the ongoing debates about the potential reform of investment arbitration *per se*, domestic courts should also be integrated into the discussions with an eye to facilitating the resolution of investment disputes. To ascertain the tradeoffs of domestic courts as a forum for investment dispute resolution and to decide to what extent these courts should/could be relied on relative to investment arbitration, a comparative institutional analysis of the mainstream options for dispute resolution (focusing on litigation and arbitration) available to nation states becomes necessary. Such an analysis aims to deepen the understanding of the relative advantages and disadvantages of each proposed dispute resolution design, and to provide a frame of reference for nation states in deciding upon the desirable dispute resolution design in various different circumstances.

As indicated later in this chapter, by conducting a comparative institutional analysis of three different designs of investor-state dispute resolution - exclusive reliance on domestic courts

[1] Wolfgang Alschner, "The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality", Yale Journal of International Law, Vol. 42, No. 1 (2017), p. 2.
[2] Armand de Mestral and Lukas Vanhonnaeker, "Reforming Investor-State Arbitration by Recourse to the Domestic Courts of Host States", Centre for International Governance Innovation, Policy Brief No. 156, September 2019, https://www.cigionline.org/sites/default/files/documents/PB%20no.%20156.pdf (last visited May 20, 2022), p. 1.

for dispute resolution, investment arbitration working as an alternative to court litigation, and investment arbitration working as a complement to court litigation, this reseach argues that both investment arbitration and domestic courts have their respective advantages and disadvantages. To tackle the current crisis facing investor-state dispute resolution and conduct reforms in an effective manner, a smart mix of court litigation and investment arbitration should be introduced, because the complement model is more likely to achieve the pre-determined goals of investor-state dispute resolution. This research does not claim that investment arbitration is a monster that should be ditched altogether nor overstate that court involvement as the initial step should be a panacea that will magically cure all the problems bogging down investor-state dispute resolution. Instead, this research maintains that investor protection is a legitimate cause and should be an obejective to pursue; that objective, however, does not have to be achieved by granting foreign investor a direct and immediate access to investment arbitration. Such approach does not take into account the evolving reality nor bear the potential to achieve the expected goals of investor-state dispute resolution. This research also does not support full reliance on domestic courts, which would subject foreign investors to the mercy of national authorities.

This chapter attempts to bring domestic courts into the broader discussions about the overall reform of investor-state dispute resolution by focusing on the adjudication of investment disputes in domestic courts. In doing so, this chapter conducts a comparative institutional analysis of a handful of dispute resolution options facing nation states, with reference to Professor Yuval Shany's goal-based approach to an analysis of the effectiveness of international courts and tribunals in particular, and international adjudication in general.[3] To lay down the framework for a comparative institutional analysis of different dispute resolution designs, the reasons why a goal-based approach is selected are clarified and the goals of investor-state dispute resolution are discussed (Section 5.2). This chapter then proceeds to the assessment of the effectiveness of the following options for investor-state dispute resolution: domestic courts as the exclusive forum (Section 5.3), investment arbitration as a substitute for domestic courts (Section 5.4), and investment arbitration as a complement to domestic courts (Section 5.5). This chapter concludes with summaries derived from the foregoing analysis (Section 5.6).

5.2 A Goal-Based Approach and the Goals of Investor-State Dispute Resolution

The provisions in IIAs for the resolution of investment disputes are divergent,[4] which is evidence that modern international investment law system is highly fragmented.[5] In the face

[3] Yuval Shany, "Assessing the Effectiveness of International Courts", Oxford University Press (2014), pp. 13-16 (arguing that the dominant goal-based approach in assessing organizational effectiveness in social science literature serves well to analysis the effectiveness of international adjudication).
[4] David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment 2012/03, OECD Publishing. August Reinisch, "The Scope of Investor-State Dispute Settlement in International Investment Agreements", Asia Pacific Law review, Vol. 21, No. 1 (2013), pp. 8-14 (providing a brief and non-exhaustive overview of some types of investor-state dispute resolution clauses in IIAs).
[5] Jaemin Lee, "Mending the Wound or Pulling It Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law", Northwestern Journal of International Law & Business, Vol.

of the choice between domestic courts and investment arbitration, national states are often likely to pitch their policy stances somewhere on the spectrum with exclusive remedy through domestic courts at one end and direct access to investment arbitration at the other. While national states, as a general principle, are free to negotiate the terms of an international treaty,[6] including investor-state dispute resolution provisions in IIAs, "lawyers [are] interested in developing a critical perspective on international adjudication" to improve the adjudicatory design or procedures.[7] In order to assess the effectiveness of the different options about the choice between domestic courts and investment arbitration, a range of yardsticks should be determined in advance in order to provide a normative baseline for a comparative institutional analysis. A goal-based approach, which is notably championed by Shany and has been applied to some international adjudication mechanisms,[8] is adopted here to assist in the determination of yardsticks for a comparison of different dispute resolution options. This goal-based approach also provides methodological guidance for a critical appraisal of the judicial review system in relation to investment arbitration. Above all, as an indispensable initial step of any normative analysis according to the goal-based approach, the goals or aims of an organization (in this case investor-state dispute resolution), i.e., "the desired outcomes it ought to generate", should be ascertained.[9]

5.2.1 A Goal-based Approach

When it comes to the academic research of international adjudicatory mechanisms, a diversity of approaches would be conceivably adopted by interested scholars. However, some approaches may fall into the trap of confirmation bias, attributing weight to evidence and events that support the predetermined hypothesis while ignoring those which may disprove it.[10] The application of such flawed approaches would thus lead to a biased analysis of the effectiveness of international adjudicatory mechanisms and inaccurate understanding of them. On the contrary, as will be shown below, a goal-based approach holds promise in establishing

39, No. 1 (2018), pp. 21-22 (arguing that a highly fragmented international investment law system "creates a problem of fragmented norms and a fragmented dispute settlement system").

[6] Joel P. Trachtman, "The Economic Structure of International Law", Harvard University Press (2008), p. 122 (arguing that, treaties, like contracts, derive their validity from the agreement of parties). See *cf.*, Olivia Chung, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration", Virginia Journal of International Law, Vol. 47, No. 4, pp. 957-959 (arguing that in the BIT negotiation process, developing countries are in a very disadvantaged position while developed countries could take advantage of their strong bargaining position to impose broad obligations).

[7] Shany, *supra* note 3, at 15.

[8] Puig attempted to recast ICSID's legitimacy debate by introducing an interdisciplinary approach which is conditioned upon the ascertainment of the goals of the institution. Sergio Puig, "Recasting ICSID's Legitimacy Debate: Towards A Goal-based Empirical Agenda", Fordham International Law Journal, Vol. 36, No. 2 (2013), pp. 465-504. Donoghue applied the goal-based approach to assess the effectiveness of the International Court of Justice where she serves as a judge. Joan E. Donoghue, "The Effectiveness of the International Court of Justice", ASIL Proceedings, Vol. 108 (2014), pp. 114-118. Similarly, Agon applied the goal-based approach in the context of the WTO dispute settlement system to assess its effectiveness. Sivan Shlomo Agon, "International Adjudication on Trial: The Effectiveness of the WTO Dispute Settlement System", Oxford University Press (2019).

[9] Shany, *supra* note 3, at 14.

[10] Hogan Lovells, "Confirmation Bias and the Law", available at https://www.hoganlovells.com/en/publications/confirmation-bias-and-the-law (last visited on May 20, 2022).

a reliable framework against which an analysis of the effectiveness of these mechanisms may be conducted.

5.2.1.1 Why a Goal-based Approach?

The ever-increasing number of international dispute resolution mechanisms has fascinated international lawyers and international relations scholars,[11] but their popularity in various areas of international law has also courted waves of criticism of their effectiveness.[12] However, the assessments of the performance of international dispute settlement systems and the debates about their effectiveness often lack a well-organized answer for what it means for such a system to be effective.[13] Thus, in an effort to decide whether an international adjudicatory mechanism is "good" or "bad", or, in other words, to assess the effectiveness of that mechanism, the question of what defines effectiveness in international adjudication is of primary importance. Professor Andrew Guzman presented an overview of how the existing legal literature measures the effectiveness of international dispute settlement systems and unveiled their respective flaws. Some commentators adopted the level of compliance with rulings as a measure of effectiveness, but this standard does not consider the role of an international adjudication mechanism in supporting the relevant legal norms.[14] Others relied on usage rates as a proxy for effectiveness, but this method may also lead to inaccurate findings.[15] Limited resort to an international adjudicatory mechanism may reflect the general uselessness of the mechanism in question (its perceived lack of effectiveness) or its achievement in encouraging relevant parties to pursue an out-of-court settlement or reinforce dispute avoidance (its perceived effectiveness).[16] Guzman pursued a different approach by defining effectiveness as "the tribunal's ability to enhance compliance with the associated substantive obligation".[17] Shany noted that, while a norm compliance approach is better than a ruling compliance approach, the former may ignore other potential or actual effects of an international adjudicatory mechanism.[18] For instance, even if improved compliance by states and other relevant actors with the associated substantive rules is achieved, whether the dispute settlement procedure *per se* is fair and efficient is uncertain. Consequently, the norm compliance approach is not adequate for the purpose of assessing the effectiveness of international adjudicatory systems due to the limited underlying considerations, though it cogently highlights a major facet of the anticipated values of such systems.

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[11] August Reinisch, "The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration", in Isabelle Buffard, et al., eds, "International Law between Universalism and Fragmentation", Brill (2008), p. 107.

[12] Andrew T. Guzman, "International Tribunals: A Rational Choice Analysis", University of Pennsylvania Law Review, Vol. 157, No. 1 (2008), p. 173 (stating that critics view international dispute resolution mechanisms "as both a threat and a waste of resources").

[13] *Ibid*, at 174.

[14] *Ibid*, at 187.

[15] *Ibid*, at 188.

[16] Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-based Approach", American Journal of International Law, Vol. 106, No. 2 (2012), p. 227.

[17] Guzman, *supra* note 12, at 188.

[18] Shany, *supra* note 16, at 228.

The inherent drawbacks of the abovementioned definitions of judicial effectiveness which prevail in legal studies on the effectiveness of international adjudicatory mechanisms necessitate the pursuit of a more compelling approach as a substitute. In the light of the "relatively novel and underdeveloped" debates about judicial effectiveness in international law scholarship,[19] the rich social science literature on organizational effectiveness may provide a more comprehensive and methodical framework for the analysis of the effectiveness of international adjudicatory mechanisms.[20] The argument for the viability and credibility of transposing the approaches applied in organizational studies to the analysis of judicial effectiveness lies in the fact that international adjudicatory mechanisms may be regarded as public organizations as well.[21] However, a cursory glance at relevant social science literature all but fails to provide a ready answer because the approaches employed in it to assess organizational effectiveness are not one-dimensional.[22] Nonetheless, the most dominant definition of effectiveness in organizational studies seems to be based on the rational system or goal-based approach, which deems an effective organization as one that accomplishes its specific objective aims.[23] The goal-based approach is based on the idea that an organization is established to achieve certain policy goals,[24] "both formally specified or implicit".[25] Thus, the structure, operation and dynamics of an organization should be coordinated to ensure that the specific policy goals are fulfilled.[26] By the same token, in order to measure the effectiveness of an organization, the gauge lies in the extent to which the performance of that organization is in alignment with the predetermined goals.[27]

Notwithstanding the prevalence and dominance of the goal-based approach in organizational studies, social scientists assess the effectiveness of organizations by other means as well.[28] Thus, the desirability of applying the goal-based approach, rather than the others, to measure the effectiveness of international adjudicatory mechanisms should be further clarified from a comparative perspective. To this end, the natural system and open system approaches should be outlined since these two models, in combination with the goal-based approach, "account for much of the variance in measures of effectiveness."[29] The natural system approach views survival as the overriding goal of an organization.[30] Correspondingly, with this approach, an organization's survivability and its ability to acquire enough resources to maintain its long-term existence are the key parameters in assessing its effectiveness.[31] In other words, an

[19] Shany, *supra* note 3, a 13.
[20] *Ibid*. Agon, *supra* note 8, at 24.
[21] Shany, *supra* note 3, at 13.
[22] *Ibid*.
[23] *Ibid*, at 13-14.
[24] Richard W. Scott, "Organizations: Rational, Natural, and Open System", Prentice Hall (2003), p. 9.
[25] Jessica E. Sowa, Sally Coleman Selden and Jodi R. Sandfort, "No Longer Unmeasurable? A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness", Nonprofit and Voluntary Sector Quarterly, Vol. 33, No. 4 (2004), p. 71.
[26] Scott, *supra* note 24, at 26.
[27] Richard W. Scott and Gerald F. Davis, "Organizations and Organizing: Rational, Natural, and Open Systems Perspectives", Prentice Hall (2007), p. 36.
[28] Shany, *supra* note 16, at 230 (referring to the argument that "there may be as many models of effectiveness as there are studies of organizational effectiveness").
[29] Scott, *supra* note 24, at 351.
[30] *Ibid*, at 352.
[31] Shany, *supra* note 3, at 15.

organization that fails to obtain sufficient resources for the maintenance of survival could not pass muster in an effectiveness test. This criterion seems appropriate in assessing the effectiveness of organizations in the private sector, the survival of which is closely aligned with value maximization, but its application to organizations in the public domain for the same purpose becomes dubious.[32] Although long-term existence may indicate that core stakeholders are satisfied with the performance of an international adjudicatory mechanism, this criterion proves inappropriate as a benchmark for assessing judicial effectiveness because survival is not necessarily related to success and vice versa.[33] Unlike the natural system approach which demonstrates obsessive focus on the survival of an organization, the open system approach to organizational effectiveness, as the name indicates, considers an organization on a broader canvas where the organization is interdependent with its external environment.[34] It follows that an effective organization is supposed to interact with the surrounding environment in a well-balanced and sustainable manner, i.e., "attract resources and transform them into valuable goods that then serve the needs of relevant constituencies."[35] The open system approach rightly takes the social impact of an organization into account yet fails to provide for normative yardsticks against which organizational effectiveness would be gauged.[36] Thus, it may not serve well to navigate the analysis of the effectiveness of an international adjudicatory mechanism because such an analysis would be concerned with what that mechanism does, but not what it should do.[37]

Aside from the normative aspects that offer the goal-based approach an advantage,[38] it stands out in comparison with the other approaches also for other reasons. For one thing, the goal-based approach provides for a rather simple and thus practicable formulation in assessing the effectiveness of international adjudicatory mechanisms, as the core work required would be centered on the extent to which the goals of that mechanism are attained.[39] For another thing, the comparative advantage of the goal-based approach is further reinforced by the strength of the normative argument that underpins it, namely, that international adjudicatory mechanisms should execute their mandates.[40] In the context of the reform of investor-state dispute resolution, the application of this approach holds great promise because it may arguably not only shed new light on the effectiveness analysis of the current mechanism but also provide for an analytical framework to evaluate the existing reform proposals. While states have taken different measures in their respective investment treaty-making practice in response to

[32] Mark H. Moore, "Managing for Value: Organizational Strategy in For-Profit, Nonprofit, and Governmental Organizations", Nonprofit and Voluntary Sector Quarterly, Vol. 29, No. 1 (2000), p. 195 (arguing that in nonprofit and governmental organizations, "there may be no necessary connection between the survival of the organization and the value it is producing"). Agon, *supra* note 8, at 27.
[33] Shany, *supra* note 3, at 15-16 (arguing that the shutdown of an international adjudicatory mechanism may be attributed to either its failure or success in fully attaining its goals).
[34] Scott, *supra* note 24, at 352.
[35] Shany, *supra* note 3, at 14.
[36] *Ibid*, at 15.
[37] *Ibid*.
[38] Shany, *supra* note 16, at 230-231 (arguing that normative considerations cannot be completely divorced from a goal-based analysis of the effectiveness of international adjudicatory mechanisms).
[39] *Ibid*, at 237.
[40] *Ibid*.

the growing concern about investment arbitration,[41] whether these measures would lead to a more effective model of investor-state dispute resolution remains unclear. The goal-based approach, however, presents an evaluative standard by indicating that a tenable responsive measure would transform the current mechanism into a more effective one that is aligned better with its preconceived goals. In addition, the application of the goal-based approach to assess the existing reform proposals echoes the call made by Lisa Sachs to "take a step back to consider the original objectives of ISDS and IIAs more generally, and to evaluate reform efforts against the features and objectives of the system as a whole."[42] Thus, the goal-based approach is employed herein to construct a methodical framework for a comparative institutional analysis of a handful of dispute resolution options facing national states, and this aims to determine which option is the most effective one. It is also drawn upon to develop a critical analysis of the system of judicial review of investment awards.

5.2.1.2 The Goals in Whose Eyes?

International adjudicatory mechanisms commonly involve a wide array of stakeholders, including national states, international organizations, executive officials, judges/arbitrators, members of the legal community, the general public and others.[43] All these stakeholders may often have divergent or even contradictory interests and expectations as regards these mechanisms.[44] Thus, any research project that attempts to apply the goal-based approach to measure judicial effectiveness must "select the goal setters whose choices and expectations should inform the analysis."[45] Shany argues that, mandate providers, which refer to national states and/or international organizations that establish and control international adjudicatory mechanisms, should be described as the goal-setter in preference to other constituencies for a number of reasons.[46] First of all, according to the principal-agent and trusteeship theories, mandate providers delegate the authority to international adjudicatory mechanisms to act as guardians of their collective interests.[47] It follows that these mechanisms should faithfully execute their mandates and achieve the goals determined by their mandate providers. Second, the goal-setting process concerning mandate providers may often include links of public consultations and open discussions, thus making the goals of mandate providers more accessible than that of other sources, such as the goals determined through internal judicial deliberations. Therefore, from a methodological perspective, the goals of mandate providers are more likely to provide precise benchmarks for the effectiveness analysis of an international adjudicatory mechanism.[48] Third, the presumptive transparent and democratic

[41] See 2.4 The Legitimacy Crisis of Investment Arbitration of Chapter 2.
[42] Lisa Sachs, "Remarks to ASIL Annual Meeting, April 4, 2018, on 'ISDS at a Crossroads: How the Settlement of Investor-State Disputes Is Being Transformed'", available at https://ssrn.com/abstract=3372537 (last visited on May 20, 2022).
[43] Shany, *supra* note 16, at 240.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*, at 240-242 (arguing that mandate providers exercise control over international adjudicatory mechanisms in the form of formulating and periodically revising their legal mandates, signaling support of, or displeasure with, their performance, and even terminating their operation in extreme cases.)
[47] *Ibid*., at 241.
[48] *Ibid*, at 241-242.

process mentioned above lends more credence to favoring the goals of mandate providers by supporting their legitimacy.[49]

Investor-state dispute resolution, not unlike other international adjudicatory mechanisms, equally concerns the interests of a wide range of stakeholders, including but not limited to national states, foreign investors, arbitral institutions, arbitrators, lawyers, and the general public.[50] Therefore, with regard to the future of investor-state dispute resolution, these stakeholders are likely to have competing or conflicting interests, which in turn entail different goals. The general analysis above describes national states as the qualified goal-setters as they provide mandates for investor-state dispute resolution by virtue of the signature and ratification of IIAs that contain the relevant dispute settlement provisions. On top of the rationales mentioned, more nuanced reasons exist to buttress the choice of the goals of states as benchmarks for evaluating the investor-state dispute resolution options, i.e., domestic courts as the exclusive remedial avenue, direct access to investment arbitration, and investment arbitration as a complement to domestic courts. If the goals of other stakeholders rather than those of states are selected as the benchmarks, the analysis of those dispute resolution options would not be likely to produce credible outcomes as a result of evidently partial and ill-balanced yardsticks.

Foreign investors, for instance, would maximize their utility in investor-state dispute resolution by preserving the direct access to investment arbitration without the need of prior use of local remedies and expanding the scope of claims that may be referred to investment tribunals. Thus, they would have little incentive to pursue a systematic reform of the current "successful" mechanism, because an effective, neutral, and independent forum is in place to protect their interests from their perspective.[51] It follows that some measures aiming to limit their access to investment arbitration, e.g., "by reducing the subject-matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by 'mailbox' companies", would conceivably put foreign investors off.[52] Likewise, arbitral institutions and arbitrators have their own interests to guard amid the heated debates of investor-state dispute resolution. ICSID, for instance, depends to a large extent on the growing caseload of investment arbitrations to maintain and expand its influence and

[49] *Ibid*, at 242 (arguing that "such goals are likely to coincide, and are presumptively in accord, with commonly held perceptions of the public good and the traditional role of international courts in contributing to it").
[50] That explains why debates and dialogues about the reform of investor-state dispute resolution often involve representatives from both the public and private sectors. For instance, an event – "Stakeholder Session on UNCITRAL ISDS Reform Process", which took place in October 2018, was co-organized by the International Institute for Sustainable Development (IISD), UNCITRAL, the Columbia Center on Sustainable Development (CCSI) and the International Institute for Environment and Development (IIED) to bring together interested members of the public and government officials to discuss the reform of investor-state dispute resolution. IISD, "Stakeholder Session on UNCITRAL ISDS Reform Process", https://www.iisd.org/event/stakeholder-session-uncitral-isds-reform-vienna-oct-2018 (last visited on May 20, 2022).
[51] Stephan W. Schill, "Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward", E15 Task Force on Investment Policy, July 2015, https://pure.uva.nl/ws/files/2512304/163092_E15_Investment_Schill_FINAL.pdf (last visited on May 20, 2022), p. 2.
[52] UNCTAD, "Reforming Investment Dispute Settlement: A Stocktaking", IIA Issues Note, Issue 1, March 2019, p. 5.

reputation.[53] Arbitrators, unlike public judges who receive a secure income, are faced with much more intense market pressures.[54] As a result, arbitrators allegedly "have tried to ensure that no substantial reforms are implemented which could compromise their own financial position."[55] Thus, arguably, both arbitral institutions and arbitrators would benefit from a model of investor-state dispute resolution where the number of investment arbitrations continues to rise (hopefully in a rapid manner). In the same vein, lawyers, especially those from elite international law firms who dominate the investment arbitration market,[56] would benefit immensely from the ever-increasing number of investment arbitrations alike.[57] In addition, the goals of the general public are also hardly appropriate for the purpose of an effective analysis because they are more likely to be unduly swayed by politics and media, generating a strong dislike of investment arbitration which allegedly benefits no-one but foreign investors.[58] To sum up, if the goals of these other stakeholders are selected for the purpose of assessing the effectiveness of the dispute resolution options, the outcome of such an assessment would be vulnerable to accusations of partiality and extremism.

The goals set by national states for investor-state dispute resolution, nevertheless, are more likely to represent an delicate balance of the interests of a broad range of constituencies. That is because states are tempted to maximize their own utility by internalizing the preferences of their constituencies rather than going to extremes by embracing complete investor protection or according no protection at all.[59] On the one hand, states, especially capital-exporting states, have undeniable interests in providing investors with the chance to resort to a competent forum for the resolution of investor-state disputes as an integral part to investment protection. [60] On the other hand, they are evidently incentivized to take other interests into consideration

[53] ICSID, "2019 ICSID Annual Report", available at https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR19_CRA_Web_Low_DD.pdf#:~:text=In%20addition%20to%20cases%20under%20the%20ICSID%20Convention,ICSID%20system%20and%20the%20skill%20of%20its%20Secretariat. (last visited on May 20, 2022), p. 2 (Meg Kinnear, the Secretary-General of ICSID, arguing that the trends of growing number of registered cases before ICSID send a clear signal of "the robustness of the ICSID system and the skill of its Secretariat").

[54] Daphna Kapeliuk, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators", Cornell Law Review, Vol. 96, No. 1 (2010), pp. 59-60.

[55] Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling An Investment Arbitration Boom", Corporate Europe Observatory and the Transnational Institute (2012), p. 47.

[56] *Ibid*, at 22.

[57] *Ibid* (arguing that "Lawyers at elite arbitration law firms charge up to US$ 1,000 per hour for their services, with cases often handled by teams of lawyers and taking years").

[58] For instance, more than 300 civil society organizations and trade unions from 73 countries signed a letter in October 2018, urging governments to move away from the investment arbitration system and facilitate a discussion on termination or wholesale replacement of existing agreements at UNCITRAL. Center for International Environmental Law, "300+ Civil Society Organizations from 73 Countries Urge Real Reform at United Nations Discussions on Corporate Investor Rights", available at https://www.ciel.org/news/300-civil-society-organizations-from-73-countries-urge-real-reform-at-united-nations-discussions-on-corporate-investor-rights/ (last visited on May 20, 2022).

[59] Anthea Roberts, "Triangular Treaties: The Extent and Limits of Investment Treaty Rights", Harvard International Law Journal, Vol. 56, No. 2 (2015), p. 357.

[60] Todd Allee, "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions", International Studies Quarterly, Vol. 54, No. 1 (2010), p. 23 (arguing that home governments are more likely to delegate authority to an independent forum, such as ICSID, for the resolution of investor-state disputes when a home country contains a sizeable number of outward-oriented firms).

in their calculations of the design of an appropriate dispute resolution mechanism, including their potential exposure to international proceedings and the corresponding strain on their public budgets.[61] Thus, the goals of investor-state dispute resolution envisioned by its mandate providers, national states, and their implementation, are more promising for striking a balance between investment protection and the interests of other relevant stakeholders. On top of that, the fact that the investment treaty regime is increasingly plagued by a legitimacy deficit further justifies the preference for the goals of national states in the effectiveness analysis of the investor-state dispute resolution options.[62] One of the burning issues in the investment treaty regime, if not the most pressing one, that remain under-addressed, is a refinement of investor-state dispute resolution as many stakeholders doubt the legitimacy of investment arbitration and states become increasingly suspicious of its utility.[63] Correspondingly, some states are taking measures, some of which are rather radical, to get rid of the investment treaty regime in general and investment arbitration in particular.[64] Thus, from a practical point of view, the goals of national states should be preferred tothat of other constituencies in a bid to maintain and enhance the confidence of these mandate providers in the investment treaty regime which arguably generates benefits for many of the stakeholders concerned.[65] After all, states should not be presumed as benevolent actors and they are engaged in the investment treaty regime (including the dispute resolution mechanism therein) to pursue their own goals.[66] In addition, according to Eric Posner and John Yoo, international adjudicatory mechanisms "are likely to be ineffective when they neglect the interests of state parties and, instead, make decisions based on moral ideals, on the interests of groups or individuals within a state, or on the interests of states that are not parties to the dispute."[67]

5.2.2 The Goals of Investor-State Dispute Resolution

The application of the goal-based approach to the analysis of the effectiveness of the design options of investor-state dispute resolution, insofar as domestic courts are concerned, facing national states requires the identification of the goals of this treaty-based mechanism as the initial step. This identification process may not be straightforward or effortless since IIAs somehow do not reserve space for a dedicated illustration of the ends that the investor-state dispute resolution mechanism is expected to achieve. That, however, does not mean that the goals of investor-state dispute resolution are elusive because the texts of IIAs and the treaty-

[61] OECD, "Government Perspectives on Investor-State Dispute Settlement: A Progress Report", Freedom of Investment Roundtable, 14 December 2012, p. 6 (indicating that some countries that have defended multiple cases "have adjusted the ISDS provisions in their model treaty texts and their agreed treaties to reflect their experiences as respondents).
[62] David Schneiderman, "International Investment Law's Unending Legitimization Project", Loyola University Chicago Law Journal, Vol. 49, No. 2 (2017), p. 232.
[63] *Ibid*.
[64] See Chapter 4 The Rise of Domestic Courts in Recent Treaty-making Practice amidst Uncertainty of Investment Arbitration.
[65] Stephan W. Schill and Vladislav Djanic, "Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law", ICSID Review, Vol. 33, No. 1 (2018), pp. 33-42 (arguing that the investment treaty regime may contribute to governing the global economy, the promotion of the rule of law, the generation of domestic economic interests, and sustainable development).
[66] Roberts, *supra* note 59, at 357.
[67] Eric A. Posner and John C. Yoo, "Judicial Independence in International Tribunals", California Law Review, Vol. 93, No. 1 (2005), p. 7.

based character of this adjudicatory mechanism can effectively inform the identification process. Before proceeding to a comparative institutional analysis of the dispute resolution options using the goal-based approach, it is vital to ascertain the goals of investor-state dispute resolution by tapping into the texts of the readily available IIAs and the research outcomes in the existing literature.

5.2.2.1 Fair and Efficient Dispute Resolution

As its name implies, the primary goal of investor-state dispute resolution should be resolving the disputes between foreign investors and host states in a fair and efficient manner. These disputes are concerned with alleged non-compliance with investment disciplines by host states, which has caused harm to the economic interests of foreign investors.[68] If these disputes linger on without an effective adjudicatory mechanism, risks of deterioration of international relations, disinvestment by foreign investors, and inhibition of economic activities would intensify.[69] The investor-state dispute resolution mechanism, unlike state-state dispute settlement which is typically an integral part to IIAs as well,[70] grants to covered investors a standing in bringing claims against host states before investment tribunals without the espousal of their host states.[71] Fair and efficient resolution of investor-state disputes as a goal of investor-state dispute resolution not only conforms to legal senses and traditions,[72] but also derives support from the nature and substance of IIAs. The 2012 U.S. Model BIT, for instance, recognizes "the importance of providing an effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration."[73] While some investment agreements rather explicitly highlight the necessity of an effective (fair and efficient) dispute resolution mechanism, most of them nonetheless seemingly stop short of specifying the goals of investor-state dispute resolution in the preamble or relevant provisions.[74] However, to the extent that dispute resolution is recognized as a part of efforts to create favorable conditions for foreign investments,[75] the stress on investment protection in the preamble of investment agreements justifies fair and

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[68] Emily Osmanski, "Investor-State Dispute Settlement: Is There A Better Alternative?", Brooklyn Journal of International Law, Vol. 43, No. 2 (2018), p. 639.
[69] Shany, *supra* note 16, at 245.
[70] Nathalie Bernasconi-Osterwalder, "State-State Dispute Settlement in Investment Treaties", International Institute for Sustainable Development, Best Practices Series, October 2014, p. 3.
[71] Arseni Matveev, "Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty", University of Western Australia Law Review, Vol. 40, No. 1 (2015), p. 349.
[72] Cesare P. R. Romano, et al., "Mapping International Adjudicative Bodies, the Issues, and Players", in Cesare P. R. Romano et al., eds, "The Oxford Handbook of International Adjudication", Oxford University Press (2013), p. 18 (arguing that "Adjudication has been thought to be a cost-effective method for settling disputes (or solving problems)").
[73] 2012 U.S. Model Bilateral Investment Treaty.
[74] The exceptions which expressly refer to effective dispute resolution noted are the few BITs concluded by the United States in accordance with 2004 US Model BIT, including the US-Uruguay BIT (2005) and the US-Rwanda BIT (2008). UNCTAD, "International Investment Agreements Navigator", UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america (last visited May 20, 2022).
[75] Wilhelm Kohler and Franck Stähler, "The Economics of Investor Protection: ISDS versus National Treatment", available at https://econ.au.dk/fileadmin/Economics_Business/Research/Seminars/2018/Investor_protection_final.pdf (last visited on May 20, 2022), p. 1 (arguing that ISDS aims to "protect foreign investors against domestic policies causing 'unjustified' harm").

efficient handling as a goal of investor-state dispute resolution.[76] The historical trajectory of the evolution of international adjudicatory mechanisms also supports the view that fair and efficient dispute resolution should be a goal sought by mandate providers.[77]

Fair and efficient dispute resolution, as a generalized statement of desired virtues in the process, may break down into some concrete procedural and substantive characteristics that should be satisfied by adjudicatory mechanisms. For instance, ensuring fairness in investor-state dispute resolution calls for an independent and impartial forum where decision-makers are not in thrall to either side of the disputes, especially considering that the parties involved in investor-state disputes are not on an equal footing.[78] Fairness should not be confined to disputing parties. Thus, third-party participation should be guaranteed to ensure that public interests are not compromised in the process and that private investor interests do not override non-economic interests.[79] Meanwhile, competence, as an institutional dimension of any adjudicative process, is inextricably linked to the quality of dispute resolution.[80]

Competent adjudicators with professional experience and expertise are thus indispensable for the achievement of fair and efficient resolution of investor-state disputes.[81] Furthermore, it is virtually self-evident that efficient investor-state dispute resolution should avoid exorbitant costs and lengthy proceedings.[82] In addition, efficient investor-state dispute resolution requires the existence of a well-functioning enforcement mechanism which commits disputing parties to the terms of the rulings made by adjudicative bodies.[83] Without such an enforcement mechanism, compliance with the rulings would likely be left to the mercy of the losing party.

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[76] OECD, "International Investment Perspectives", 2006 Edition, p. 145 (arguing that "BITs traditionally stress the importance of creating favourable conditions for investments and/or investors of both parties").
[77] Shany, *supra* note 16, at, at 246.
[78] UNCTAD, "Investor-State Disputes: Prevention and Alternatives to Arbitration", UNCTAD Series on International Investment Policies for Development, 2010, p. 10.
[79] Schill and Djanic, *supra* note 65, at 30 (arguing that critics of the international investment law regime are concerned that the interests of foreign investors are protected at the expense of public interests, "such as the environment, human rights, the right to health, cultural heritage, or the rights of indigenous peoples").
[80] Competence refers to "the ability of trials and of triers (judges and juries) to investigate, understand, and make the substantive social decisions that may come to them." Neil K. Komesar, "Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy", University of Chicago Press (1997), p. 138 (arguing that competence is an institutional dimension that should be taken into consideration of any discussion of the advantages and disadvantages of the adjudicative process).
[81] Gabrielle Kaufmann-Kohler and Michele Potestà, "The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards", CIDS Supplemental Report, 15 Nov. 2017, p. 24 (arguing that the most individual selection criterion for qualified adjudicators, in the context of discussions of a prospective Multilateral Investment Court, concerns professional experience and expertise). Article 2 of the Statute of the International Court of Justice provides that "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who **possess the qualifications required in their respective countries for appointment to the highest judicial offices**, or are **juriconsults of recognized competence in international law** (emphasis added)."
[82] Jayoung Jeon, "Drafting an Optimal Dispute Resolution Clause in Investment Treaties", PKU Transnational Law Review, Vol. 4, No. 2 (2016), p. 189 (arguing that "A good ISDS provisions should encourage early and effective resolution, and lower the costs of managing disputes"). Johan Gernandt, "Cost and Time Effectiveness of Dispute Resolution", Contemporary Asia Arbitration Journal, Vol. 3, No. 2 (2010), p. 201 (arguing that "cost is directly related to time effectiveness" in that "The longer an arbitration lasts, the more expensive it is for the parties").
[83] *Ibid*, at 189-190 (arguing that the investor-state dispute resolution system should be able to lead to enforceable results).

5.2.2.2 Norm Compliance

International adjudicatory mechanisms are often established through inter-state treaties, and, accordingly, these mechanisms are intended to interpret and apply the norms set out in these treaties.[84] In general terms, the work of these mechanisms is focused on monitoring the conduct of the parties to the treaty, identifying the violations of substantive norms, and issuing rulings to restore compliance and/or impose corrective measures.[85] All these efforts are supposed to promote compliance with the governing international norms, and, by doing so, to augment the credibility of the undertakings embodied in them.[86] By the same token, investor-state dispute resolution could be understood as a legal innovation to step up compliance by treaty parties with the norms of investment agreements where this mechanism acquires a mandate and makes sense.[87] This understanding conforms to the popular conception in the investment law scholarship that the investor-state dispute resolution system, as an almost ubiquitous feature of modern investment agreements, is an enforcement mechanism for international investment law.[88] IIAs create obligations for treaty parties with respect to the treatment of foreign investors and their investments, and these "external constraints and disciplines" serve to foster and reinforce values related to the principle of good governance within host states.[89] However, those treaty parties may at some point, for some reason or other, fail to comply with the obligations set out in investment agreements to which they have committed themselves.[90] Thus, as a significant enforcement mechanism for IIAs, investor-state dispute resolution should contribute to the promotion of compliance with investment disciplines not least by providing covered investors with an avenue to complain about the alleged misconduct of host states. The goal of inducing compliance with the underlying investment agreements is in line with the expectation of treaty parties (as the mandate providers) for investor-state dispute resolution given that compliance is central to the role of international law in regulating international relations.[91] More specifically, reformers, particularly those in developing countries, see investment agreements as powerful tools to accelerate the modernization of their legal systems, because these instruments

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[84] Shany, *supra* note 16, at 244.
[85] *Ibid*, at 245.
[86] *Ibid*, at 244-245.
[87] The obligations contained in IIAs, especially traditional investment agreements, are essentially one-way in the sense that sovereigns have obligations while investors do not. Tim R. Samples, "Winning and Losing in Investor-State Dispute Settlement", American Business Law Journal, Vol. 56, No. 1 (2019), p. 139.
[88] David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment 2012/03, p. 10 (arguing that investor-state dispute resolution is an enforcement mechanism that promotes compliance). Akhmad Bayhaqi and Howard Mann, "ISDS as an Instrument for Investment Promotion and Facilitation", APEC Policy Support Unit, Policy Brief No. 28, October 2019 (arguing that investor-state dispute resolution "functions as an enforcement mechanism for obligations under investment treaties").
[89] Samples, *supra* note 87, at 125. Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law", Oxford University Press (2008), p. 25.
[90] Zoe P. Williams, "What, When, Where and Why? Patterns in Investor-State Arbitration", in Kavaljit Singh and Burghard Ilge eds., "Rethinking Bilateral Investment Treaties: Critical Issues and Policy Options", Both Ends, etc., (2016), pp. 36-37 (arguing that non-compliance of treaties by states may result from their lack of ability to do so or the outcome of careful cost-benefit calculations).
[91] Andrew T. Guzman, "A Compliance-Based Theory of International Law", California Law Review, Vol. 90, No. 6 (2002), p. 1830.

introduce external checks and disciplines on national governance regimes which are difficult to agree upon and implement at the domestic level.[92] The effectiveness of these external checks and discipline would in turn largely depend on whether the procedural mechanisms in investment agreements, particularly investor-state dispute resolution, would be able to induce states to comply with treaty standards of good governance. In addition, if compliance with IIAs cannot be established and sustained, the resources devoted to the negotiation and maintenance of these treaties will be discarded and their anticipated economic functions will be lost.[93] Non-compliance with the investment discipline embodied in IIAs would be likely to bring about more negative externalities, including, among others, increased costs for dispute resolution, rising political antagonism among states, less cordial investor-state relationship, a less favorable global investment climate, and reduced cross-border capital flows.

5.2.2.3 Facilitating the Objectives of the Investment Law Regime

Most international adjudicatory mechanisms are established as a part of their respective legal regimes which usually comprise a specific set of treaties and, in some cases, organizations.[94] As a result, a built-in bias may arguably become characteristic of these mechanisms in the sense that they may be expected to contribute to the attainment of the goals of the overarching regimes where they originate from.[95] For instance, the Dispute Settlement System of the World Trade Organization (WTO), which is embedded in the complex WTO legal framework, is meant to sustain the long-term operation of the multilateral trading system and to support the realization of the goals of the WTO, such as trade liberalization and facilitation.[96] It follows that investor-state dispute resolution, which has been a salient procedural element of IIAs for decades,[97] should equally through its operation facilitate the accomplishment of the goals of the underlying investment law regime. However, to the best knowledge of the author, most of the existing literature on the reform of investor-state dispute resolution seemingly neglects to reveal their discussions with due regard to the overall objectives of the investment law regime. On the other hand, in some more recent literature, a handful of investment law scholars have addressed the goals of IIAs and thereby elaborated further on their visions of the future contours of the investor-state dispute resolution system.[98] Likewise, the Report of UNCITRAL Working Group III for its 35th session suggests that

[92] Rudolf Dolzer, "The Impact of International Investment Treaties on Domestic Administrative Law", New York University Journal of International Law and Politics, Vol. 37, No. 4 (2005), pp. 971-972.
[93] *Ibid*. Alan O. Sykes, "The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design", American Journal of International Law, Vol. 113, No. 3 (2019), pp. 485-509 (arguing that IIAs serve a dual function – to restrain host states from imposing international externalities on foreign investors and to reduce inefficient risks that uneconomically increase the cost of imported capital in host states).
[94] Shany, *supra* note 16, at 246.
[95] *Ibid*.
[96] Agon, *supra* note 8, at 67.
[97] Schill, *supra* note 51, at 1.
[98] Bayhaqi and Mann, *supra* note 88. It is argued that IIAs and ISDS are mainly intended to advance four objectives: "(1) promote investment flows; (2) depoliticize disputes between investors and states; (3) promote the rule of law; and (4) provide compensation for certain harms to investors." Lise Johnson, et al., "Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?", Columbia Center on Sustainable Development, http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/ (last visited on May 20, 2022).

government representatives also urged the Group to take a holistic view of investor-state dispute resolution in its work to advance reforms not least by exploring whether the mechanism was achieving its stated objectives.[99]

The pressure on the goal of investor-state dispute resolution to advance the objectives of the investment law regime then begs the question of what precisely constitutes those objectives. First and foremost, the established view in the investment law scholarship is that IIAs should primarily serve to protect foreign investors and their investments, on the one hand, and to promote investment flows, on the other hand.[100] The preambles of many investment agreements also confirm that treaty parties desire to provide favorable conditions for investors and to stimulate the cross-border flow of capital through the operation of IIAs.[101] In addition, a retrospective review of the investment law regime reveals that the emergence of investment agreements also aims to depoliticize international investment relations by setting out legal rules governing the regulation of foreign investments and thus dissolving the disagreement between countries, especially between the North and the South.[102] From this perspective, international investment law in general and investor-state dispute resolution in particular fulfil a valuable function of reducing political antagonism by subjecting international investment relations to the rule of law instead of power politics.[103] Furthermore, the pursuit of a strengthened rule of law as an additional goal of international investment law

[99] UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-fifth Session (New York, 23-27 April 2018)", A/CN.9/935, p. 15.

[100] Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", Harvard International Law Journal, Vol. 46, No. 1 (2005), pp. 75-79 (arguing that the goals of the BIT movement include investment protection and promotion). Genevieve Fox, "A Future for International Investment? Modifying BITs to Drive Economic Development", Georgetown Journal of International Law, Vol. 46, No. 1 (2014), p. 232 (arguing that while developed countries regard BITs as a means to protect their nationals' investments overseas, developing countries sign on to these treaties for more inflows of FDI to benefit economic development). See, *cf*., Anthea Roberts, "Triangular Treaties: The Extent and Limits of Investment Treaty Rights", Harvard International Law Journal, Vol. 56, No. 2 (2015), p. 376 (arguing that investment protection and increased foreign investment are not goals in and of themselves). According to Anne van Aaken, "It is not only questionable whether the (only) purpose of IIAs is the protection of investment, but also whether it is actually a purpose at all. As most preambles reveal, the protection and promotion of investment is the means to an end, the end being the maximization of welfare, development, or prosperity of the home and host states." Anne van Aaken, "Interpretational Methods as An Instrument of Control in International Investment Law", ASIL Proceedings, Vol. 108 (2014), p. 198.

[101] The preamble of the 2012 U.S. Model BIT includes a statement which reads: "Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties." 2012 U.S. Model BIT. The preamble of the 2018 Dutch Model BIT indicate the parties desire "to strengthen their traditional ties of friendship and to extend and intensify economic relations between them by creating conditions with a view to attract and promote responsible foreign investment of the Contracting Parties in their respective territories that contribute to sustainable economic development." Netherlands Model Investment Agreement, 19 October 2018, https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden/modeltekst-voor-bilaterale-investeringsakkoorden.pdf (last visited on May 20, 2022).

[102] Jeswald W. Salacuse, "The Treatification of International Investment Law", Law and Business Review of the Americas, Vol. 13, No. 1 (2007), p. 155 (arguing that the multiplication of investment agreements in part resulted from the contestation between industrialized countries and newly decolonized countries about the content of international investment law).

[103] Stephan W. Schill, "In Defense of International Investment Law", in Marc Bungenberg, et al., eds., "European Yearbook of International Economic Law", Springer (2016), p. 313.

is often mentioned in the literature.[104] However, while IIAs clearly aspire to consolidate the international rule of law by committing states to a set of established legal standards of treatment towards foreign investments,[105] whether their goal likewise includes the promotion of the rule of law at domestic level remains less straightforward. The domestic rule of law may seem to fall outside the remit of IIAs especially considering the cliché that these agreements are initially established as a substitute for lame and ineffective domestic regimes.[106] However, the opportunity that treaty parties and their investing nationals have to fall back on the legal rules and remedies in investment agreements when a violation of international investment discipline occurs, does not negate the states' wish to boost good governance at domestic level. For one thing, it is counterintuitive to argue that the domestic rule of law is not in the minds of treaty negotiators if for no other reason than because, as Rudolf Dolzer argues, "domestic rules applicable to foreign investors must be adjusted to accord with the obligations imposed by the international treaty."[107] For another thing, states conclude international treaties to promote inter-state cooperation, which is necessary for avoiding the imposition of negative externalities on each other and for producing public goods.[108] The investment protection orientation of investment agreements indicates that states desire to avoid negative externalities by requiring the other side(s) to accord due protection to their investing nationals, or, in other words, by inducing appropriate state behavior which may consist of many forms of regulation. From that perspective, treaty parties, as the mandate providers of investment agreements, surely aim to improve the domestic rule of law in host states at least as far as foreign investment regulation is concerned when they conclude these agreements.

5.2.2.4 Legitimizing the Investment Treaty Regime

Although it is often an unstated goal, international adjudicatory mechanisms are expected to operate as a legitimacy booster for the overarching treaty regimes,[109] not only because they are expected to make sure that the underlying legal norms and rules are enforceable, but their own legitimacy is mapped onto that of the overall architecture. Since legitimacy concerns public perceptions of a specific regime and thus affects its long-term existence and efficacy, the legitimacy-conferring goal of international adjudicatory mechanisms is essential to the attainment of the ultimate goals of the associated regime.[110] In the specific case of investor-state dispute resolution, this goal may arguably warrant extra attention in that the investment

[104] Johnson, et al., *supra* note 98. Salacuse, *supra* note 102, at 161.
[105] Peter-Tobias Stoll, "International Investment Law and the Rule of Law", Goettingen Journal of International Law, Vol. 9. No. 1 (2018), p. 276 (arguing that IIAs accord protection to foreign investors by putting substantive rules and procedural remedies in place, displacing power play and uncertainty and thus becoming an important achievement of international rule of law).
[106] Mavluda Sattorova, "The Impact of Investment Treaty Law on Host States: Enabling Good Governance?", Hart Publishing (2018), p. 137 (arguing that "even though initially created as a substitute for lacking and ineffective domestic regimes and not intended as a catalyst of regulatory reform in host states, international investment law has subsequently developed into a mechanism that can foster positive transformation at a national level").
[107] Dolzer, *supra* note 92, at 955.
[108] Eric A. Posner and Alan O. Sykes, "Economic Foundations of International Law", The Belknap Press of Harvard University Press (2013), p. 63.
[109] Shany, *supra* note 16, at 246-247.
[110] *Ibid*, at 247.

treaty regime is dragged down by a legitimacy gap (if not a crisis) and (some) countries are tempted to abandon international courts/tribunals amid the rise of nationalism and populism around the globe.[111] While an appropriate design of investor-state dispute resolution is clearly not a panacea for bridging the legitimacy gap,[112] the goal of enhancing the legitimacy of the underlying investment treaty regime is apparently failing with the current design, not least because the design in and of itself attracts considerable critical attention.[113]

Notwithstanding the recognition that the legitimacy of the investment treaty regime implies a multiplicity of issues and dimensions, some salient challenges against the current design of investor-state dispute resolution squarely reveal the contours of some of the unresolved legitimacy concerns. The current design is charged with the accusations that it distorts the level playing field between economic actors,[114] that it gives short shrift to states' judicial sovereignty,[115] that it deviates from the customary practice shared by other areas of public international law,[116] and that it exposes countries, including those from the North, to an ever increasing number of international arbitration claims.[117] These concerns should be addressed in any attempt to engender positive changes to investor-state dispute resolution, otherwise the persistent legitimacy gap would continue to threaten the longevity and utility of the overall investment treaty regime. It follows that the extent to which investor-state dispute resolution may contribute to the legitimacy of the overall investment treaty regime should be considered as a benchmark for a comparative institutional analysis of the design options where domestic courts would be involved to varying degrees.

5.3 Effectiveness Analysis of Domestic Courts as the Exclusive Forum

Before the emergence of the investment treaty regime and the associated treaty-based investment arbitration system, domestic courts within the territory of host states were the main forum where disputes between foreign investors and host states were resolved.[118] However, modern investment agreements almost eliminate the requirement of prior use (let alone exhaustion) of local remedies, feeding an impression that investment arbitration proves

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[111] M. Sornarajah, "The International Law on Foreign Investment", Cambridge University Press (2017), p. 1 (arguing that the legitimacy of the investment law system is contested, which has resulted in a spate of reactions from states). Joost Pauwelyn and Rebecca J. Hamilton, "Exit from International Tribunals", Journal of International Dispute Settlement, Vol. 9, No. 4 (2018), pp. 681-683 (arguing that states have increasingly exited from international courts and tribunals across all subfields of international law).
[112] Schneiderman, *supra* note 62, at 233 (arguing that no "technical fix" is likely to solve the crisis).
[113] See Chapter 2 Setting the Stage: The Legitimacy Crisis Facing Investment Arbitration and the Need to Reform Investor-State Dispute Resolution.
[114] Vid Prislan, "European Perspectives on the Role of National Courts in The Resolution of Investor-State Disputes", in Yuwen Li, et al., eds., "China, the EU and International Investment Law: Reforming Investor-State Dispute Settlement", Routledge (2019), pp. 153-154.
[115] David S. Grewal, "Investor Protection, National Sovereignty, and the Rule of Law", American Affairs, Vol. 2, No. 1 (2018), pp. 17-28 (arguing that according to the principle of judicial sovereignty, "the U.S. court system should have a first crack at getting international disputes right").
[116] Steffen Hindelang, "Study on Investor-State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law", Transnational Dispute Management, Vol. 16, No. 1 (2016), p. 7.
[117] Sornarajah, *supra* note 111, at 5 (arguing that states are prompted to rethink the legitimacy of investment arbitration by the burgeoning number of arbitration cases brought against developing countries and the fact that many arbitration cases are also brought against developed countries).
[118] Dolzer and Schreuer, *supra* note 89, at 214.

to be an alternative to domestic courts.[119] While this cumulative general trend is not yet reversed, a reverse force is nonetheless becoming more popular. The positive analysis of the recent treaty-making practice of some countries above has shown that eliminating investment arbitration in favor of domestic courts has been embraced as a recent shift in foreign investment policy by a handful of countries.[120] Likewise, the ongoing domestic campaign against investment arbitration initiated by various parts of the society suggests that this option may be accepted by more countries in the future.[121] Thus, this option is not only academically relevant but stands as a possible path that countries may go down in the face of the need to reform investor-state dispute resolution. In order to avoid any unnecessary confusion, it should be clarified that even if states abandon investment arbitration in its entirety, foreign investors are in theory entitled to recourse to other remedial avenues apart from domestic courts, including but not limited to diplomatic protection and contractual solutions.[122] However, with the limitations of these alternatives in mind,[123] adjudication via domestic courts seems to be the most guaranteed and practical forum for foreign investors to have their disputes with public authorities resolved.[124] Thus, this section postulates that adjudication via domestic courts would become the exclusive remedy for the majority of foreign investors who are keen to adjudicate investment disputes if investor-state arbitration is removed altogether by the countries concerned.

5.3.1 Fairness and Efficiency without Guarantee

This subsection analyzes that if domestic courts within the host states are selected as the exclusive forum for the resolution of investor-state disputes, how well the goal of investor-state dispute resolution in ensuring fairness and efficiency throughout the process may be realized. It is revealed that while domestic courts may have some distinct advantages in comparison to investment arbitration in this regard, the goal of ensuring fair and efficient dispute resolution would most likely hinge on the quality of the courts in question.

5.3.1.1 Not as Biased, Inefficient, and Incapable as Before

At the origins of the establishment of modern international investment law lies the inconvenient truth that the domestic legal systems of developing capital-importing countries

[119] George K. Foster, "Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration", Columbia Journal of Transnational Law, Vol. 49, No. 2 (2011), p. 204 (arguing that the conventional view is that "investors should be free to file treaty-based arbitrations without having to first pursue, let alone exhaust, local remedies").
[120] See Chapter 4 The Rise of Domestic Courts in Recent Treaty-making Practice amidst Uncertainty of Investment Arbitration.
[121] For instance, 230 U.S. law and economics professors, including a Nobel laureate and many heavyweights, wrote a letter to President Donald Trump in October 2017, urging the U.S. administration to "stop any expansion of ISDS – namely through the China BIT and the TTIP – and to eliminate ISDS from past U.S. trade deals, beginning with NAFTA." 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts, https://www.citizen.org/wp-content/uploads/migration/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf (last visited on May 20, 2022).
[122] Leon E. Trakman, "Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo", UNSW Law Journal, Vol. 35, No. 3 (2012), p. 984.
[123] Schill, *supra* note 103, at 315-318 (offering an elaboration on the limitations of these other alternatives).
[124] Trakman, *supra* note 122, at 984.

were perceived as unreliable in offering an appropriate level of protection to foreign investors.[125] Driven by the desire of companies in developed countries to invest safely and securely in developing countries, investment agreements were concluded to provide an extra layer of protection for those investors in addition to the domestic legal regimes in place.[126] Parallel with substantive provisions that set out the standards of protection for covered investors, investment arbitration has become an integral part of investment agreements since 1969 as an addition to, or a substitute for, domestic courts in the developing world.[127] Correspondingly, the vast majority of BITs were initially concluded between economically advanced, capital-exporting countries and developing, capital-importing countries.[128] However, more than fifty years have elapsed since the advent of investment treaty arbitration in the late 1960s, implying that the system created during the post-World War II economic expansion probably should be adapted to the circumstances of modern times.[129] In the light of the considerable concern with regard to investment arbitration, the fundamental question of whether investment arbitration is more preferable than domestic courts should be treated seriously. Especially considering that investment arbitration is widely regarded as a more attractive alternative to the settlement of investment disputes by domestic courts,[130] the implicit premise that domestic courts in host states are (often) biased, inefficient, and incapable demands re-examination as it may not be as true today as it was more than half a century ago.

First and foremost, due to the growing recognition of the great role of a well-functioning judiciary in economic and social progress,[131] the judiciary across the globe has been in a state of flux in the sense that judicial reforms have been introduced around the world in recent decades.[132] Notably, developed countries themselves, including the US, the EU, Canada, the

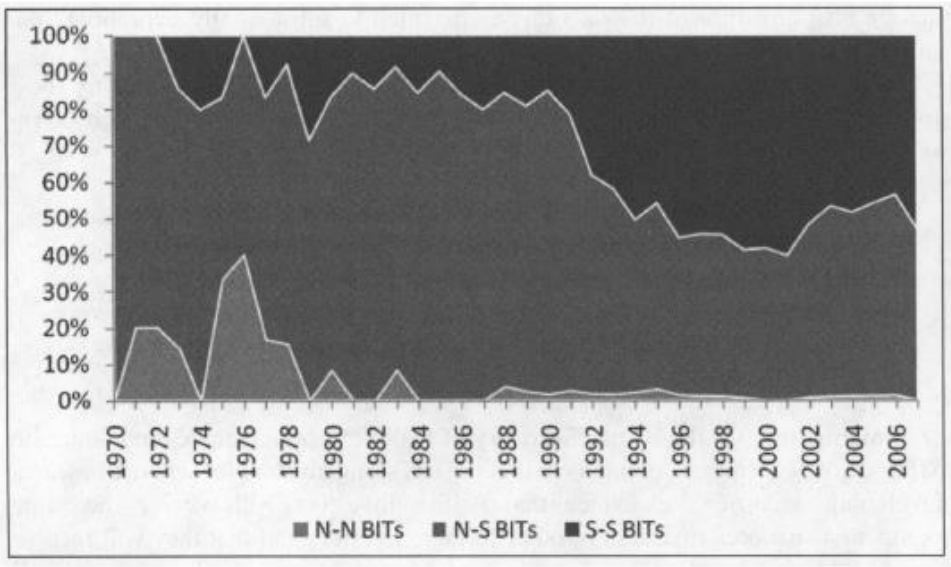
[125] Hindelang, *supra* note 116, at 7.
[126] Salacuse and Sullivan, *supra* note 100, at 75 (arguing that host states can easily change domestic law after a foreign investment is made and recourse to domestic courts may prove to be of little value in the face of prejudice against foreigners or governmental interference in the judicial process). Jonathan Bonnitcha, Lauge N. Poulsen and Michael Waibel, "The Political Economy of the Investment Treaty Regime", Oxford University Press (2017), pp. 8-9 & 11-12 (implying that the less than welcoming attitude in much of the developing world after the Second World War towards foreign investment and the long-held perception in the western world that international law should grant a set of international standards of treatment for foreign investment could also be part of the impetus behind the BIT movement).
[127] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 24 (arguing that the conclusion of BIT between Italy and Chad in 1969 marked the beginning of the movement to include investment arbitration as a dispute settlement mechanism between treaty parties and private investors into BITs).
[128] Srividya Jandhyala, et al., "Three Waves of BITs: The Global Diffusion of Foreign Investment Policy", Journal of Conflict Resolution, Vol. 55, No.6 (2011), pp. 1049-1050.
[129] Notably, the ICSID Convention entered into force in 1966 and the first BIT that incorporated the investment arbitration mechanism emerged in 1969.
[130] Christoph Schreuer, "The Future of Investment Arbitration", https://www.univie.ac.at/intlaw/pdf/98_futureinvestmentarbitr.pdf (last visited on May 20, 2022).
[131] Maria Dakolias, "Court Performance Around the World: A Comparative Perspective", Yale Human Rights and Development Law Journal, Vol. 2, No. 1 (1999), p. 87 (arguing that the judicial reforms going on in many countries "resulted from growing recognition that economic and social progress cannot sustainably be achieved without respect for the rule of law, democratic consolidation, and effective human rights protection; each of which requires a well-functioning judiciary that can interpret and enforce the laws equitably and efficiently").
[132] John O. Haley, "Judicial Reform: Conflicting Aims and Imperfect Models", Washington University Global Studies Law Review, Vol. 5, No. 1 (2006), pp. 81-82 (arguing that "[b]y the end of the1980s the attention of the judicial reform movement had shifted to Latin America, and subsequently, after the collapse of the Soviet Union to Eastern Europe, then to Central, South and Southeast Asia, and most recently to the Middle East").

Nordic States, and Japan, as well as international and regional organizations, such as the World Bank and the American Development Bank, have been zealously engaged in the judicial reform efforts in developing countries by virtue of providing funding and sharing experience.[133] Thus, as an often neglected matter in the corpus of the reform of investor-state dispute resolution, the quality of the judiciary in host states in terms of independence and efficiency should not be viewed as static; instead, the evolution of the court system over decades should be discerned and internalized to foster positive changes to the settlement of investor-state disputes. While the measurement of the fruition of judicial reform efforts worldwide remains an elusive exercise and the general data on that score is not forthcoming, not least due to the complexity and political sensitivity of the matter, an emerging mass of literature attests to the progress that has been achieved across the globe regarding the judiciary, particularly within developing countries. Dozens of commentators argue that the concerns over legal justice in certain host state jurisdictions, which have justified the genesis of investment arbitration and the marginalization of domestic courts, have been "widely addressed in many legal systems since decolonization."[134] Some country-specific studies on the judicial reforms which have been under the way in major developing economies also provide revealing insights in this respect. For instance, China has allegedly achieved impressive progress in the quality of judiciary since the reconstruction and reform began in the late 1970s, especially with regard to the ability to deal with the "litigation explosion" in a relatively functional manner.[135] In the Ease of Doing Business rankings maintained by the World Bank, China is ranked fifth in 190 economies on the topic of enforcing contracts, which acts as a proxy for judicial efficiency.[136] In India, a remarkable degree of institutional independence of the judiciary vis-à-vis the political branches of government has been secured by the Supreme Court since 1970s.[137] Meanwhile, India has taken measures to boost judicial efficiency and lift the competence of judges as part of the overarching agenda for judicial reforms.[138] Likewise, decades of judicial reform efforts in Latin America have led to justice sectors, especially the courts, that "are larger, more complex, better funded, have more competent staff, and are increasingly equipped with modern information equipment", and

[133] *Ibid*, at 82-83.
[134] Emma Aisbett, et al., "Rethinking International Investment Governance: Principles for the 21st Century", http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf (last visited Mar. 3, 2020), p. 115.
[135] Yuwen Li, "The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice", Ashgate (2014), p. 237.
[136] The World Bank, "Ease of Doing Business Rankings", https://www.doingbusiness.org/en/rankings# (last visited on May 20, 2022).
[137] Rehan Abeyratne, "Judicial Independence and the Rise of the Supreme Court in India", in Hoong P. Lee and Marilyn Pittard eds., "Asia-Pacific Judiciaries: Independence, Impartiality and Integrity", Cambridge University Press (2018), p. 184 (arguing that judicial independence in India was achieved by "expanding fundamental rights jurisdiction, limiting Parliament's constitutional amendment authority, and retaining the final word on judicial appointments").
[138] Justice K. G. Balakrishnan, "Judicial Reforms in India", Indo-EU Business Forum, London (Oct. 31, 2008), http://www.delhihighcourt.nic.in/library/articles/Judicial%20Reforms%20in%20India.pdf (last visited on May 20, 2022) (arguing that "The larger agenda for judicial reforms touches on several issues – namely the methods for selection and appointment of judges at different levels, the urgent need for improvements in the physical infrastructure available to the judiciary, the state of legal education as well as Continuing Legal Education (CLE) in India and last but not the least, the continuing debate about judicial accountability).

"tend to enjoy greater independence and higher levels of institutional autonomy."[139] Notwithstanding the unsurprisingly mixed perceptions of the judicial reforms in developing countries particularly, the positive changes recited above with respect to the judiciary should not be discounted peremptorily. These changes in no way suggest that the judiciary in the developing world is especially competent in resolving investor-state disputes, but they at the least indicate that the courts in many jurisdictions as of today are not as primitive as what the architects of the investment arbitration system had seen several decades ago. All in all, attempts at reforming investor-state dispute resolution should note the progress that the judiciary made over time and revisit the appropriateness of domestic courts in settling investor-state disputes.

Figure 10 BITs Signed by Dyad Type



Source: Jandhyala, etc. (2011)

Not only hs the judiciary across the world progressed over decades, but also the panorama of the global investment treaty regime. More BITs have been signed between developed countries since the late 1980s, although it does not change the fact that the North-North BITs account for a minor portion of the entire BIT complex (see Figure 10).[140] More importantly, an emerging trend is that more than one developed countries have been increasingly involved in particular international economic instruments which address, among others, investment-related issues and are invoked regularly for the initiation of investment arbitrations. The notable examples are the NAFTA/USMCA and the Energy Charter Treaty. Accordingly, the number of cases of investment arbitration against developed countries has been on the rise in the past two decades, with the "developed vs developed" claims (filed by investors from a developed home country against another developed host country) even slightly outnumbering the "developed vs developing" claims (filed by investors from a developed home country

[139] Linn Hammergren, "Expanding the Rule of Law: Judicial Reform in Latin America", Washington University Global Studies Law Review, Vol. 4, No. 3 (2005), p. 603.
[140] Jandhyala, et al., *supra* note 128, at 1052.

against a developing host country) since the mid-to-late 1990s (see Figure 11).[141] In the meantime, the landscape of the global FDI flows is equally changing vigorously with traditional capital-importing countries, such as China, expanding overseas investment and traditional capital-exporting countries, such as the US, hosting an increasing amount of investment inflows.[142] Indeed, according to the records of FDI stocks maintained by OECD, the top FDI recipients in terms of stocks of inflows are predominantly developed economies (see Figure 12). All these parameters fuse into a message that, after several decades of transformation, not only are the judiciary of developing countries "on trial" but also that of developed countries in the (re)examination of the relevance of investment arbitration. The data from the World Justice Project (WJP) Rule of Law Index 2019 demonstrates that, notwithstanding the existence of few outliers, the majority of the top FDI recipients fares well in terms of judicial control over the executive branch and judicial independence (see Figure 13).[143] Although the judiciaries of developed economies may just be better off than most judiciaries and are in no way perfect models,[144] these well-ranked domestic courts should not be under-rated for their ability to resolve investor-state disputes in a relatively fair and

[141] Thomas Schultz and Cédric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study", European Journal of International Law, Vol. 25, No. 4 (2015), p.1156.

[142] José E. Alvarez, "The Once and Future Foreign Investment Regime", in Mahnoush Arsanjani, et al., eds., "Looking to the Future: Essays on International Law in Honor of W. Michael Reisman", Martinjus Nijhoff (2011), p. 634 (arguing that "[m]ore countries than ever before are, like the PRC and the United States, capital exporters as well as capital importers").

[143] The WJP, "Rule of Law Index 2019", pp. 1-193. There are several clarifications that should be made here regarding Figure 13 to improve the precision of the corresponding text above. First, the finding that the majority of the top FDI destinations (except China and Russia) fared well in the rankings is made as compared with most other jurisdictions that are included therein. Second, Switzerland, Ireland, and Saudi Arabia are not included in the figure because the data is unavailable. Third, while there are dozens of factors that are considered to measure the rule of law level across a multiplicity of jurisdictions, the author chose two factors from those, namely "government powers are effectively limited by the judiciary" and "civil justice is free of improper government influence", as benchmarks to measure the judicial quality of the top FDI destinations because they seem to be most related to the resolution of investor-state disputes via domestic courts. However, these two factors in no way reflect the entire or accurate picture of the ability of domestic courts to settle investor-state disputes because they obviously only take into consideration of judicial independence and the checks and balances in the political structures of the relevant countries but could not capture other crucial aspects, such as the efficiency of the courts in question. It has to be especially clarified that although the second factor examines whether and to what extent civil justice is free from improper government influence, the associated methodological illustrations offered by the WJP indicate that civil justice herein incorporates administrative lawsuits and civil lawsuits in which the executive branch had interests (as a litigant or a third party). These are classical forms of the resolution of investor-state disputes via domestic courts. The WJP
, "Variables Used to Construct the WJP Rule of Law Index 2019",
https://worldjusticeproject.org/sites/default/files/documents/ROLIndex2019_Variables_0.pdf (last visited Mar. 5, 2020), p. 31. Last, the WJP Rule of Law Index 2019 only provides one version of the story and therefore should not be counted as a definitive account. There are also other studies, for example, the Global Competitiveness Index 2017-2018 maintained by the World Economic Forum, that provide different outcomes as to the aspect of judicial independence and beyond. The Index by the World Economic Forum notably places (mainland) China ahead of, *inter alia*, Taiwan (China), India, Spain, Brazil, Italy, Russia, and Mexico in terms of judicial independence. World Economic Forum, "Global Competitiveness Index 2017-2018",
http://reports.weforum.org/global-competitiveness-index-2017-2018/competitiveness-rankings/?doing_wp_cron=1583431534.0356719493865966796875#series=EOSQ144 (last visited on May 20, 2022).

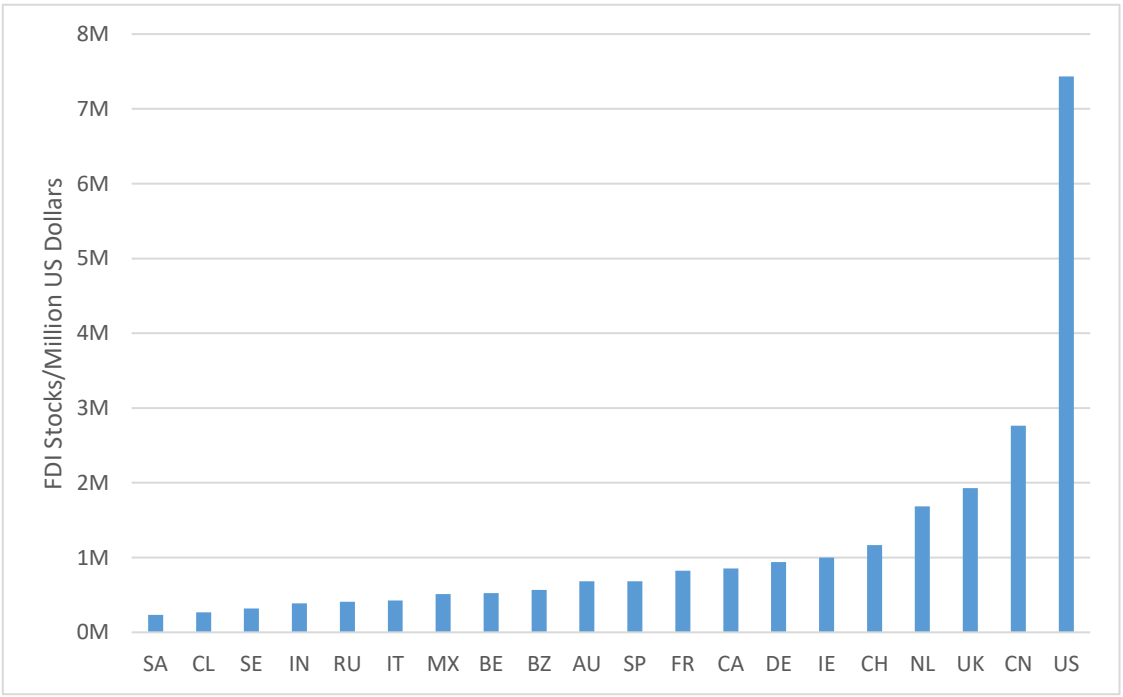
[144] Peter J. Messitte, "Expanding the Rule of Law: Judicial Reform in Central Europe & Latin America", Washington University Global Studies Law Review, Vol. 4, No. 3 (2005), p. 618 (arguing that "while the judiciary in the United States may be better off than most judiciaries, we are not perfect").

efficient way. In addition, while larger stocks of FDI inflows do not necessarily lead to a higher incidence of investor-state disputes, the judiciary of developed countries should be taken into consideration in the choice between domestic courts and investment arbitration as a means for investor-state dispute resolution. And that factor would be likely to tilt the balance somewhat in favor of the former over the latter.

Figure 11 Percentage of Claims Filed Per Year, by Developed/Developing Pairs (Three-Year Moving Average)

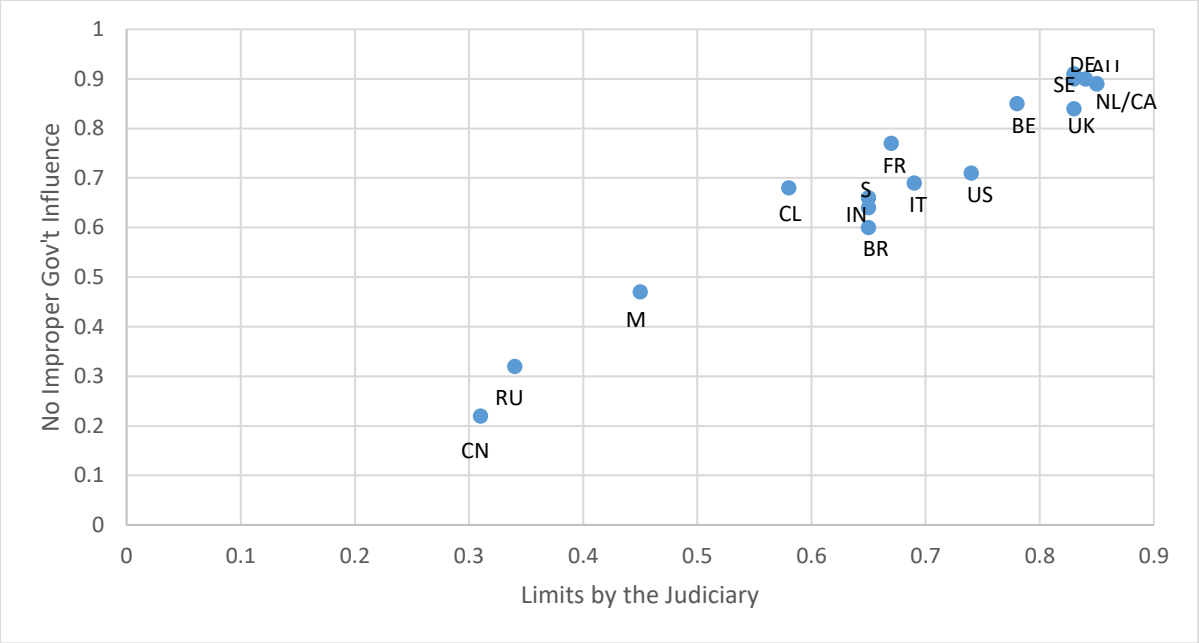
Source: Schultz and Dupont (2015)

Figure 12 Top FDI Recipients by Country



Data Source: OECD (2018 or latest available)

Figure 13 Judicial Quality of Top FDI Recipients



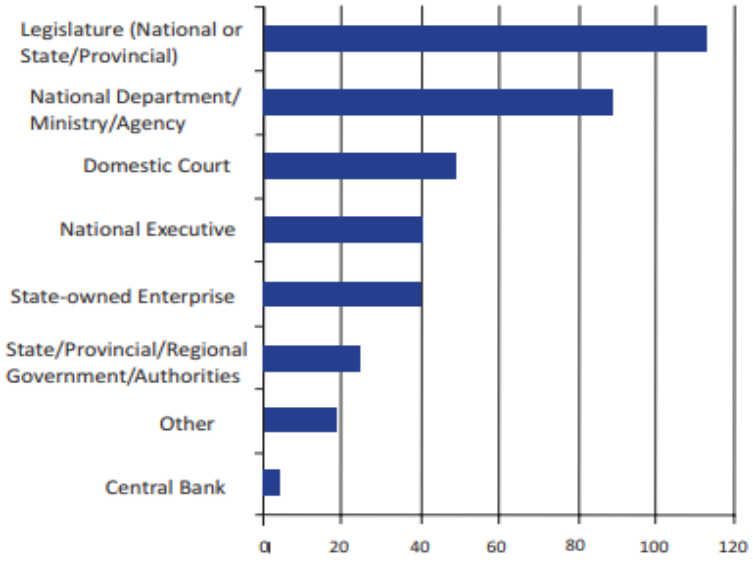
Data Source: The WJP Rule of Law Index 2019

The analysis above is designed to put domestic courts in host states of today in perspective by delving into the changed parameters which result from the reforms of domestic institutions, the evolution of the investment treaty regime, and the changes of the global FDI scene. However, it leaves unanswered another critical and practical question regarding whether, in practice, domestic courts in host states are accessible for foreign investors in need of legal remedies. While this question was probably more academically relevant some years ago, it requires an earnest study now as more countries are contemplating the idea of withdrawing from investment agreements and disengaging from investment arbitration.[145] While traditional accounts of domestic remedies for foreign investors rarely address the specifics of domestic regimes, a recent empirical study could update our understanding of the accessibility of the judiciaries in host states for foreign investors in terms of the resolution of investment disputes.[146] That study found out that, in general, foreign investors, regardless of individuals or corporates, are granted access to domestic courts in host states for lawsuits against the governments and for challenges against government measures and policies as illegal or unconstitutional.[147] In this regard, the same entitlement generally applies to both domestic and foreign individuals or companies, although exceptions do exist.[148] In addition,

[145] Mestral and Vanhonnaeker, *supra* note 2, at 2.
[146] *Ibid*, at 1.
[147] A notable exception is Nigeria which favored other means of dispute settlement for disputes involving foreign investors. *Ibid*, at 3-4.
[148] *Ibid*, at 4 (claiming that as foreign juridical persons, except those having their seat within the EU and operating within the scope of application of EU non-discrimination principles, do not enjoy fundamental rights

foreign investors are usually channeled to the same courts of host states as domestic individuals and companies are for challenges against government measures with the same procedural rules and judicial structures applied.[149] The empirical study also identified that, in the case where administrative courts exist in the judicial structure, they normally take charge of challenges against administrative acts.[150] By contrast, complaints about legislative acts usually fall into the terms of reference of ordinary courts or constitutional courts.[151] Therefore, if the breakdown of domestic institutions involved in investment arbitrations as shown in Figure 14 can fairly represent the entire collection of investment disputes, an encouraging message would be that the majority of these disputes can arguably be adjudicated by domestic courts of host states since most of the disputes involve legislatures (central and local) and various government organs.[152] Furthermore, some academic studies, such as those by Hamida and Gáspár-Szilágyi, concluded that foreign investors, in practice, indeed seized domestic courts for the resolution of investment disputes.[153] Gáspár-Szilágyi further claims that among hundreds of thousands of locally incorporated companies with various degrees of foreign ownership all over the world, most of them probably would have their disputes with host state authorities settled through domestic remedies of which domestic courts are apparently a major part.[154]

Figure 14 The Breakdown of Domestic Institutions Involved in Investment Arbitrations



under German law, they are not allowed to seize the German Constitutional Court for a constitutional challenge against direct legislative interference with their rights). Schill, *supra* note 103, at 316.

[149] Mestral and Vanhonnaeker, *supra* note 2, at 4.

[150] *Ibid.*

[151] *Ibid.*

[152] Williams, *supra* note 90, at 32.

[153] Walid B. Hamida, "Investment Treaties and Domestic Courts: A Transnational Mosaic Reviving Thomas Wälde's Legacy", Transnational Dispute Settlement, Vol. 9, No. 1 (2012), pp. 72-75. Szilárd Gáspár-Szilágyi, "Let Us Not Forget about the Role of Domestic Courts in Settling Investor-State Disputes", The Law & Practice of International Courts and Tribunals, Vol. 18, No. 3 (2020), p. 395 (arguing that at least for the countries included in his study, "a large percentage of investors resorted to the courts of the host State prior to initiating ITA, regardless of whether the domestic judiciary was highly developed or transitional").

[154] Gáspár-Szilágyi, *supra* note 153, at 409.

Source: Williams (2016)

Perhaps more important is that at least some courts around the world demonstrated their readiness to apply and interpret relevant investment agreements as the applicable instruments when investment disputes were subjected to their scrutiny.[155] On the other hand, for those jurisdictions where dualism takes hold in the characterization of the relationship between international law and domestic law, the limited discretion or willingness of domestic courts to directly apply IIAs should not be a tenable argument against their ability to handle investment disputes.[156] The fundamental reason lies in that, under public international law, states are entitled to discharge their international obligations in the way that they prefer.[157] Thus, states may give effect to investment agreements by immediately incorporating them into domestic legal systems (incorporation), or by transforming or transposing the provisions therein through a domestic implementing act (transformation).[158] Alternatively, they may honor the commitments made in investment agreements by ensuring the conformity of domestic law with the provisions enshrined in those international instruments.[159] Therefore, when domestic courts refer to municipal law that in substance reflects the norms contained in IIAs for the adjudication of investment disputes, investment agreements are in fact enforced by domestic courts in a broad sense although it is done in a more invisible manner. In view of the analysis above, serious doubt should be cast onto some traditional accounts that consider the lack of ability of some judiciaries to directly apply investment agreements as an argument against domestic courts handling investment disputes.[160] That is because from the perspective of international investment law, what matters should not be "what law the domestic court purports to be applying" but "whether international [investment] law is complied with."[161] Not to mention that, contrary to the perception of some commentators,[162] domestic regimes of foreign investor protection may not fall below the standards established by IIAs.[163] All in all,

[155] Hamida, *supra* note 153, at 73-75 (providing several examples where domestic courts in some countries, such as Argentina, Venezuela, and Namibia, adjudicated investment disputes submitted by investors by referring to the provisions set out in relevant investment agreements).
[156] Hindelang, *supra* note 116, at 47. A research team in 2011 identified that the possibility of direct application of IIAs by domestic courts varies across jurisdictions and it is not necessarily hinged on whether the jurisdiction in question is a monist or dualist state. Bahakal Yimer, et al., "Application of International Investment Agreements by Domestic Courts", Trade Law Clinic, Geneva, Jun. 10, 2011, https://georgetown.app.box.com/s/ju9rbnew9ch9gqrsferbb1z7131xjfxz (last visited on May 20, 2022).
[157] Hindelang, *supra* note 116, at 47.
[158] Antonios Tzanakopoulos, "Domestic Courts in International Law: The International Judicial Function of National Courts", Loyola of Los Angeles International and Comparative Law Review, Vol. 34, No. 1 (2011), pp. 142-143.
[159] *Ibid*, at 143.
[160] Schill, *supra* note 103, at 316 (arguing that in some countries, "obligations arising under international law, including those granted in an IIA, may not be enforceable in domestic courts due to their inapplicability within the domestic legal order"). Trakman, *supra* note 122, at 998 (arguing that "Acting as a leveling force, ISA is founded on principles, standards and rules of investment jurisprudence that are not ordinarily sublimated by domestic legal systems and rules of procedure").
[161] Tzanakopoulos, *supra* note 158, at 144 (arguing that "from the perspective of international law, it does not really matter what law the domestic court purports to be applying. What matters is whether international law is complied with").
[162] Trakman, *supra* note 122, at 998.
[163] Hindelang, *supra* note 116, at 61 (arguing that "[a]t least in advanced systems the standard should generally not fall below what is offered in international law"). For instance, the specialized investment law of China, which came into force on Jan. 1, 2020, incorporates a multiplicity of provisions that aim to protect the

some domestic courts, if not the majority, referring mainly to municipal law to adjudicate investment disputes is not necessarily of concern as long as the relevant domestic law is aligned with the requirements of IIAs.

In addition to debunking perpetual stigma attached to domestic courts in view of widespread judicial reforms over decades and the changes of the material circumstances, other institutional aspects should also be noted to give domestic courts due credit in handling investment disputes. First, domestic courts, unlike other comparable forums, are more likely to provide a single forum for dispute resolution, including that of investment disputes.[164] That is doubtless related to the fact that domestic courts are widely acknowledged to have inherent authority in establishing jurisdiction over claims that arise from within their home jurisdictions.[165] But there are more nuanced views that point to domestic courts as a competent single forum for the adjudication of investment disputes in a society where international law and domestic law intertwine, and investor rights and responsibilities are in parallel. On this score, unlike traditional "extrovert" or "outward-looking" international norms which impose obligations on one state versus other states on the international plane, investment agreements represent "introvert" or "inward-looking" norms which regulate a state's behavior within its own territories.[166] The latter form of international norms would often entail rights and interests for natural persons and legal entities.[167] Due to the fact that "introvert" international norms address state behavior within their own jurisdictions, the rights for individuals and corporations established thereby could be equally affirmed by

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commercial interests of foreign investors and their investments in China and these provisions indeed to a large extent reflect the standards that are common to IIAs, such as national treatment, prohibition of expropriation without due compensation, and free transfer of capitals. Because of the limits of space, it is not practical to recite all the relevant provisions, but emblematic articles could be invoked for an illustrative purpose. **Article 4** reads that "The state applies the administrative system of pre-establishment national treatment plus negative list to foreign investment. 'Pre-establishment national treatment' as mentioned in the preceding paragraph means the treatment accorded to foreign investors and their investments no less favorable to that accorded to domestic investors and their investments at the stage of investment access; and 'negative list' as mentioned in the preceding paragraph means a special administrative measure for access of foreign investment in specific field as imposed by the state. The state accords national treatment to foreign investment outside of the negative list. The negative list shall be issued by or with the approval of the State Council. Where any international treaty or agreement concluded or acceded to by the People's Republic of China provides for any more favorable treatment in respect of access of foreign investors, the relevant provisions of the treaty or agreement may apply." **Article 9** reads that "The state's various policies to support the development of enterprises shall equally apply to foreign-funded enterprise according to the law." **Article 20** of the Law reads that "The state expropriates no foreign investment. Under certain special circumstances, the state may expropriate or requisition the investment of foreign investors in the public interest according to the provisions of laws. Expropriation and requisition shall be conducted under statutory procedures, and fair and reasonable compensation shall be made in a timely manner." **Article 21** of the Law reads that "A foreign investor may, according to the law, freely remit into or out of China, in Renminbi or foreign exchange, its contributions made, profits, capital gains, proceeding from disposition of assets, and royalties of intellectual property rights derived from, indemnity or compensation lawfully acquired, and income from liquidation, among others, within China." National People's Congress, Foreign Investment Law of the People's Republic of China, Articles 4, 9, 20 & 21.

[164] Hindelang, *supra* note 116, at 61. William S. Dodge, "Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement", Vanderbilt Journal of Transnational Law, Vol. 39, No. 1 (2006), pp. 33-34.

[165] Trakman, *supra* note 122, at 993-994 (arguing that "a domestic court of the state that is party to an investment treaty is the appropriate forum to resolve an investment disputes, in the same manner as it resolves other disputes between that state and other private or corporate claimants").

[166] Tzanakopoulos, *supra* note 158, at 138-140.

[167] *Ibid*, at 140-141.

national legal systems. Thus, the rights accorded to foreign investors *a priori* could be derived from both international and domestic law.[168] From the perspective of foreign investors, they would likely not care whether their rights stem from domestic or international law since it is in their best interests to bring their claims against host state authorities on any legal basis.[169] That explains why in investment disputes domestic and international claims are often intertwined.[170] While investment tribunals usually lack the jurisdiction to address claims based on domestic law,[171] domestic courts, at least when they may directly invoke investment agreements, are able to adjudicate investment disputes by examining host state measures against both domestic and international law.[172] The existence of a single forum would not only benefit foreign investors in the sense that they could assert their rights under both domestic and international law, but it would also potentially spare host states "from having to defend the same measure in two different forums."[173] In the meantime, the advantage of domestic courts in operating as a single forum is equally demonstrated by that, as a principle, the right to file a counterclaim by the respondent is admitted by all national legal systems.[174] The right to file a counterclaim concerns at the same time fairness and efficiency in adjudicative proceedings. For one thing, it allows the respondent side the equal right to present a claim (the counterclaim) in the hope that not only the claim from the claimant (the principal claim) would be rejected but also the claimant would be condemned for a violation of law.[175] For another thing, the recognition of the right to file a counterclaim consolidates the connected claims (the counterclaim and the principal claim) in a single proceeding, thus obviating the need for duplicate proceedings and the associated negative consequences, such as extra costs and inconsistent decisions.[176] While most counterclaims filed by states have been rejected in investment arbitration,[177] domestic courts admitting counter claims could take better account of host states' rights and judicial efficiency. On top of the aspects mentioned, domestic courts, as a single forum, are better positioned to take into consideration third-party rights in the handling of investment disputes so that the voice of the individuals or entities affected could be heard at the same venue.[178] In recognition of the fact

[168] Jarrod Hepburn, "Domestic Investment Statutes in International Law", American Journal of International Law, Vol. 112, No. 4 (2018), pp. 658-659 (arguing that foreign investment laws "offer many of the same substantive protections as investment treaties" and "commonly include guarantees on transfer of capital, expropriation, and non-discrimination (national treatment)").
[169] Tzanakopoulos, *supra* note 158, at 141 (arguing that from the perspective of natural persons and legal entities, "whether the right that has been violated by Executive action stems from international or domestic law is irrelevant: they will challenge it on any available legal basis").
[170] Dodge, *supra* note 164, at 33.
[171] *Ibid* (stating that a second NAFTA tribunal in *Waster Management* "ruled that the [Mexican] city's breaches of the concession agreement amounted only to violations of domestic law, over which the tribunal lacked jurisdiction").
[172] Hindelang, *supra* note 116, at 61.
[173] Dodge, *supra* note 164, at 33.
[174] Hedge E. Veenstra-Kjos, "Counterclaims by Host States in Investment Treaty Arbitration", Transnational Dispute Management, Vol. 4, No. 4 (2007), p. 4.
[175] Arnaud de Nanteuil, "Counterclaims in Investment Arbitration: Old Questions, New Answers?", The Law and Practice of International Courts and Tribunals, Vol. 17, No. 2 (2018), p. 374.
[176] Veenstra-Kjos, *supra* note 174, at 7.
[177] Nanteuil, *supra* note 175, at 377.
[178] Sergio Puig and Gregory Shaffer, "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law", American Journal of International Law, Vol. 112, No. 3 (2018), p. 389. Third-party rights may be affected by investment disputes in many different ways, such as: (1) "Disputes arise out of discrete competing

that a proceeding may affect the legitimate rights and interests of third-parties, most domestic legal systems do justice to their concerns in procedural rules by, among others, enabling their participation in the proceeding.[179] Therefore, given that domestic courts provide a single forum for multiple voices, the adjudicative process is rendered not only more efficient, but is fairer.[180]

Furthermore, other institutional aspects may also militate in favor of domestic courts handling investment disputes. First, as surprising as it may be, judges in domestic courts may have a competitive edge over arbitrators in terms of their expertise in handling investment disputes as domestic law-related issues are all but an inseparable element in foreign investment regulation. Schreuer, for instance, notably argues that typically both domestic law as well as international law are involved in investment relationships.[181] Since a host of technical issues related to foreign investment are governed by the host state's domestic law,[182] the application and interpretation of domestic law is hardly avoidable even when international remedy is sought. To be more precise, in addition to the existence of foreign investment as a fundamental question, the domestic law of the host state is also relevant to a number of other issues, such as "whether the investment is held in the territory of the host state, its validity, the nature and the scope of the rights making up the investment and whether they vest on a protected investor, the conditions imposed or assurances granted by national law for the operation of the investment, as well as the nature and scope of the government measures allegedly in breach of the IIAs."[183] The Tribunal in *MTD v. Chile* explicitly notes that while the judgment of a breach of an international obligation would be made against international law, municipal law may have to be taken into account to work out the facts of the breach.[184] As a comparison with investment arbitrators who are often deficient in the knowledge of the domestic law of the host state,[185] court judges in respondent states are

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claims advanced in different fora between non-governmental actors, states and investors;" (2) "Disputes [that focus on] … aspects of the legal proceedings and/or outcomes of a dispute between the investor and other private litigants;" (3) "Disputes [that] … involve competing rights and interests;" and (4) "Disputes in which the claimant seeks request for relief (e.g., injunctive or declaratory) that affect non-disputing third parties." Jesse Coleman, et al., "Third-Party Rights in Investor-State Dispute Settlement: Options for Reform", UNCITRAL, Jul. 15, 2019, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_reformoptions_0.pdf (last visited on May 20, 2022), pp. 5-6.

[179] In order to appropriately address third-party rights, the procedural rules in many jurisdictions often provide for: (1) "Participation by interested or affected third parties through intervention, joinder, or interpleader;" (2) "Dismissal of claims where such parties are unwilling or unable to intervene or be joined;" and (3) Reframing of claims, arguments and remedies where circumstances require." Coleman, et al., *supra* note 178, at 7.

[180] Puig and Shaffer, *supra* note 178, at 389.

[181] Christoph Schreuer, "International and Domestic Law in Investment Disputes – The Case of ICSID", Australian Review of International and European Law, Vol. 1, No. 1 (1996), p. 89.

[182] *Ibid*.

[183] Andrew Newcombe and Lluís Paradell, "Law and Practice of Investment Treaties: Standards of Treatment", Kluwer Law International (2009), pp. 92-94.

[184] *MTD v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), para. 204.

[185] Albert Jan van den Berg, an eminent arbitrator, claims that the five groups "from which investment arbitrators are generally recruited these days are as follows: (1) law professors in international public law, whether active or emeritus; (2) former judges, whether from State Courts or the International Court of Justice (ICJ); (3) retired diplomats and officials in foreign service or an international organisation; (4) practicing lawyers who are, or were, partners in a law firm or barristers; (5) migrating commercial arbitrators." Albert Jan van den Berg, "Qualified Investment Arbitrators? A Comment on Arbitrators in Investment Arbitrations", in Patrick Wautelet, et al., eds, "The Practice of Arbitration: Essays in Honour of Hans van Houtte", Hart

arguably much more expert in the reading of domestic law, especially with regard to reaching a thorough understanding of the law against a usually sophisticated domestic legal system.

The superior expertise in domestic law would arguably lead to a higher level of decisional accuracy, which may more often be compromised without an effective correction mechanism in place. The likely benefit provided by such a mechanism, in turn, comprises precisely the second point that offers domestic courts a competitive edge in adjudicating investment disputes. Unlike disputing parties to international arbitration, litigants are granted the fairly general right to appeal trial court decisions in virtually all legal systems.[186] Shavell argues that the appeals system allows the society to tap into the information that litigants have about the occurrence of errors and thus to improve the accuracy of decisions at a relatively low cost.[187] Moreover, he incidentally opines that the appeals system also serves a function of error prevention in that trial judges would be more incentivized to make fewer errors due to their fears of reversal.[188] Thus, the error correction and prevention functions of the appeals system would be likely to increase the accuracy of decisions made by domestic courts in investment disputes.[189] It is worth noting that empirical evidence garnered by Gáspár-Szilágyi shows that investors could, and did, regularly appeal the decisions made by lower courts to higher courts in investment disputes across at least the jurisdictions surveyed.[190]

Additionally, domestic courts may in certain circumstances surprisingly entail a process that is more economical and expeditious than international arbitration. From an empirical perspective, comprehensive data on the relative costs of litigation via domestic courts versus investment arbitration is not forthcoming. While any generalized statement on this point may therefore risk a fallacious composition, evidence from the UK and the US shows that litigating commercial cases may be lower than the total cost of investment arbitration.[191] Domestic proceedings may also be more resource-friendly considering that international arbitration often involves elite law firms which offer services at an exorbitant price and costly arbitrators.[192] Moreover, litigation in domestic courts is more likely to be financially

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Publishing (2012), p. 54. Rule 3 of the ICSID Arbitration Rules, for instance, reads that: "(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention: (a) either party shall in a communication to the other party: (i) name two persons, identifying one of them, who shall not have the nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator …" This rule clearly makes it highly unlikely that an individual with the nationality of the host state and the associated putative expertise of that state would be involved in the arbitration process. Rule 3, Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

[186] Steven Shavell, "The Appeals Process as A Means of Error Correction", Journal of Legal Studies, Vol. 24, No. 2 (1995), p. 379.

[187] *Ibid*, at 381-382 (arguing that the society's investment in the appeals system is economical by comparison to its improving the accuracy of the trial process in the sense that "the legal system will be burdened with reconsidering only the subset of cases in which errors were more probably made").

[188] *Ibid*, at 425-426.

[189] Hindelang, *supra* note 116, at 61. Jeon, *supra* note 82, at 191.

[190] Gáspár-Szilágyi, *supra* note 153, at 404.

[191] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 88 (arguing that "evidence from English and US commercial cases suggests that the cost of litigating commercial cases in the United Kingdom and the United States until the point of final resolution – that is, including any appeal – is lower than the average total cost of investment treaty arbitration since the 2000s").

[192] Gáspár-Szilágyi, *supra* note 153, at 404.

beneficial for the state side than the investor side since states would be able to defend cases with local lawyers or even in-house counsels instead of engaging eminent international lawyers.[193] On balance, it suffices to say that investment arbitration "is not necessarily cheaper than litigation in domestic courts, and is possibly more expensive."[194] While the preceding analysis primarily concerns costs for disputing parties, some law and economics literature suggests that litigation is preferable in terms of social costs. Landes and Posner notably argue that, in contrast with arbitration which mainly benefits the parties, adjudication via domestic courts generally creates large and public positive externalities.[195] To be more precise, as a result of the work of creating precedents and providing information within the court system, the whole society is likely to reap the benefits of the increased clarity in legal norms and their application.[196] In the meantime, owing to the lack of reliable data on the average duration of comparable proceedings before domestic courts, whether domestic litigation is more expeditious than investment arbitration remains a wide open question.[197] However, some existing evidence indicates that in certain circumstances domestic proceedings before courts, especially those in countries with advanced legal systems, can be (much) faster than investment arbitration. The contrast of Table 1 and Table 2 shows that the duration of civil litigation in a few selected developed countries is half of the average duration of ICSID arbitrations (3.6 years).[198] In addition, some research identified cases which involved both domestic proceedings and investment arbitration to illustrate that domestic courts could resolve investment disputes more quickly than arbitral tribunals.[199] Moreover, the previously mentioned bullet points, like the expertise of judges in municipal law and domestic courts as a single forum, may also allude to presumably greater efficiency in the proceedings before domestic courts. However, it should be stressed again that a generalized statement is hard to make as regards the relative duration of domestic proceedings versus investment arbitration.

Table 1 Duration of ICSID Arbitrations

[193] IISD, et al., "Meeting Report: Shifting International Investment Law Toward Sustainable Development: Strategies for Renegotiation, Reform and Defence", 12th Annual Forum of Developing Country Investment Negotiators, Feb. 27 – Mar. 1, 2019, Cartagena, Colombia, https://www.iisd.org/sites/default/files/meterial/12th-annual-forum-report-en.pdf (last visited on May 20, 2022), p. 30.
[194] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 88-89. Nigel Blackaby, et al., "Redfern and Hunter on International Arbitration", 6th edn., Oxford University Press (2015), p. 35.
[195] William M. Landes and Richard A. Posner, "Adjudication as A Private Good", Journal of Legal Studies, Vol. 8, No. 2 (1979), pp. 236-240.
[196] *Ibid.*
[197] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 90.
[198] Note that the average length of civil litigation in Italy (3.1 years) is modestly shorter than the average ICSID arbitrations and that in India (3.9 years) is slightly longer than the average ICSID arbitrations.
[199] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 91. Jeon, *supra* note 82, at 196.

	Average duration (years)	Median duration (years)	Minimum duration (years)	Maximum duration (years)
Registration to constitution of tribunal	0.8	0.5	0.01	9.0
Constitution of tribunal to last hearing	1.7	1.5)	0.1	5.6
Latest hearing to award	1.3	1.0	0.1	8.4
Subtotal	3.6	3.2	0.7	12.2
Award to annulment decision	2.7	2.3	1.1	9.6
Total (including annulment)	6.3	6.3	1.1	13.3

Note: Based on 198 ICSID cases and 40 annulment requests, excluding settled cases (on average, it takes 5.1 years from registration to settlement, 2.5 years longer than for decided cases). The table includes contract, treaty, and investment law arbitrations, as well as ordinary ICSID and Additional Facility arbitrations.

Source: Waibel and Wu dataset, drawing on Sinclair (2009).

Source: Bonnitcha, et al. (2017)

Table 2 Average Length of Civil Litigation

Country (overall 'Doing Business' ranking in brackets)	Average length (in years) to obtain and enforce final judgment (Doing Business 2016)	Average length (in years) to obtain first-instance decision (ICLG 2016)	Average length (in years) to obtain decision (2013 data)		
			First	Second	Final
England & Wales (33)	1.2*	1.5	0.9		
France (14)	1.1	–	0.8	0.9	0.9
Germany (12)	1.2	0.8	0.5	0.6	
Italy (111)	3.1	3.5	1.5	3.0	3.3
India (178)	3.9	7.5	–	–	–
United States (21)	1.0	1.5**	–	–	–
Switzerland (46)	1.1	1.5	0.4	0.4	0.3

* United Kingdom as a whole; ** denotes California only

Source: Author compilation, based on Doing Business (2016); International Comparative Legal Guides (ICLG) (2016); and OECD (2013).

Source: Bonnitcha, et al. (2017)

Although the marvellous enforceability of arbitral awards has been widely acclaimed as a prominent advantage of international arbitration,[200] adjudication of investment disputes via domestic courts may have its own advantages when it reaches the phase of compliance and enforcement. Given that investment disputes at issue involve public authorities as the respondent side, the willingness to comply with unfavorable decisions could be greater if they were made by the judiciaries at home rather than a remote international body.[201] In case voluntary compliance with decisions is not realized in a timely manner, domestic courts would ideally wield constitutionally vested power to enforce home-made judgements with no need to invoke special international/regional arrangements.[202] And this should be particularly true in jurisdictions where judicial independence is firmly established.[203]

[200] Gary B. Born, "International Arbitration: Law and Practice", 2nd edn., Kluwer Law International (2015), pp. 9-10. Blackaby Nigel, et al., "Redfern and Hunter on International Arbitration", 6th edn., Oxford University Press (2015), pp. 29-30.

[201] Puig and Shaffer, *supra* note 178, at 389 (arguing that as domestic courts "are more likely to be accepted as legitimate venues for resolving claims than a remote international body", voluntary compliance with and enforcement of decisions could be facilitated).

[202] Vid Prislan, "Domestic Courts in Investor-State Arbitration: Partners, Suspects, Competitors", Doctoral Thesis, Leiden University, Jun. 27, 2019, p.426.

[203] Note that, however, the European Court of Human Rights reported that "[v]iolations [of the European Convention of Human Rights] due to non-execution of domestic court decisions, in particular those against the State itself, are amongst the most frequent types found by the court." Although the decisions referred to by the Court are perhaps not related to investment disputes in most cases, the finding indicates that domestic courts

5.3.1.2 Risks of Unfairness and Inefficiency Still Exist

As mentioned above, the judicial reforms carried out across the world in the last decades should have in all likelihood engendered positive changes to judiciaries with varying degrees, which at least suggests that domestic courts concerned today should be more advanced than at the time when investment arbitration started to gain momentum in the 1960s.[204] Meanwhile, the increasing involvement of developed countries with a good record of the rule of law in investment arbitration adds more nuances, indicating that arguably more trustworthy courts are often bypassed by foreign investors in favor of investment arbitration.[205] However, these observations in no way permit complacency about the independence, impartiality, or integrity of domestic courts across jurisdictions with distinct political systems and legal traditions. Given that empirical work on foreign bias in domestic courts is scarce,[206] a comprehensive measure of the level of neutrality of judiciaries all over the world is understandably impractical. That, nevertheless, does not necessarily mean that general conclusions with policy relevance about the potential bias in domestic courts could not be drawn. On the contrary, existing reports and studies abound with information which would cast doubt on the reliability and credibility of domestic courts in consistently providing a neutral forum for investor-state dispute resolution. Evidently, the intensity of doubt would vary across jurisdictions as the quality of the judiciaries there is anything but homogenous. The WJP Rule of Law Index 2019 reveals that the rule of law in general and the independence of judiciaries in particular is developed in a very imbalanced manner in the sense that the chasm between the North and the South is rather conspicuous and some sizable economies fared badly in key indicators.[207] Figure 13 further indicates that there are some top FDI recipients where judiciaries are likely to be subject to undue governmental pressures and where the executive branch could not be sufficiently controlled by the judicial branch. Among them is the Chinese judiciary which is also accused by the U.S. Department of State in its 2019 Investment Climate Statements of failing to demonstrate judicial independence.[208] It claims that, despite the favorable outcomes that U.S. companies received in limited cases, Chinese courts, particularly at lower levels, are susceptible to outside political influence from particularly local governments and regulators.[209] While the judiciaries in developing

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could not execute their own judgments at times, especially when the decisions are against the interests of public authorities. Council of Europe, "Guide to Good Practice in respect of Domestic Remedies", https://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf (last visited on May 20, 2022), p. 38.

[204] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.

[205] *Ibid*.

[206] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 86 (arguing that "Existing work is largely limited to civil litigation in the US").

[207] The WJP, *supra* note 143, at 1-193.

[208] U.S. Department of State, "2019 Investment Climate Statements: China", https://www.state.gov/reports/2019-investment-climate-statements/china/ (last visited Mar. 30, 2020).

[209] Other reasons for judicial interference enumerated in the Statements include: "(1) Courts fall under the jurisdiction of local governments; (2) Court budgets are appropriated by local administrative authorities; (3) Judges in China have administrative ranks and are managed as administrative officials; (4) The CCP is in charge of the appointment, dismissal, transfer, and promotion of administrative officials; (5) China's Constitution stipulates that local legislatures appoint and supervise the courts; and (6) Corruption may also influence local court decisions." *Ibid*.

countries may be more liable to criticisms of being biased and dependent, not all domestic courts in the Global North perform well on both parameters all the time. More than a third of the EU member states are allegedly perceived to have an inadequate performance in judicial independence, which is said to be recognized by the European Commission in its own assessment of the quality of national judiciaries.[210] Furthermore, academics reminded that jurisdictions with well-developed judicial institutions could also demonstrate prejudice against foreigners in individual cases, invoking the experience of Loewen, a Canadian company, in the Mississippi state court prior to the NAFTA arbitration *Loewen v. United States*.[211] Indeed, concerns over the neutrality of domestic courts, particularly those in developing and transitioning economies, permeate the scholarship of foreign investment law. The ability of domestic courts to provide neutral decision-making in investment disputes is often queried on the grounds of the perception that these courts are vulnerable to political influence, prejudice against foreigners, and corruption.[212] While a consensus on the neutrality of adjudication of investment disputes via domestic courts is elusive for a number of reasons, such as the lack of convincing data, "the perception of bias of domestic courts may be just as important as the reality of bias."[213] It thus suffices to say that domestic courts cannot always administer justice in the handling of investment disputes due to their embedded position in the national legal order and inextricable links with other branches of the state apparatus.[214]

Moreover, other institutional aspects may also unavoidably come into play at times only to dent the reputation of domestic courts in providing decision-making services in investment disputes with steady fairness and efficiency. We can note from the analysis above, domestic law issues are all but inseparable components from investment disputes.[215] Therefore, domestic courts could hardly do justice to foreign investors if the national legal system *per se* consigns them to an unfavorable position.[216] Opportunistic legislative changes may be made to the domestic legal framework to give foreign investors overwhelming odds in domestic proceedings and domestic courts may have little room to maneuver in that case subject to the power dynamics in that particular jurisdiction.[217] Despite the rarity,[218] domestic courts may even be deprived of the ability to review the (certain) impugned conduct of public authorities

[210] Marco Bronckers, "Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements", Journal of International Economic Law, Vol. 18, No. 3 (2015), p. 671.
[211] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 87 (arguing that the civil jury that was in charge of the case ordered Loewen to pay "damages that were thirty times what the claimant had asked for, based in no small part on the 'anti-Canadian prejudices' that the lawyer … managed to stir up among the jurors during trial").
[212] Schill, *supra* note 103, at 315.
[213] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 86.
[214] Christoph Schreuer, "Do We Really Need Investment Arbitration", https://www.international-arbitration-attorney.com/wp-content/uploads/1do-we-need-investment-arbitrationby-christoph-schreuerinvestment-protection-in-general-and-i.pdf (last visited on May 20, 2022), p. 6 (referring to Jan Paulsson who concluded that "it would be preposterous to imagine that even half of the world's population lives in countries that provide decent justice" and "the rule of law is pure illusion for most of our fellow travelers on this planet").
[215] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[216] Schreuer, *supra* note 214, at 6 (arguing that "Where, as is often the case, an alleged violation of investor rights is a consequence of domestic legislation, domestic courts are usually powerless to provide a remedy").
[217] Prislan, *supra* note 202, at 426.
[218] Mestral and Vanhonnaeker, *supra* note 2, at 3-4.

as a result of constitutional and legislative limitations.[219] More exceptional is that only domestic individuals or companies are granted the right to challenge public authorities while foreign investors are denied the standing by the domestic legal order. For instance, Nigeria allegedly denies foreign investors access to domestic courts for the resolution of investment disputes.[220] The competence of domestic courts in investor-state dispute resolution is not only bogged down by concerns of neutrality but also fears of inefficiency.[221] Despite the existence of disagreement,[222] a traditional perception is that judges before domestic courts are generalists in the sense that they "have no designated subject-matter specialization" and "must accordingly hear and decide cases presenting virtually any legal issues."[223] The lack of specialization would in turn lead to concerns of accuracy and speed in decisions. For one thing, resulting from the lack of deft expertise in the field of foreign investment, generalist judges may not be able to make decisions that are in some qualitative and categorical sense as good as those made by specialists.[224] For another thing, even if generalist judges are able to deliver decision-making with the same quality, that would require an additional investment of time and resources which may be unwise or impracticable.[225] In addition, domestic judges, especially those in developing countries, may often lack the sophistication and educational background that are needed to understand the complex issues common to investment disputes and to accordingly render informed decisions.[226] Insofar as domestic courts are authorized to directly apply IIAs in the handling of investment disputes, the concern that judges are usually less experienced and expert in the application and interpretation of public international law may also arise.[227] The limited knowledge of domestic judges of international law matters would be likely to further undermine the decisional accuracy or absorb extra amount of time and money in the decision-making process.[228] Furthermore, apart from the fact that the time

[219] Prislan, *supra* note 202, at 426. For instance, the Administrative Litigation Law of the PRC makes clear that "Administrative regulations and rules or decisions and orders with general binding force developed and issued by administrative agencies" could not be challenged by citizens, legal persons, or other organizations. Article 13, the Administrative Litigation Law of the PRC.
[220] Mestral and Vanhonnaeker, *supra* note 2, at 4.
[221] Surya P. Subedi, "International Investment Law: Reconciling Policy and Principle", Hart Publishing (2008), p. 81.
[222] Edward K. Cheng, "The Myth of the Generalist Judge", Stanford Law Review, Vol. 61, No. 3 (2008), p. 561 (arguing that although many structural barriers prevent specialization, "many circuit judges have embraced specialization through their opinion assignments, clearly showing preferences for some subjects over others").
[223] Chad M. Oldfather, "Judging, Expertise, and the Rule of Law", Washington University Law Review, Vol. 89, No. 4 (2012), pp. 851-852. Laurence Baum, "Specialization in the Courts", in Richard G. Niemi and Joshua J. Dyck eds., "Guide to State Politics and Policy", CQ Press (2013), p. 285 (arguing that many judges who serve on U.S. state courts are generalists).
[224] Oldfather, *supra* note 223, at 854-855.
[225] *Ibid*, at 856. Jeon, *supra* note 82, at 194-195.
[226] For instance, the U.S. Department of State accuses judges in China, especially those from lower courts, of lacking "the sophistication and educational background needed to understand complex commercial disputes." U.S. Department of State, *supra* note 208.
[227] Hindelang, *supra* note 116, at 61 (arguing that, however, "public international law is applied or accommodated on a rather frequent basis" in many domestic courts).
[228] There are understandably different opinions in academia regarding the ability of domestic judges to apply and interpret international law. Bronckers, for instance, argues that there is no reason to assume that domestic judges would have particular difficulties in applying and interpreting international law, especially considering that "international law has been on the regular curriculum of most law schools for some time now". Bronckers, *supra* note 210, at 660-661.

needed to get the first-instance decisions in some jurisdictions may already be daunting,[229] the appeals procedure that is characteristic of the public court system would sometimes inevitably drag out the agony of litigation.[230] The agony of lengthy domestic proceedings could be further worsened in those jurisdictions where domestic courts are inundated with a heavy backlog of cases as judges therein are not likely to be able to help but would put aside submitted investment disputes.[231] In addition, domestic judges, especially those from the highest courts, are usually under less market pressure, which could generate a negative impact on their incentive to deliver judgments of good quality in an expeditious way.[232] The efficiency of court proceedings may likewise be further impaired by rigid procedural rules and extensive document production which is often non-negotiable unless otherwise provided by law.[233] For example, in a case where an investment dispute is submitted to a U.S. court, the foreign investor may be subject to "aggressive American style discovery" which is an unfamiliar notion for those from the Continental legal system.[234] These factors may combine to decrease the efficiency of the judicial process in not only developing and transitioning economies but also developed economies.[235] Last but not least, in a case where a judgment in favor of the investor side is not voluntarily complied with nor effectively enforced by the domestic courts system, the investor would very likely face a rough ride if the recognition and enforcement of the judgment is sought elsewhere particularly considering that the debtor of the judgment may be a public authority.[236]

5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks

The giant web of investment agreements promises foreign investors a wide span of protection against undue interference in their rights and interests, which corresponds to the obligations of host states to handle foreign investment-related issues as per established standards.[237] While these standards are commonly drafted in vague and ambiguous language,[238] they constitute binding principles for state behavior versus foreign investors and their investments. From the analysis in Section 5.2, we note that non-compliance with the international

[229] For instance, Table 2 suggests that, according to the data collected by International Comparative Legal Studies in 2016, the average length of domestic proceedings to obtain first-instance decisions in civil litigation before Indian courts is 7.5 years. Note, however, this is only the data from one study.
[230] Jeon, *supra* note 82, at 195.
[231] Geeta Oberoi, "The Curious Case of Court Manager in India: From Its Creation to Its Desertion", International Journal for Court Administration, Vol. 9, No. 1 (2017), p. 1 (arguing that a huge pendency of cases exists in Indian courts, which has attracted vociferous criticisms).
[232] Richard A. Posner, "Economic Analysis of Law", 7th edn., Wolters Kluwer (2007), p. 570.
[233] Jeon, *supra* note 82, at 195.
[234] *Ibid*.
[235] Schill, *supra* note 103, at 315-316 (arguing that "overly long court proceedings" have been labelled as a "systemic problem" in the German legal system by the European Court of Human Rights).
[236] Born, *supra* note 200, at 5 (arguing that "there are again only a few regional arrangements for the enforcement of foreign court judgments (in particular, the Brussels Regulation), and there is currently no global counterpart to the New York Convention for foreign judgments").
[237] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 11.
[238] Lise Johnson, et al., "Aligning International Investment Agreements with the Sustainable Development Goals", Columbia Journal of Transnational Law, Vol. 58, No.1 (2019), p. 68 (arguing that the standards of treatment contained in IIAs are often expressed with hotly contested contours). Alison Giest, "Interpret Public Interests Provisions in International Investment Treaties", Chicago Journal of International Law, Vol. 18, No. 1 (2017), p. 330 (arguing that many states are not satisfied with "the wide 'interpretative powers' of investment tribunals that stem from the ambiguous protections provided for in the (investment) treaties").

investment discipline would bring about a rash of unwanted negative externalities.[239] In addition, a good record of compliance with IIAs is also necessary for the proof of the raison d'être of the international investment treaty regime. The prodigious importance of compliance then begs the question of whether domestic courts would be able to improve national states' compliance with investment treaty norms, especially considering that domestic courts are often looked down on in terms of their ability in enforcing international law.[240] However, the perception that the lack of direct applicability of investment treaty norms in some jurisdictions makes domestic courts less functional in the promotion of compliance with IIAs risks misunderstanding the means of implementation of international law and failing to capture the nuances of the investment discipline. The starting point is that the role of domestic courts in facilitating the international rule of law has been long recognized by academics as international law increasingly branches out to cover a wide array of issue-areas and penetrates domestic legal order.[241] The analysis above of how international investment law may work at domestic level shows that in some jurisdictions foreign investors are entitled to directly invoke investment treaty norms to support their claims in domestic judicial proceedings.[242] On the other hand, foreign investors in other jurisdictions where the direct applicability of investment agreements is denied, are not necessarily left to ghastly deprivation of protection caused by the exclusive applicability of domestic legal order as long as domestic law accords them protection on a par with common standards of treatment established internationally. Indeed, the protection offered by the domestic legal order does not necessarily fall below that by investment agreements, given that the factual instances of protection of rights or entitlements are equally found on the national level and the ground covered by investment treaty norms are similar to that covered by administrative law or state liability law within domestic legal orders.[243] Thus, on the assumption that domestic law in general gives effect to investment agreements in one way or another, domestic courts show great promise in assessing impugned actions/inaction of public authorities against

[239] See 5.2.2.2 Norm Compliance.
[240] Schill, *supra* note 103, at 316.
[241] Antonios Tzanakopoulos and Christian J. Tams, "Introduction: Domestic Courts as Agents of Development of International Law", Leiden Journal of International Law, Vol. 26, No. 3 (2013), p. 533 (arguing that domestic courts on all continents increasingly, or even routinely, engage with international law). Wayne Sandholtz, "How Domestic Courts Use International Law", Fordham International Law Journal, Vol. 38, No. 2 (2015), p. 635 (arguing that "Domestic courts from diverse legal traditions and in every region of the world invoke international legal materials in resolving disputes brought before them"). Andre Nollkaemper, "National Court and the International Rules of Law", Oxford University Press (2011), pp. 9-10 (arguing that domestic courts could contribute to the protection of international rule of law in a variety of ways, including the adjudication of international claims and the review of the legality of national acts in the light of international obligations to ensure rule-conformity).
[242] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[243] Hindelang, *supra* note 116, at 61. Anne van Aaken, "Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View", in Stephan W. Schill ed., "International Investment Law and Comparative Public Law", Oxford University Press (2010), p. 721. Bonnitcha, Poulsen and Waibel, *supra* note 126, at 150 (arguing that the available evidence about the treatment of foreign investors by the executive and legislative branches "casts doubt on the view that host states treat foreign firms less favorably than their domestic competitors"). Kate Hadley, "Do China's BITs Matter? Assessing the Effects of China's Investment Agreements on Foreign Direct Investment Flows, Investor Rights, and the Rule of Law", Georgetown Journal of International Law, Vol. 45, No. 1 (2013), p. 310 (arguing that "the BIT programs of developed democracies have been successful in promoting stronger property rights foreign investors [sic] and some reforms that promote consistency and transparency in China's legal system").

international standards of treatment without directly applying international law in the narrow sense.[244] It follows that domestic courts are capable of promoting compliance with investment treaty norms by states although the ways in which it is achieved would conceivably vary across jurisdictions.

Apart from the finding that domestic courts are capable of implementing investment treaty norms in their own ways, the remedy design within domestic legal orders offers these courts more potential in promoting compliance with international obligations by states. Within both domestic and international spheres of law, reparation due to injured right holders from national states mostly comprises two forms – primary remedies and secondary remedies.[245] Primary remedies, unlike secondary remedies which are directed at the provision of pecuniary remedies, focus on the impugned government act or the challenged legislation *per se*.[246] These remedies, which are also understood as public law remedies, feature the action of rescission as the main content but may equally include declaratory actions, mandatory injunctions, and an order of mandamus.[247] Primary remedies, for all intents and purposes, could be equated to restitution that is a far more familiar notion for international lawyers. Restitution requires the restoration of the *status quo ante*, namely the situation as it was before the commission of the wrongful act by the state.[248] Restitution is further divided into material restitution and legal/juridical restitution based on the type of injury that had been incurred by the aggrieved party.[249] Material restitution entails the obligation of the state to restore to the aggrieved party the physical property or money that was taken from him/her.[250] Legal restitution, however, requires the re-establishment of the legal situation as it was before the commission of the wrongful act, which could involve the annulment of national laws or the reissuance of certificates.[251] It thus becomes clear that primary remedies are preventive or restitutive.[252] They are intended to "avoid present and future loss or injury" and to "remedy the current state of affairs."[253] Law and economics scholars would probably equate primary remedies to property rules (which are meant to deter trespass) and secondary remedies to liability rules (which are meant to encourage market bypass).[254] It follows that primary remedies are in many cases able to provide a stronger form of protection for foreign investors and are more potent in aligning the behavior of states with investment treaty norms.[255] While some Law and Economics scholars arguably would not make an issue out of "efficient

[244] Bronckers, *supra* note 210, at 669 (introducing the perception that "each country has the basic constitutional freedom to choose the system it prefers of giving effect to public international law").
[245] Van Aaken, *supra* note 243, at 725-733 (arguing that the remedies against national states for injured right holders comprise mostly primary remedies and secondary remedies).
[246] *Ibid*, at 724.
[247] *Ibid*.
[248] Borzu Sabahi, "Compensation and Restitution in Investor-State Arbitration: Principles and Practice", Oxford University Press (2011), p. 61.
[249] Steffen Hindelang, "Restitution and Compensation Reconstructing the Relationship in Investment Treaty Law", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525065 (last visited on May 20, 2022), p. 4.
[250] Sabahi, *supra* note 248, at 65.
[251] *Ibid*, at 73-79.
[252] Van Aaken, *supra* note 243, at 724.
[253] *Ibid*.
[254] *Ibid*, at 744-745. Bonnitcha, Poulsen and Waibel, *supra* note 126, at 16.
[255] Van Aaken, *supra* note 243, at 745.

breach",[256] lawyers are likely to be more concerned about the negative impact of secondary remedies on the compliance with international law by states. It is argued that secondary remedies would likely "merely sanction past misconduct, and may not act as a sufficient deterrent to eventual future violations by states of their international obligations, insofar as they encourage mere payment for breach rather than observance of the law."[257] On the contrary, primary remedies would "induce the state to reconsider its decision" by, for instance, revoking an unjust regulation or reissuing a construction permit,[258] and keep its behavior in line with investment treaty norms instead of merely compensating for unlawful conduct. Thus, while secondary remedies would compensate the negative externalities of non-compliance more or less, primary remedies hold great promise in the preservation of compliance by undoing the violation. Hindelang's call to prioritize primary remedies in investment law in order to "establish and maintain long-term and stable investment relations on the basis of the rule of law" equally echoes the idea that primary remedies are more likely to promote the compliance with investment treaty norms by states.[259] The advantage of primary remedies in advancing norm compliance precisely highlights the qualified superiority of domestic courts in this regard. That results from the fact that domestic courts, in comparison to investment tribunals, are more readily capable of awarding primary remedies to the aggrieved foreign investor.[260] Within domestic legal orders, primary remedies are indeed preferred in general as the main form of reparation in state liability law or administrative law while national judiciaries are found to be reluctant to grant secondary remedies.[261] Even so, domestic courts are vested with the power to grant secondary remedies in certain circumstances,[262] thus exhibiting more reflexive ability to combine primary and secondary remedies to induce norm compliance. To sum up, insofar as domestic courts are more reasonably positioned to award primary remedies to the aggrieved investor, the adjudication of investment disputes via domestic courts would be superior to investment arbitration in promoting compliance with strings attached.

As indicated above, although primary remedies are in theory more likely to induce a higher level of norm compliance, domestic courts are not consequently capable of securing compliance with investment treaty norms by states consistently. The preceding text allows for an analysis of the doubtful qualification of domestic courts in this regard from two perspectives. For one thing, the lack of independence and impartiality could be a systematic deficiency characterizing the judicial branch of some jurisdictions and not all domestic courts within a certain jurisdiction could maintain such a desirable quality in addressing any

[256] Eric A. Posner and Alan O. Sykes, "Efficient Breach of International Law: Optimal Remedies, 'Legalized Noncompliance,' and Related Issues", Michigan Law Review, Vol. 110, No. 2 (2011), p. 294 (arguing that "states should generally have an option to breach and pay reparations, make other concessions, or bear retaliation that causes them to internalize their harm to other states").
[257] Gisele Stephens-Chu, "Is It Always All About the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration", Arbitration International, Vol. 30, No. 4 (2014), p. 685.
[258] Van Aaken, *supra* note 243, at 745.
[259] Hindelang, *supra* note 249, at 22.
[260] See below 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[261] Van Aaken, *supra* note 243, at 723.
[262] *Ibid*, at 725-730.

investment disputes submitted before them.[263] Probably the most prominent theoretical and practical obstacle for domestic courts wishing to advance the compliance with investment treaty norms turns out to be that these courts are inherently part of the very states whose acts and omissions these norms are supposed to control.[264] Although this obstacle is effectively removed or minimized in jurisdictions where the rule of law is ingrained in the internal governance system and the judiciary is maintained as an independent force of power, it is undeniable that in some jurisdictions domestic courts may lack the competence necessary to hold other branches of the state accountable for violations of investment treaty norms or their implementing national rules.[265] In a case where the judicial branch of a certain jurisdiction is fettered by political pressures or plagued by systematic xenophobia, domestic courts there could hardly be regarded as a reliable agent for the promotion of compliance with investment treaty norms. For another thing, provided that investment agreements are not directly applicable within a certain jurisdiction, whether and to what extent domestic courts can promote norm compliance is equally hinged on the conformity of the domestic legal system with these agreements. While the investment law scholarship in general gives off a sign of optimism about the consistency of domestic investment rules and investment treaty norms,[266] national legal systems do not always accord foreign investors protection that is at the same level with that covered by investment agreements. National states, despite their engagement with other countries in investment treaty-making practice, may fail to bring domestic law into line with their international obligations. The more deeply that they feel not connected to the investment treaty regime (in the sense that "its rules and institutions do not represent them in some way"), the less likely it is that they will promulgate domestic laws granting foreign investors protections that emanate from investment agreements.[267] In addition, a recent empirical study based on qualitative interviews with governmental officials in Turkey, Uzbekistan, and Nigeria with previous experience of investment treaty-making, investment dispute settlement, or close engagement with foreign investors is also revealing on this score.[268] The presumption in this study is that if host states are encouraged to adjust domestic legal orders accordingly upon the conclusion of investment agreements, government officials have to understand the scope and substance of investment protection guarantees embodied in these agreements.[269] However, the study suggests that there is a low level of awareness of investment treaty norms among government agencies (not necessarily the interviewees themselves) and many of the interviewees were of the view that the incorporation of these

[263] See 5.3.1.2 Risks of Unfairness and Inefficiency Still Exist.
[264] Nollkaemper, *supra* note 241, at 299 (arguing that probably "the most significant theoretical as well as practical barrier against considering national courts as a systemic force in the protection of the international rule of law is that national courts are an organ of the very states whose acts and omissions they are to control").
[265] See 5.3.1 Fairness and Efficiency without Guarantee.
[266] Hindelang, *supra* note 116, at 61. Bonnitcha, Poulsen and Waibel, *supra* note 126, at 150. Hepburn, *supra* note 168, at 658-659. Van Aaken, *supra* note 243, at 721.
[267] Steven R. Ratner, "International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows", Journal of World Investment & Trade, Vol. 21, No. 1 (2020), p. 28.
[268] Mavluda Sattorova, et al., "How Do Host States Respond to Investment Treaty Law? Some Empirical Observations", in John D. Haskell and Akbar Rasulov eds., "European Yearbook of International Economic Law (Special Issue: New Voices and New Perspectives in International Economics Law)", Springer (2020), p. 136.
[269] *Ibid*, at 135.

norms into national legal orders is unnecessary for the reason that "national laws are good."[270] Despite the great uncertainty of the general applicability of the finding of this study, it casts doubt on the possibility that domestic legal orders could always mirror the investment treaty regime as regards the provision of foreign investment protections. There are also country-specific examples demonstrating the gap between protection for foreign investors granted by investment agreements and national legal systems. It is noted that within some EU member states, such as Germany, foreign investors do not enjoy the same legal protection as do domestic investors.[271] Likewise, U.S. law does not contain principles promising foreign investors non-discriminatory treatment, and foreign investors could fare rather badly in some instances in the US.[272] Considering that both Germany and the US are known for the good record of the rule of law, many other countries arguably would not be able to align all applicable national rules and norms in investor-state relations with their commitments in investment agreements. That perhaps would in turn spawn scenarios where domestic courts apply national laws in good faith in addressing investment disputes yet fail to drive forward the spirit of international investment law or secure genuine compliance with investment treaty norms. In a nutshell, decisions of domestic courts may be in some cases constricted by deficiencies in their national laws.

5.3.3 The Attainment of Objectives: Chances and Challenges

Investor-state dispute resolution, at least in the context of this research, is inherently rooted in the investment treaty regime. The embedded nature, in turn, dictates that investor-state dispute resolution should in one way or another facilitate the attainment of the objectives of the investment treaty regime.[273] Despite the apparent challenge in the enumeration of all the relevant parameters in a finite list, some salient objectives often explicitly mentioned in investment agreements, or referred to by the literature, are available for the creation of a framework for analysis. These objectives include, *inter alia*, the protection of foreign investors and their investments, the consolidation of the domestic rule of law, the separation of politics from investment disputes, the promotion and maintenance of foreign investment flows, and the achievement of sustainable development goals.[274] Since fair and efficient dispute resolution and norm compliance to a great extent represent the interests of foreign investors, this section will instead focus on the rest of the objectives of investment agreements rather than on foreign investor protection.

First of all, adjudication of investment disputes via domestic courts could promote the rule of law at domestic level by, among others, disciplining state behavior, improving national laws, and strengthening the judicial branch. A recurrent argument in the investment law literature is that investment agreements may promote the domestic rule of law given that the established standards of treatment of foreign investors therein would impact the conduct of public authorities of the treaty parties.[275] Although the interaction mechanisms between the

[270] *Ibid*, at 142.
[271] Schill, *supra* note 103, at 316. Bronckers, *supra* note 210, at 658.
[272] Bronckers, *supra* note 210, at 658.
[273] See 5.2.2.3 Facilitating the Objectives of the Investment Law Regime.
[274] *Ibid*.
[275] Stoll, *supra* note 105, at 278.

investment treaty regime and the domestic rule of law are not limited to the operation of dispute resolution,[276] the emphasis is placed on how domestic courts may come into play in the interactive process in the current analysis. By submitting investment disputes to the jurisdiction of national judiciaries, domestic courts in some states would be able to assess government conduct or national legislation against international standards of treatment of foreign investors by directly applying investment treaty norms. Even if the applicable law in the adjudicative process is not these norms, an argument could be made that investment agreements are in fact enforced by domestic courts in such an instance.[277] This would be the case when these courts invoke a domestic rule that gives effect to an investment treaty obligation; when they construe a domestic rule in a way that is consistent with the spirit of an investment treaty obligation; or even when they apply a "deeply internationalized" domestic rule (i.e., a domestic rule that has a parallel existence in investment agreements).[278] On the assumption that domestic courts can put investment treaty norms into effect either directly or indirectly, they may contribute to the domestic rule of law by controlling government conduct and developing national laws along the lines of the essence of good governance.[279] The potential contribution of domestic courts in this respect relates to a previously mentioned point that these courts are better positioned to award primary remedies as a form of reparation in response to the investment claims filed by foreign investors.[280] Instead of simply "buying oneself out of" an investment relationship by virtue of providing monetary compensation, primary remedies are aimed at wiping out all the legal and material consequences of wrongful acts.[281] Thus, primary remedies are more likely to discipline the acts of public authorities in a given jurisdiction, which in turn provides domestic courts with a competitive edge in facilitating the objectives of the investment treaty regime, particularly the promotion of the domestic rule of law.[282] Resolution of investment disputes via domestic courts would further facilitate the domestic rule of law by strengthening the judicial process of the host state.[283] By channelling investment disputes to the jurisdiction of domestic courts, judges would be able to gain more competence and professional ethos in the process of addressing foreign investment-related controversies which typically involve a wide range of legal issues, such as the license rules and environmental protection regulations[284]. In the meantime, judges would be granted "the opportunity to grapple with and learn from a dynamic array of local and international law,"[285] which would in theory improve the quality (in terms of both precision and efficiency) of their decision-making gradually, not only in adjudicating investment

[276] Benjamin K. Guthrie, "Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law", New York University Journal of International Law and Politics, Vol. 45, No. 4 (2013), p. 1185 (arguing that the investment treaty regime may also exert influence on the domestic rule of law through administrative and legislative actions).
[277] Tzanakopoulos, *supra* note 158, at 147.
[278] *Ibid*.
[279] Van Aaken, *supra* note 243, at 726 (arguing that "States usually require the use of primary remedies before right holders can claim damages against the state").
[280] See 5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks.
[281] Hindelang, *supra* note 249, at 21-22.
[282] Tomoko Ishikawa, "Restitution as A 'Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options", McGill Journal of Dispute Resolution, Vol. 3 (2016-2017), pp. 165-166.
[283] IISD, et al., *supra* note 193, at 30.
[284] Puig and Shaffer, *supra* note 178, at 389.
[285] Fox, *supra* note 100, at 256.

disputes but a much broader scope of cases. Additionally, it is argued that granting to foreign investors an exclusive remedy via domestic courts would be conducive to judicial capacity-building and legal system reform in the host state as more pressure from these investors demanding sound and well-oiled legal and judicial institutions would provide the state with a renewed incentive to invest more resources in the improvement of the rule of law.[286] Ultimately, what lends domestic courts another advantage in promoting the domestic rule of law is that courts are believed to be able to generate positive externalities for the whole society, instead of only for the disputing parties, by creating precedents and providing more clarity in law.[287] Therefore, domestic courts would be able to further clarify relevant domestic legal standards, such as the approval procedures for licenses and permits or the conditions of the conferment of concessions or resource extraction rights.[288]

One of the principal objectives of the investment treaty regime is to facilitate and maintain the dynamic flows of FDI in the hope that cross-border capitals would make a variety of stakeholders, including host states and foreign investors, better off.[289] It follows that investor-state dispute resolution should somehow or other contribute to the stimulation of FDI flows and the maintenance of existing foreign investment in a certain economy. Note that the analysis of this presumes foreign investment as a beneficial economic tool and leaves what Law and Economics literature often sees as "over-investment" out of consideration.[290] For one thing, adjudication of investment disputes via domestic courts is likely to enhance the quality of legal and judicial institutions of the host state, thus rendering the state a more attractive investment destination for overseas investors. Chen argues that, in contrast to commitments made at the international level, the quality of domestic institutions appears to have a more significant impact on foreign investment.[291] Insofar as resolution of investment disputes via domestic courts holds great promise in improving the legal and judicial institutions of the host state as indicated above, channelling more of these disputes to national judiciaries is likely to attract more FDI inflows into the state concerned in the long run. For another thing, domestic courts adjudicating investment disputes could be more conducive to the preservation of stable and long-term investor-state relationships and to the maintenance of FDI stocks within a given economy for a number of reasons. First of all, domestic courts are more likely to award primary remedies (restitution) and that in turn could help to prevent the

[286] Aisbett, et al., *supra* note 134, at 118. However, this argument would conceivably be subject to a series of significant qualifications, such as whether the legal system of the state is susceptible to outside pressure, the nature of the reform measures advocated by foreign investors, and whether other stakeholders show support of the advocated reform measures. Guthrie, *supra* note 276, at 1197-1198.
[287] Landes and Posner, *supra* note 195, at 241.
[288] Aisbett, et al., *supra* note 134, at 120. Matthew C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come", Yale Journal of International Law Online, Vol. 41 (2015), pp. 5-6.
[289] Christopher M. Ryan, "Meeting Expectations: Assessing the Long-term Legitimacy and Stability of International Investment Law", University of Pennsylvania Journal of International Law, Vol. 29, No. 3 (2008), pp. 736-737 (arguing that although FDI is not a panacea and may cause negative impact at times, "it can stimulate faltering economies, expand trade opportunities, strengthen infrastructure, and lead to improved governance").
[290] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 140 (arguing that "while foreign investment is usually beneficial for host states, this is not necessarily the case for all foreign investments in all circumstances").
[291] Richard C. Chen, "Bilateral Investment Treaties and Domestic Institutional Reform", Columbia Journal of Transnational Law, Vol. 55, No. 3 (2017), p. 549.

relationship between the foreign investor and the host state from breaking up.[292] The Tribunal in *Arif v. Moldova* notably argues that "restitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State."[293] Hindelang equally contends that restitution should be prioritized in the adjudication of investment disputes because that would accord with the aim of states to keep up healthy and enduring investment relations.[294] Second, adjudication of investment disputes via domestic courts would be likely to increase pacific communication and amicable resolution,[295] thus keeping the unwanted deterioration of investment relations at bay. Whether, and to what extent, this is promising is certainly related to the legal tradition and judicial culture of the jurisdiction of the host state. For instance, in recent years, the average mediation rate of cases before Chinese courts was said to be more than 60% and the figure could be higher (more than 75%) in certain areas, such as Henan and Jiangsu provinces.[296] While critics are concerned that the high rate of court mediation indicates "a new political interference" and relegates formal and professional legal decision-making to the background,[297] it is conceivable that Chinese courts would probably assume an active role to broker an out-of-court settlement between the foreign investor and the public agency. That would hold the promise of preventing a stark divorce and achieving mutual understanding and reciprocal concessions from both sides. Third, resolution of investment disputes before domestic courts would arguably reduce the confrontations between the foreign investor and the host state for the reasons that a specific public agency (such as a ministry or municipality), instead of the state, is typically put in the dock and that the avoidance of resorting to an international forum would play down the prominence of the investment dispute in the light of a deluge of domestic disputes involving public authorities.[298] Thus, there is a greater chance that the investment relationship could be preserved after the dispute is resolved or settled and the FDI stocks concerned could remain in the host state to generate benefits for all relevant parties.

Moreover, while the tension between the need to protect foreign investments and the right of states to regulate for public interests appears to have simmered down in recent years, there is an increasing call for the further incorporation of sustainable development goals into the foreign investment governance regime.[299] Sustainable development is an apparently abstract

[292] Ishikawa, *supra* note 282, at 165-166. IISD, et al., *supra* note 193, at 30.
[293] *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013), para. 570.
[294] Hindelang, *supra* note 249, at 22.
[295] IISD, et al., *supra* note 193 at 31.
[296] Yedan Li, et al., "Understand China's Court Mediation Surge: Insights from a Local Court", Journal of the American Bar Foundation, Vol. 43, No. 1 (2018), at 58-59.
[297] *Ibid*, at 59.
[298] Gáspár-Szilágyi, *supra* note 153, at 397 (arguing that the study of a sample of domestic proceedings prior to investment arbitrations shows that most of these cases before domestic courts were brought by foreign investors against "some form of emanation of the State or State-controlled commercial entity").
[299] Johnson, et al., *supra* note 238, at 60-61 (arguing that "foreign direct investment ('FDI') is critical to sustainable development objectives because it represents real economic activity being directed into a country"). John A. VanDuzer, et al., "Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators", Commonwealth Secretariat (2013), p. 1 (arguing that "investment flows have not always contributed to sustainable development"). Andrew Newcombe, "Sustainable Development and Investment Treaty Law", Journal of World Investment & Trade, Vol. 8, No. 3 (2007), p. 357

and fuzzy concept, which could comprise a wide span of principles that pursue distinctive (but often-related) policy goals.[300] If investment disputes are to be referred to the jurisdiction of domestic courts, some principles related to sustainable development, such as public participation and good governance, are more likely to be advanced.[301] The pursuit of sustainable development via the investment treaty regime would then beg the question of whether, and to what extent, investor-state dispute resolution may have an impact upon environmental protection which is the matrix where the idea of sustainable development arose.[302] To sum up in advance, domestic courts are more likely to achieve a balance between environmental concerns and business interests in the process of addressing investment disputes, thus demonstrating a comparatively reliable ability to facilitate the objective of environmental protection. Judges in domestic courts are believed to be more experienced in considering an investment dispute against the national legal system as a whole, which is usually anchored by a complicated and delicate balance between competing interests, such as economic development versus ecological civilization.[303] They are thus more likely to be sensitive to legitimate policy goals at the domestic level, like the preservation of wildlife, behind the challenged administrative decisions or legislative instruments and to account for both corporate profits and public interests during their deliberations.[304] Magraw and Puig more specifically argue in their article *Greening Investor-State Dispute Settlement* that, to enhance climate change regulation in the face of pressing challenges posed by global warming, states should prioritize domestic courts and institutions in handling investment disputes.[305] Thus, domestic courts are in theory more liable to foster the realization of the goal of environmental protection in the process of resolving investment disputes by referring to complex national legal systems and the associated legitimate policy agenda.[306]

(arguing that "There is widespread consensus in the international community that foreign direct investment (FDI) is necessary for sustainable development Agenda 21").

[300] The International Law Association identified seven principles of international law are instrumental in pursuing the objectives of sustainable development: (1) the duty of states to ensure sustainable use of natural resources; (2) the principle of equity and the eradication of poverty; (3) the principle of common but differentiated responsibilities; (4) principle of the precautionary approach to human health, natural resources and ecosystems; (5) principle pf public participation and access to information and justice; (6) the principle of good governance; (7) the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. The International Law Association, "ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002", International Environmental Agreements, Vol. 2, No. 2 (2002), pp. 211-216.

[301] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before and 5.3.3 The Attainment of Objectives: Chances and Challenges.

[302] Tarcisio Gazzini, "Bilateral Investment Treaties and Sustainable Development", Journal of World Investment & Trade, Vol. 15, No. 5-6 (2014), p. 931 (arguing that the concept of sustainable development is grown out of environmental concerns).

[303] Hindelang, *supra* note 116, at 61.

[304] *Ibid*. But that does not mean that investment tribunals would only focus on the interests of foreign investors without addressing competing public interests that are usually acknowledged by both domestic and international law. Alessandra Asteriti, "Environmental Law in Investment Arbitration", Journal of World Investment & Trade, Vol. 16, No. 2 (2015), pp. 271-272 (arguing that "some of the earlier tribunals had no qualms about considering the international dimension of the host states' laws, for example rejecting a claim by an investor found to have breached domestic environmental laws").

[305] Daniel B. Magraw and Sergio Puig, "Greening Investor-State Dispute Settlement", Boston College Law Review, Vol. 59, No. 8 (2018), p. 2727.

[306] IISD, et al., *supra* note 193, at 31.

However, with respect to the facilitation of the objectives of the investment treaty regime, entrusting domestic courts with the exclusive competence of dispute resolution would also entail significant challenges. One could imagine a given jurisdiction with an egregious lack of respect for the rule of law, or with scant regard to international obligations, or with a judicial system full of persistent flaws, where the potential of domestic courts to generate strides in the domestic rule of law is bound to bear no fruit.[307] If that is the case, the frustrating prospect of a minimal level of effective legal protections for foreign investments would also scare away risk-averse cross-border capital and incentivize divestment from the host state by regretful foreign investors.[308] In addition, if domestic courts are the only available forum for foreign investors, or, in other words, if these investors are not granted the private right of actions at the international level, the trade of barbs and sanctions is more likely to arise between the home state and the host state. While the absolute depoliticization of investment disputes is increasingly believed to be both unrealistic and unnecessary,[309] the involvement of the home state of the foreign investor in the process is often expected to bring damaging consequences with it.[310] Conceivably, the combination of a feeble court system and the lack of an international remedy would be a recipe for a greater possibility that the home state of the (economically and politically influential) foreign investor could be convinced to intervene in the dispute resolution process on behalf of the investor.[311] Even worse is that unfavorable

[307] *Ibid*, at 30-31 (arguing that political interference, corruption, and weakness in the court system could frustrate the dispute resolution process). August Reinisch and Loretta Malintoppi, "Methods of Dispute Resolution", in Peter Muchlinski, et al., eds., "The Oxford Handbook of International Investment Law", Oxford University Press (2008), p. 1199 (arguing that "actual or perceived partiality, prejudice, the impact of public opinion and various other political implications" may prevent the state and the investor from litigating on an equal footing before domestic courts).

[308] IISD, et al., *supra* note 193, at 30-31 (arguing that foreign investors may pull capitals out of the host state if their claims are not resolved before domestic courts and that exclusive remedy via domestic courts may lower other foreign investors' incentive to invest in the host state due to competitive reasons).

[309] Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority", Harvard International Law Journal, Vol. 55, No. 1 (2014), p. 3 (arguing that "most investment treaties now contain two dispute resolution clauses: one permitting investor-state arbitration for investment disputes and the other permitting state-to-state arbitration for disputes concerning the treaty's interpretation and/or application"). Lise Johnson, et al., "Costs and Benefits of Investment Treaties: Practical Considerations for States", Policy Paper, Columbia Center on Sustainable Development, March 2018, http://ccsi.columbia.edu/files/2018/04/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf (last visited on May 20, 2022) , p. 9 (arguing that "'politicization' may not be as much of a problem as it is often portrayed to be and, in fact, may in some cases and from some perspectives even be preferable to more legalistic forms of dispute resolution"). Rodrigo Polanco, "The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?", Cambridge University Press (2019), p. 5 (arguing that the increasing participation of states in the process of dispute resolution is made to reassert their control of investment agreements, as 'masters', in response to a system that is producing inconsistent interpretations of treaty obligations negotiated by them).

[310] Puig, *supra* note 8, at 484 (arguing that the involvement of the home state of the investor "would inescapably favor powerful states over weaker ones" and "could give rise to paralyzing diplomatic confrontations and destructive zero-sum games between states affected by the conflict"). Geoffrey Gertz, et al., "Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes", World Development, Vol. 107 (2018), p. 239 (asserting that prior to the rise of investment arbitration, "developing countries would routinely be met with sanctions, or worse, if they failed to resolve serious investment disputes with American investors"). Ursula Kriebaum, "Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes", ICSID Review, Vol. 33, No. 1 (2018), p. 15 (arguing that "The weaker the host state, the more exposed it is to arbitrary determinations of the claiming state").

[311] Polanco, *supra* note 309, at 2 (arguing that prior to the rise of investment arbitration, foreign investment disputes were settled either by the host state's domestic courts or through diplomatic protection).

court judgements against foreign investors, which were made through due process and sound legal reasoning, could also easily become an excuse for a great power to exert unjustifiable influence on weaker host states. While the resolution of inter-state disputes through legal means, such as state-to-state arbitration, is acceptable,[312] the consequences resulting from the involvement of the home state in the process could go either way. Thus, empowering the domestic courts of the host state with exclusive competence in investor-state dispute resolution would more likely bring back the home state of the foreign investor to the process, creating unnecessary risks for international relations and global cooperation and condemning weaker states to an especially vulnerable position.

5.3.4 Legitimizing the Investment Treaty Regime? Cautious Optimism.

While the investment treaty regime has for long been inundated with criticisms of lacking balance and demands for systemic reforms,[313] a general consensus is that investment agreements remain as critical policy tools which produce positive externalities for the global community.[314] Insofar as the investment treaty regime is worth being kept in place, the legitimacy of the regime should be elevated and investor-state dispute resolution could contribute to this process even though legitimization could be a never-ending project.[315] The need for legitimacy bears substantial significance in the investment treaty regime not only because the notion has become central to international law,[316] but also states will only feel obliged to comply with the norms of investment treaties when they regard these norms as legitimate.[317] In his seminal work *The Power of Legitimacy Among Nations*, Thomas Franck defined legitimacy as: "Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[318] It can be inferred that if the legitimacy gap in the investment treaty regime is not (partially) addressed, more states would

[312] Roberts, *supra* note 309, at 68-69 (arguing that state-to-state arbitration works as an important mechanism for signatory states of investment agreements to re-engage with the regime to influence the interpretation and application of their treaties).
[313] Elisabeth Tuerk and Diana Rosert, "The Road Towards Reform of the International Investment Agreement Regime: A Perspective from UNCTAD", European Yearbook of International Economic Law (2016), p. 772 (arguing that a broad range of stakeholders agreed that global investment governance had to be improved and believed that the investment treaty regime and the related investment dispute settlement system required systematic and comprehensive changes at a conference hosted by UNCTAD in 2014). Alexis Galán, "The Search for Legitimacy in International Law: The Case of the Investment Regime", Fordham International Law Journal, Vol. 43, No. 1 (2019), p. 80 (arguing that criticisms at the investment treaty regime are diverse but often share the undertone of investment agreements being the enemy of states).
[314] Tuerk and Rosert, *supra* note 313, at 772 (arguing that many participants of the conference were of the view that "IIAs remain an important policy tool to help foster a stable and predictable business climate for the protection and attraction of foreign investment"). Barnali Choudhury, "International Investment Law as A Global Public Good", Lewis & Clark Law Review, Vol. 17, No. 2 (2013), p. 519 (arguing that the reach and impact of the rules, principles, and policies in international investment law "extend well beyond the parties to the treaty, causing such a broad global impact that it warrants the label 'global public good'").
[315] Schneiderman, *supra* note 62, at 269 (arguing that "the task needs to be undertaken with the expectation that legitimacy will never be definitively acquired, remains precarious, and will always be open to challenge").
[316] Galán, *supra* note 313, at 82.
[317] Ratner, *supra* note 267, at 30.
[318] Thomas M. Franck, "The Power of Legitimacy among Nations", Oxford University Press (1990), p. 24.

conceivably shrug off investment treaty norms or even exit the regime altogether.[319] The ensuing consequence would be that the global investment governance scheme which has been built upon the incremental efforts of states over decades would be deprived of much of its substance and that all the benefits that may be generated by the regime would be lost as well. Therefore, the (re)design of investor-state dispute resolution should examine the extent to which the legitimacy of the overarching regime may be facilitated and a comparative institutional analysis of the design options facing states should certainly take this issue into consideration. It should also be noted that while the legitimacy of the investment treaty regime arguably concerns a great deal of aspects, such as the clarity of the relevant rules and norms,[320] not all of them, not even the majority, would be analyzed since the focus in this is how dispute resolution may have an impact on the legitimacy of the investment treaty regime.

First, referring investment disputes to domestic courts would increase the legitimacy of the investment treaty regime by giving effect to its rules, norms, and principles within the domestic sphere of state parties which the regime is intended to address. The reader may recall that from the analysis above regarding domestic courts' potential in promoting norm compliance and facilitating the domestic rule of law, national judiciaries are better positioned in certain circumstances to demand the conformity of state conduct, including administrative and legislative acts, to investment treaty norms rather than merely compensating the foreign investor for its economic losses *ex post*.[321] In this way, the legitimacy of the overall regime would benefit from the strong impression that investment treaty norms are effective in instilling good governance principles into the host state and in building up a favorable investment climate for global investors.[322] In the meantime, considering that domestic courts would in general prioritize the use of primary remedies instead of monetary compensation, global constituents would not regard the treaty-based dispute resolution mechanism as simply providing states with a possibility to buy the right to violate international law.[323]

Second, referring investment disputes to domestic courts would also help quell legitimacy concerns in the sense that, unlike international arbitration, national judiciaries are generally equipped with certain characteristics that are often expected from public organs charged with the adjudication of disputes with public implications. For instance, constituents around the world are familiar with the notion that any errors in decisions or judgments, regardless of whether they are concerned with the determination of facts or the application of law, could be corrected later through the activation of the appeals procedure.[324] In addition, given that the administration of justice is widely considered as a public good for the society at large, most national and international judicial systems are chiefly financed by public budgets instead of

[319] Choudhury, *supra* note 314, at 520.
[320] Galán, *supra* note 313, at 96 (arguing that "the arguments regarding legitimacy in the international law literature can roughly be divided into the following four categories: 1) legality or rule of law; 2) substantive values; 3) technical knowledge; and 4) effectiveness").
[321] See 5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks and 5.3.3 The Attainment of Objectives: Chances and Challenges.
[322] Galán, *supra* note 313, at 96 (arguing that the international law literature often regards the effectiveness of rules and institutions as a criterion for the legitimacy of the relevant regime).
[323] Stephens-Chu, *supra* note 257, at 685.
[324] Colin M. Brown, "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches", ICSID Review, Vol. 32, No. 3 (2017), p. 680.

by the contributions of private parties.[325] National judiciaries would conceivably meet such expectations of the general public as they typically allow the appeal of a judgment and maintain their daily operations via subsidies from public funding.[326]

Third, adjudication of investment disputes via domestic courts would reduce the sovereignty costs incurred by states, thus contributing to the legitimacy of the investment treaty regime by watering down the menace generated by dispute settlement. The investment law literature indeed abounds with sovereignty-related comments from critics of the regime that investment agreements, particularly in the current design of investor-state dispute resolution, have excessively constrained state sovereignty.[327] Although national states almost always agree to cede a certain degree of discretion when acceding to regimes established by international law,[328] these states would in all likelihood exit such regimes if a calculating analysis shows that the resulting sovereignty costs outweigh the expected benefits.[329] Thus, the sovereignty costs of the investment treaty regime should not bear hard on state parties, especially when the economic benefits of signing investment agreements are at best unclear for capital-importing countries.[330] While the sovereignty costs imposed by investment agreements on states are typically equated with the chilling effect on regulatory freedom,[331] these costs could also take the form of the marginalization of domestic courts and national legal orders. That is precisely why 230 American law and economics professors called for an almost complete elimination of investment arbitration from past and future U.S. trade deals on the grounds that, otherwise, domestic and democratic institutions are undermined, domestic sovereignty is threatened, and the rule of law is weakened, in a letter addressed to President Donald Trump in 2017.[332] Thus, if investment disputes are channelled to domestic courts of the host state, sovereignty costs are expected to decrease as state practices would not be under the scrutiny

[325] *Ibid*, at 679.
[326] Schneiderman, *supra* note 62, at 238 (arguing that the shared belief of dominant and subordinate classes would also impact the legitimacy of a rule or a regime).
[327] Paul Robert Gilbert, "Sovereignty and Tragedy in Contemporary Critiques of Investor State Dispute Settlement", London Review of International Law, Vol. 6, No. 2 (2018), pp. 216-220.
[328] Charles N. Brower and Sadie Blanchard, "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States", Columbia Journal of Transnational Law, Vol. 52, No. 3 (2014), p. 720 (arguing that "The broadly stated objection that investment treaties limit state discretion or 'reduce sovereignty' is actually a challenge that applies against the whole of international law").
[329] Anne van Aaken, "Perils of Success? The Case of International Investment Protection", European Business Organization Law Review, Vol. 9, No. 1 (2008), p. 16 (arguing that "States will only participate in the system if the expected costs of constraining its (regulatory) sovereignty through BITs and State contracted will deliver expected (net) benefits").
[330] Mary Hallward-Driemeier, "Do Bilateral Investment Treaties Attract FDI? Only a Bit … and They Could Bite", in Karl P. Sauvant and Lisa E. Sachs, eds., "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", Oxford University Press (2009), p. 374 (arguing that "An analysis of twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment"). Christian Bellak, "Economic Impact of Investment Agreements", Vienna University of Economics and Business, Department of Economics Working Paper No. 200, August 2015, https://epub.wu.ac.at/4625/1/wp200.pdf (last visited on May 20, 2022), p. 20 (arguing that "the positive impact of BITs on FDI suggested by theoretical reasoning has not been confirmed empirically").
[331] Julia G. Brown, "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?", Western Journal of Legal Studies, Vol. 3, No. 1 (2013), p. 24 (arguing that "IIAs place constraints on a government's ability to create legislation where that legislation might prejudice an investor").
[332] 230 Law and Economics Professors, *supra* note 121.

of supranational adjudicative bodies and national judiciaries would reclaim their "usurped" role in applying and interpreting domestic law on issues of both substance and procedure.[333] In addition, considering that state liability in the form of damages is still rather limited within domestic legal orders and countries are more likely to engage local lawyers or in-house counsels in domestic proceedings,[334] states, particularly developing states, will also be relieved from financial strains imposed by huge damages owed to foreign investors if investment disputes are to be handled by domestic courts. Less pressure on the national treasury would be likely to lead to a higher level of political legitimacy of the investment treaty regime since states would be less incentivized to leave a regime that does not (often) raise acute financial concerns.[335]

Last but not least, electing domestic courts as the forum for investor-state dispute resolution would be beneficial to the legitimacy of the overarching regime via the medium of increased justice as discrete groups of stakeholders would be put on the same footing in the market. Although whether justice should be included as a criterion for assessing the legitimacy of a rule or institution is an open question,[336] allegations of injustice are likely to curtail the legitimacy of a specific set of rules and undermine the authority of the associated regime.[337] At present, there are prevalent criticisms that investment instruments excessively favor foreign investors over their local counterparts by granting them an additional layer of legal remedies.[338] Domestic courts as the designated body would strip foreign investors of what many see as an unfair privilege at the stage of dispute resolution, easing concerns about unequal competitive conditions between domestic and foreign investors.[339] While some may argue that not being part of the constituency *per se* operates to the disadvantage of foreign investors,[340] available empirical evidence nonetheless does not support the idea that foreign investors are reduced to a disadvantageous position in comparison to their local

[333] Johnson, et al., *supra* note *supra* note 309, at 14.
[334] Van Aaken, *supra* note 243, at 725-726 (arguing that this is not only true for Germany but also for France, the UK, and China). See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[335] Jacob A. Kuipers, "Too Big To Nail: How Investor-State Arbitration Lacks An Appropriate Execution Mechanism for the Largest Awards", Boston College International & Comparative Law Review, Vol. 39, No. 2 (2016), p. 419 (arguing that concerns over financial strains imposed by dispute settlement in some cases prompted some states to completely walk away from previously agreed investment agreements).
[336] Franck, *supra* note 318, at 208-209 (arguing that not including justice as one of the factors making for legitimacy is due to, on the one hand, the operational reason, i.e., "that justice can only be said to be done to persons", and on the other hand, the theoretical reason, i.e., "that the concepts of justice and legitimacy are related but conceptually distinct").
[337] Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework Analysis", European Journal of International Law, Vol. 15, No. 5 (2004), p. 927.
[338] Steffen Hindelang and Markus Krajewski, "Conclusion and Outlook: Whither International Investment Law?", in Steffen Hindelang and Markus Krajewski eds., "Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified", Oxford University Press (2016), p. 391.
[339] Note that while the specific aim of the investment treaty regime is to protect foreign investors by establishing an international system in addition to domestic protections offered by the host state, one may argue that the substantive provisions in investment agreements do not necessarily provide foreign investors with extra entitlements that are not enjoyed by domestic investors yet investment arbitration explicitly closes the door to those investors at home. UNCTAD, "World Investment Report 2015", https://unctad.org/system/files/official-document/wir2015_en.pdf (last visited on May 20, 2022), p. 147 (arguing that granting foreign investors greater rights than those of domestic investors and creating unequal competitive conditions is one of the main arguments made against ISDS).
[340] Schill, *supra* note 51, at 6.

competitors.[341] In the meantime, choosing domestic courts would equalize the position of foreign investors and other foreigners who may equally contribute to the society of the host state when the need arises for dispute resolution with local authorities. These other foreigners include both individuals and entities which do not qualify as an "investor" under investment agreements and these would-be candidates whose home states nevertheless have not signed an investment agreement with the state where they invest.[342] Meanwhile, assuming that domestic litigation proceedings are usually cheaper than international arbitration,[343] entrusting domestic courts with the exclusive competence would avoid the unconscionable consequence that only wealthy individuals and economically powerful enterprises among all the covered investors are entitled to international proceedings.[344] In addition, since third-party participation is widely recognized by domestic legal orders,[345] funnelling investment disputes to domestic courts would give voice to the concerns of those local communities affected by investment claims as well. Furthermore, considering that the domestic rule of law would be consolidated and judicial capacity would be strengthened as a result,[346] choosing domestic courts would also deliver justice to a much broader community in the long term.

However, once domestic courts are entrusted with the exclusive competence in the adjudication of investment disputes, foreign investors would be stripped of an extra layer of protection through supranational adjudicative bodies. In a world where domestic courts are not always trustworthy, foreign investors could be exposed to gross injustice resulting from the poor legal and/or judicial institutions in the host state. And if that becomes normal, the investment treaty regime would be caught in another form of legitimacy crisis since all the protection promised to foreign investors would become unobtainable.[347]

5.3.5 Summary

Entrusting domestic courts with the exclusive role in adjudicating investment disputes is not solely an academic proposition anymore as states are reviewing and adjusting their policy

[341] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 150-151.
[342] For instance, according to the BITs between China and many EU member states, EU investors in China are generally granted the right to bring investment claims against Chinese government before international investment tribunals. However, EU citizens who live and work in China, for instance, are not entitled to the same privilege. Probably more relevant is that owing to the lack of such an arrangement between the US and China, U.S. investors in China are in many cases restricted to Chinese courts. In this regard, EU and U.S. investors are not placed on the same footing, which could then result in inefficiency in the market.
[343] William S. Dodge, "Investment Agreements between Developed States: The Dilemma of Dispute Resolution", in Catherine A. Rogers and Roger A. Alford eds., "The Future of Investment Arbitration", Oxford University Press (2009), p. 174.
[344] Third-party funding may provide finance for some individual investors and small and medium-sized enterprises to initiate investment arbitrations, but funders are usually incentivized to conduct extensive due diligence before they decide to fund the investment claims of a specific investor. Moreover, third-party funding *per se* is a highly controversial presence in investment arbitration. Frank J. Garcia, "Third-Party Funding as Exploitation of the Investment Treaty System", Boston College Law Review, Vol. 59, No. 8 (2018), p. 2934 (arguing that third-party funding "should be properly understood as posing exploitation and other risks to the current investment regime, and should be eliminated outright while the possibility still exists").
[345] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[346] See 5.3.3 The Attainment of Objectives: Chances and Challenges.
[347] Ryan, *supra* note 289, at 745 (arguing that meeting the expectations of private investors, i.e., mitigating the risk associated with foreign investment is necessary for maintaining the long-term legitimacy and stability of international investment law).

stances towards foreign investment governance in response to all the controversies surrounding the investment treaty regime. However, the analysis in this section reveals that whereas domestic courts demonstrate unique advantages in comparison to arbitration, full reliance on domestic courts is not an ideal option for the realization of the goals of investor-state dispute resolution. Almost undoubtedly, national judiciaries as of today are different from what the founders of ICSID had faced several decades ago in consequence of a wide range of judicial reforms carried out around the world during the intervening period. Besides, judiciaries of developed states with a good record of the rule of law are increasingly bypassed by foreign investors as well since it is not a rare occasion for traditional capital-exporting countries to face investment arbitration claims any longer. That should in turn add more nuances to our general impression of domestic courts versus arbitration in any efforts to seek a (re)design of the investor-state dispute resolution mechanism. Moreover, some institutional aspects of domestic courts are conducive to the achievement of fair and efficient dispute resolution, such as the availability of a single forum for a variety of claims and the superior expertise of national judges in domestic law. However, the stark reality that legal and judicial institutions in some countries are not sufficient to protect the interests of foreign investors casts doubt on the consistent ability of domestic courts to achieve fair and efficient dispute resolution. Furthermore, national legal orders generally prioritize the award of primary remedies, i.e., the restoration of the *status quo ante*, indicating that domestic courts are more promising in promoting norm compliance by controlling state behavior rather than merely awarding compensation from the state to the foreign investor. However, it is safe to say that the goal of promoting norm compliance is barely achievable in host states where the tradition of the rule of law is missing and/or the judicial branch is inappropriately fettered by other branches of power. Furthermore, although domestic courts have great potential in achieving some of the objectives of the investment treaty regime, such as the improvement of the domestic rule of law, stripping foreign investors of the opportunity of international remedies would be likely to invite back the politicization of investment relationship. In addition, involving domestic courts in the dispute resolution process seems to be rather beneficial for the enhancement of the legitimacy of the overarching investment treaty regime, but domestic courts claiming exclusive jurisdiction over investment disputes would instead adversely impact the regime by failing to meet foreign investors' expectations.

5.4 Effectiveness Analysis of Investment Arbitration as a Substitute for Domestic Courts

While the last section is dedicated to an analysis of effectiveness of the design option in which domestic courts are designated as an exclusive forum for adjudication of investment disputes, this section will conduct such an analysis of the current design that is common to IIAs by which investment arbitration largely operates as a substitute for domestic courts. Over several decades of development, the procedural mechanism of investment arbitration has become an integral part of most modern investment agreements.[348] In the light of the steady increase of investment claims before international tribunals, investment arbitration has been regarded by some as the most dominant mechanism for the settlement of investment

[348] Schill, *supra* note 51, at 1 (arguing that provisions on investment arbitration have become a core component of investment agreements for decades).

disputes.[349] Some of them even argue that national judiciaries have been completely marginalized by the increasing recourse to investment arbitration as a result of the preference of foreign investors.[350] While this section equates the current design of investor-state dispute resolution with that investment arbitration acts as a substitute for domestic courts, it is well recognized that national judiciaries have not in fact been completely wiped out from the landscape of the resolution of investment disputes. For one thing, as indicated in Chapter 3, some investment agreements specify or underlie the involvement of domestic courts in the dispute resolution process by virtue of the exhaustion of the local remedies rule, the prior litigation requirement, or the fork-in-the-road clause.[351] For another thing, empirical evidence has shown that in practice foreign investors sometimes resort to the courts of host states prior to the initiation of investment claims at the international level.[352] However, although foreign investors may have incentives to choose domestic courts in reality,[353] it does not change the fact that the current design largely enables foreign investors to circumvent the courts of host states in favor of investment arbitration. That foreign investors are granted the discretion to immediately start investment arbitration and that domestic courts are increasingly bypassed by these investors in proportion to the continuing rise of investment arbitrations should be a sufficient cause for concern for host states. Thus, for the convenience of the conduct of the following analysis, this section will second Puig and Shaffer's view that investment arbitration has been proposed and operated as a substitute for domestic courts, albeit with reservations.[354] It should also be clarified at this stage that the following analysis would be based on the investment arbitration mechanism as it stands at the moment, leaving out all the positive improvements which could be engendered down the road by a number of proposals, such as the reform of the remuneration system, the addition of an appeals system, or even the establishment of a standing investment court, of consideration. Putting the focus on the status quo of investment arbitration is mainly because many of these reform proposals are shrouded in uncertainty,[355] but it could also avoid unnecessary complications to the institutional analysis of investment arbitration as an alternative to national judiciaries.

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[349] Sergio Puig, "No Right without a Remedy: Foundations of Investor-State Arbitration", University of Pennsylvania Journal of International Law, Vol. 35, No. 3 (2014), p. 831 (arguing that "investor-state arbitration becomes the dominant remedy to enforce international investment obligations"). Emmanuel T. Laryea, "Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens through Investment Arbitration", Boston College Law Review, Vol. 59, No. 2 (2018), p. 2846 (arguing that the most dominant mechanism for resolving investment disputes is investment arbitration).

[350] Aisbett, et al., *supra* note 134, at 115. Jun Xiao, "Chinese BITs in the 21st Century: Protecting Chinese Investment", in Julien Chaisse and Philippe Gugler eds., "Expansion of Trade and FDI in Asia: Strategic and Policy Challenges", Routledge (2009), pp. 131-132.

[351] See Chapter 3 The Roles of Domestic Courts in Investor-State Dispute Resolution. Reinisch, *supra* note 4, at 10-12.

[352] Gáspár-Szilágyi, *supra* note 154, at 395.

[353] *Ibid*, at 402-404 (arguing that the reasons behind that foreign investors would rely on the domestic courts of the host state include, among others, that investors did not know about investment arbitration and its advantages, domestic disputes are different from international ones, and other considerations, such as financial costs).

[354] Puig and Shaffer, *supra* note 178, at 395 (arguing that both investment arbitration and international investment court have been proposed and operated as substitutes for domestic courts).

[355] Julien Chaisse and Matteo Vaccaro-Incisa, "The EU Investment Court: Challenges on the Path Ahead", Columbia FDI Perspectives, No. 219, Feb. 12, 2018, http://ccsi.columbia.edu/files/2016/10/No-219-Chaisse-and-Vaccaro-Incisa-FINAL.pdf (last visited on May 20, 2022), p. 2 (arguing that the initiative of establishing bilateral investment courts "seems overly focused on EU interests and concerns, and thus is counterproductive to the goal of global ISDS reform").

5.4.1 Fair and Efficient Dispute Resolution: Perceptions versus Reality

While criticisms of the investment arbitration mechanisms have been mounting over the years and some rather radical reform proposals have been formulated as a response,[356] the investment law scholarship is understandably focused on the controversial aspects of investment arbitration and often lacks a systematic analysis of the relative strengths of this mechanism in relation to domestic litigation. At this watershed moment for the future of investor-state dispute resolution, investment arbitration should be put into perspective prior to the formulation of any informed reform proposals. If the broad network of investment agreements and the remarkable growth of cases are valid indicators for the measurement of the success of investment arbitration,[357] it can be inferred that this mechanism should, at least in theory, demonstrate distinctive advantages in facilitating a fair and efficient dispute resolution to appeal to both states and investors.

Since investment arbitration "grafts public international law (as a matter of substance) onto international commercial arbitration (as a matter of procedure)",[358] the institutional advantages of investment arbitration in this regard largely mirror that of international commercial arbitration. Indeed, the defining feature and benefit of international arbitration, as invariably highlighted by the definitive monographs in this domain, is the presence of a neutral forum, "a forum for dispute resolution that does not favor either party, but affords each the opportunity to present its case to an objective and impartial tribunal."[359] For foreign investors, the most appealing property of investment arbitration should be that investment tribunals charged with the task of adjudicating investment disputes, unlike domestic courts, are not under the direct control of the host state.[360] It follows that the process of investment arbitration would not be spoiled or distorted by assorted self-serving actions and measures taken by the host state, including the imposition of pressure on domestic judges or the initiation of opportunistic legislative changes to undermine the position of the foreign investor.[361]

Meanwhile, investment tribunals are not restricted by the possible hurdles for investment claims created by domestic constitutional and/or legislative framework, and thus they provide for a more definite forum for the review of a broader span of administrative and legislative acts that unduly interfere with private interests.[362] In addition, as investment agreements have made no efforts to discriminate national judiciaries from other branches of power,

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[356] Brower and Blanchard, *supra* note 328, at 695 (arguing that the chief justice of Singapore called for "global regulation that effectively permit states to vet the arbitrators that investors can choose").
[357] Stephen E. Blythe, "The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties", International Lawyer, Vol. 47, No. 2 (2013), pp. 275-276.
[358] Anthea Roberts, "Divergence between Investment and Commercial Arbitration", ASIL Proceedings, Vol. 106 (2012), p. 297.
[359] Born, *supra* note 200, at 8. Blackaby, et al., *supra* note 194, at 28-29.
[360] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 86 (arguing that the neutrality of investment arbitration is theoretically appealing for foreign investors for at least two reasons: first, it avoids the upsetting possibility that the judiciary of the host state is not independent from other branches of power or that judicial corruption is rampant; second, it avoids the situation that domestic courts of the host state may be biased against foreign claimants).
[361] Prislan, *supra* note 202, at 425-426.
[362] *Ibid*.

contemporary international investment law empowers foreign investors to challenge judicial acts as well by invoking certain standards of treatment, including the provisions that are related to expropriation, fair and equitable treatment, and the obligation to ensure effective means of asserting claims.[363] Figure 14 above reveals that claims against domestic courts account for a notable portion of all investment claims at the international level, underlining the necessity of investment arbitration in pursuing fairness by granting foreign investors effective protection against judicial misconduct. Perhaps more importantly, while domestic legal orders may fail to guarantee for foreign investors the protection that rivals treaty standards,[364] investment tribunals are well-positioned to apply investment treaty norms although domestic laws are in many cases a non-negligible element.[365] Thus, investment tribunals may have an upper hand in assuring foreign investors of fairness in the adjudicative process from the perspective of applicable law.

In addition, unlike domestic judges who are invariably employees of the host state, investment arbitrators are usually selected by the investor and the state as disputing parties.[366] In a typical investment arbitration case, the constitution of an arbitral tribunal of three members is usually achieved in the following way: "Each party typically appoints one arbitrator, and the presiding arbitrator is selected by agreement of the parties, or, more often, by an appointing authority."[367] For foreign investors, the possibility of engaging in the process of deciding who will decide their disputes is both appealing and reassuring and constitutes one of the justifications for their general preference for investment arbitration over domestic litigation.[368] Therefore, if domestic judges can in any sense be understood as the agents of the host state, the party-appointment system in investment arbitration bolsters procedural fairness by making sure that both the investor and the state are represented in the investment tribunal in a certain way. In addition, Bruce Benson argues that the veto power usually enjoyed by disputing parties in the selection process of arbitrators indicates that those selected decision-makers are likely to be unbiased and less corruptible,[369] which would, in turn, significantly contribute to the fairness of the dispute resolution process since arbitrators are the core element of international arbitration.[370]

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[363] Mavluda Sattorova, "Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct", International and Comparative Law Quarterly, Vol. 61, No. 1 (2012), p. 223.
[364] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[365] Karl-Heinz Böckstiegel, "Commercial and Investment Arbitration: How Different Are They Today?", Journal of the London Court of International Arbitration, Vol. 28, No. 4 (2012), pp. 579-580 (arguing that while public international law provides the fundamental legal framework for investment arbitration, national law as a substantive law may be involved in several ways in the arbitral process).
[366] Schill, *supra* note 103, at 320.
[367] Chiara Giorgetti, "Who Decides Who Decides in International Investment Arbitration", University of Pennsylvania Journal of International Law, Vol. 35, No. 2 (2014), p. 442.
[368] *Ibid*, at 443 (arguing that "Parties to international investment arbitration consistently indicate party-appointment as a strong reason to prefer arbitration to litigation").
[369] Bruce L. Benson, "Arbitration", in Boudewijn Bouckaert and Gerrit De Geest eds., "Encyclopedia of Law and Economics: The Economics of Crime and Litigation V. 5", Edward Elgar (2000), pp. 184-185.
[370] Catherine A. Rogers, "The International Arbitrator Information Project: An Idea Whose Time Has Come", http://arbitrationblog.kluwerarbitration.com/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/ (last visited May 20, 2022).

Apart from the presumptive outstanding neutrality and impartiality of investment arbitrators, other notably institutional aspects exist to militate in favor of investment arbitration from the perspective of fair and efficient resolution of disputes. The first aspect relates to the incentive structure of investment arbitrators. The economic approach to arbitral decision-making posits that arbitrators are utility maximizers in the same way as public judges.[371] However, unlike public judges who are entitled to a secure stream of income regardless of the number of cases that are handled by them, arbitrators would only get compensation from disputing parties once their selection to arbitral tribunals is sealed.[372] Thus, while public judges are largely immune from market pressures, arbitrators are incentivized to compete with each other to stay in the business.[373] One may further argue that income is not the only factor in an arbitrator's utility function, as he or she may also have interests in developing a professional reputation along the process not only to increase the chance of re-election to arbitral tribunals in the future but also to boost his or her career in other spheres, whether as a private counsel or an academic.[374] The interests of arbitrators in consolidating their market positions and furbishing their images within and without the arbitration community would conceivably incentivize these arbitrators to increase the quality of their decision-making (in terms of accuracy and efficiency) and to observe professional ethos, such as dispensing with bias and favoritism, to preserve their own reputation that is usually held dear.[375]

Second, in contrast to public judges who are usually randomly assigned to cases, the selection of decision-makers in arbitration is heavily dictated by disputing parties.[376] The difference in the appointment process partially causes the situation where, although public judges are often generalists in the domestic courts of many countries,[377] arbitration provides for a specialized dispute resolution forum where decision-makers are often experts in a particular field.[378] Thus, in the context of investment arbitration, industry experts who are genuinely familiar with foreign investment-related matters can be appointed as arbitrators.[379] These arbitrators are often expected to have expertise in public international law and/or specific industry knowledge, such as technical issues that are related to the development of foreign investment

[371] Richard A. Posner, "Judicial Behavior and Performance: An Economic Approach", Florida State University Law Review, Vol. 32, No. 4 (2005), pp. 1260-61.
[372] Christopher R. Drahozal and Keith N. Hylton, "The Economics of Litigation and Arbitration", Journal of Legal Studies, Vol. 32, No. 2 (2003), p. 559.
[373] Robert D. Cooter, "The Objectives of Private and Public Judges", Public Choice, Vol. 41, No. 1 (1983), p. 107 (arguing that "some private judges have to attract business, so they are exposed to the same market pressures as anyone who sells a service").
[374] Kapeliuk, *supra* note 54, at 65-66.
[375] *Ibid*.
[376] Susan D. Franck, "The Role of International Arbitrators", ILSA Journal of International & Comparative Law, Vol. 12, No. 2 (2006), p. 509.
[377] Diane P. Wood, "Generalist Judges in a Specialized World", SMU Law Review, Vol. 50, No. 5 (1997), p. 1756 (arguing that "Judges in most other countries are often staggered by the breadth of the American federal judge's writ").
[378] Drahozal and Hylton, *supra* note 372, at 558.
[379] Manuel Indlekofer, "International Arbitration and the Permanent Court of Arbitration", Wolters Kluwer (2013), pp. 220-221 (arguing that since experts from the field where the dispute occurred in can be appointed to arbitral tribunals, international arbitration can thus respond to the specialization of international law very effectively).

projects.[380] The specialization of investment arbitrators suggests that the efficiency of the arbitration process would be increased largely because disputing parties do not have to provide as much information to these arbitrators as they would to a non-specialized judge or jury to avoid an error in decisions.[381] That resonates with what Posner sees as an attractive feature of arbitration: a lower error rate than juries.[382]

Third, procedural flexibility is a salient feature of arbitration, indicating that an arbitral process could be more efficient than national court proceedings.[383] That is because in arbitration disputing parties are generally granted considerable autonomy to avoid assorted technical formalities common to judicial processes and to tailor the arbitral procedure to the particularities of their disputes.[384] This extensive party autonomy is only subject to the mandatory procedural requirements spelt out in the applicable arbitration rules and the underlying investment agreement.[385] Parties may, for instance, set up an overall timetable for the arbitral process that suits their needs, or decide the modes for the presentation of facts and expert evidence, or determine the times and length of hearings.[386] They may also be spared from the heavy burden of extensive documentation,[387] further saving financial and time costs involved in the dispute resolution process.

Fourth, the efficiency of the arbitral process would be further improved by the institutional characteristic that arbitral decisions made by international tribunals are generally exempt from extensive appellate review.[388] The general lack of availability of an appeals procedure is both descriptive of ICSID and non-ICSID arbitration,[389] indicating that the putative higher arbitration costs and more frequent procedural delays associated with appellate review are largely avoided in investment arbitration.[390]

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[380] Böckstiegel, *supra* note 365, at 582 (arguing that, in practice, "many arbitrators of commercial arbitration do not feel comfortable or are not chosen by the parties in investment arbitrators, and vice versa, many experts of international law selected for investment arbitration are not active in commercial arbitration").
[381] Bruce L. Benson, "To Arbitrate or To Litigate: That Is the Question", European Journal of Law and Economics, Vol. 8, No. 2 (1999), p. 94 (arguing that "Specialization by arbiters selected for their expertise and reputation means that arbitration typically is a faster, less formal, and less expensive procedure than litigation, in part because the parties do not have to provide as much information to the arbitrator to avoid an error in judgement as they would to a non-specialized judge or jury").
[382] Posner, *supra* note 371, at 1261.
[383] Born, *supra* note 200, at 11 (arguing that an objective and perceived advantage of international arbitration is the enhancement of party autonomy and procedural flexibility).
[384] *Ibid*, at 12. Jeon, *supra* note 82, at 195.
[385] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 68.
[386] Born, *supra* note 200, at 12.
[387] Jeon, *supra* note 82, at 195.
[388] Born, *supra* note 200, at 11.
[389] Fenghua Li, "The Divergence of Post-Award Remedies in ICSID and Non-ICSID Arbitration", Chinese Journal of Comparative Law, Vol. 4, No. 1 (2016), pp. 98-99 (arguing that "the finality of investor-state arbitral awards has been historically honoured by both States and investors"). Meng Chen, "Embracing Non-ICSID Investment Arbitration? The Chinese Perspective", Northwestern Journal of International Law & Business, Vol. 39, No. 3 (2019), p. 255 (arguing that the ICSID annulment procedure "does not work as an appeals system in which the appellant authority can revise a previous award based on its own discretion"). Markus Burgstaller and Charles B. Rosenberg, "Challenging International Arbitral Awards: To ICSID or Not to ICSID", Arbitration International, Vol. 27, No. 1, pp. 91-92 (arguing that "national courts in 'arbitration friendly' jurisdictions, such as England, France and the United States, appear to be more reluctant to set aside arbitral awards").
[390] Born, *supra* note 200, at 11 (arguing that "Dispensing with appellate review significantly reduces litigation costs and delays").

Fifth, standing in marked contrast to the absence of a dynamic international system for the recognition and enforcement of foreign judgments,[391] investment arbitration is particularly known for its relatively efficient institutional arrangements in guaranteeing the clear enforceability of both ICSID and non-ICSID awards.[392] Parallel with the fact that ICSID awards enjoy a particular high level of enforceability as a result of the far-reaching membership of the ICSID Convention, the New York Convention governing the enforcement of non-ICSID awards largely makes certain that these investment awards could be enforced across much of the globe with efficiency and effectiveness as well.[393]

However, the traditional perception that investment arbitration is more promising in bringing fair and efficient dispute resolution has been increasingly under critical scrutiny in recent years not least due to the emergence of some empirical evidence that suggests the opposite.[394] Reader may recall that from the introduction of the legitimacy crisis of investment arbitration above, some salient features of this dispute resolution mechanism that may undermine fairness and efficiency have been extensively criticized by academics and practitioners.[395] To begin with, the perceived neutrality of arbitrators has been threatened by both the party appointment system and the arbitrator remuneration system characteristic of investment arbitration. Because disputing parties are granted the right to appoint their own representatives to an investment tribunal, investment (ICSID) arbitrators are said to be largely divided into two categories: "many have either 'a pro-investor' reputation or 'a pro-state' outlook."[396] The partisan ideology of party-appointed arbitrators may arguably, in turn, undermine the overall perceived integrity of an investment tribunal to adjudicate the dispute according to the facts and applicable rules immune from affiliation bias. In the meantime, investment arbitrators are much better rewarded for their work in comparison to non-governmental WTO panellists and these arbitrators are remunerated by disputing parties themselves instead of the public purse.[397] Thus, there is an inherent risk that financial incentives may have an impact on the decision-making pattern of investment arbitrators,[398] particularly considering that what these arbitrators may get paid is higher where the dispute at hand passes the threshold of jurisdiction and reaches the merit phase.[399] Whether and to what

[391] *Ibid*, at 9-10.
[392] Marc Bungenberg and August Reinisch, "Recognition and Enforcement of Decisions", European Yearbook of International Economic Law (2019), p. 158 (arguing that "Although enforcement under the ICSID Convention has the advantage that the awards do not have to withstand a review by the executing State, the New York Convention is considered as an effective and established enforcement mechanism as well").
[393] *Ibid*, at 156-158.
[394] Jeon, *supra* note 82, at 195 (arguing that "arbitration's expected advantage in efficiency has been challenged by many international arbitration practitioners").
[395] See Chapter 2 Setting the Stage: The Legitimacy Crisis Facing Investment Arbitration and the Need to Reform Investor-State Dispute Resolution.
[396] Joost Pauwelyn, "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus", American Journal of International Law, Vol. 109, No. 4 (2015), p. 781.
[397] *Ibid*, at 791 (arguing that the daily paycheck of ICSID arbitrators is "more than 4.5 times as much as what nongovernmental WTO panelists get paid, and governmental panelists get nothing"). Brown, *supra* note 324, at 679 (arguing that "the disputing parties themselves pay the remuneration of the adjudicators in the current ISDS system"). Sergio Puig, "Social Capital in the Arbitration Market", European Journal of International Law, Vol. 25, No. 2 (2014), p. 398 (arguing that the financial incentives of ICSID appointments are significant).
[398] Brown, *supra* note 324, at 679.
[399] Pauwelyn, *supra* note 396, at 791 (arguing that "ICSID arbitrators are compensated U.S.$3000 per day worked on the case").

extent these financial incentives would result in a pro-investor bias is unclear from an empirical perspective,[400] but what actually matters, as Brown argues, "is the *perception* of the impacts of such financial incentives."[401]

Besides, while the finality of arbitral decisions may at times reduce the overall arbitration costs and the duration of arbitral proceedings, the lack of an appeals system indicates that errors in arbitral decisions concerning the determination of facts and the application of law generally cannot be corrected.[402] If the defeated party does not have effective remedies in the face of a flawed arbitral decision, fairness to disputing parties in the arbitral process is bound to be overshadowed. Meanwhile, the absence of appellate review would also be likely to decrease the efficiency of dispute resolution by creating "an environment which fosters prolonged litigation after awards are issued."[403] For instance, with regard to the annulment procedure in ICSID arbitration, "parties are not limited to one request for annulment, thus increasing the inefficiency of the arbitration process."[404] Posner likewise concluded that the efficiency advantage of arbitration offered by the specialization of arbitrators is at least partially offset by the fact that arbitration awards cannot be appealed.[405] A related point is that no appellate review significantly accounts for the alleged "many inconsistencies and contradictions" in investment arbitration jurisprudence,[406] further complicating the determination of whether and how often fairness is actually guaranteed in the arbitral process.

Furthermore, investment arbitration more often than not fails to operate as a single forum for dispute resolution, adding further suspicion to its ability to produce genuine efficiency. For one thing, in most cases, investment tribunals have not found themselves in a position to hear counterclaims filed by host states either for the reason of jurisdiction or admissibility.[407] The blunt rejection of counterclaims indicates that host states usually have to seek relief in their own courts or via other avenues, which could not only increase the expenditure of time and money but also lead to inconsistent decisions.[408] For another thing, given that investment arbitration is removed from the general public and access costs to the arbitral procedure are high, other stakeholders involved in investment disputes, such as wronged host state citizens, are not able to raise their own claims in the arbitral process.[409] Conceivably, investment-related disputes would be likely to drag on as these stakeholders whose access to the arbitral

[400] Puig, *supra* note 397, at 398 (finding that some arbitrators with private background consider ICSID work "*pro bono*" and refuse to take many cases).
[401] Brown, *supra* note 324, at 679.
[402] Elsa Sardinha, "The Impetus for the Creation of An Appellate Mechanism", ICSID Review, Vol. 32, No. 3 (2017), p. 504 (arguing that the one-kick-at-the-can character of investment arbitration has been criticized by commentators as there is "the lack of review for error of law in annulment under the ICSID Convention and judicial review (non-ICSID) processes").
[403] Erin E. Gleason, "International Arbitral Appeals: What Are We So Afraid Of?", Pepperdine Dispute Resolution Law Journal, Vol. 7, No. 2 (2007), p. 282.
[404] *Ibid*, at 284.
[405] Posner, *supra* note 371, at 1261.
[406] Puig and Shaffer, *supra* note 178, at 396.
[407] Nanteuil, *supra* note 174, at 377. Veenstra-Kjos, *supra* note 174, at 46-47 (finding that counterclaims filed by host states would be heard by investment tribunals only if (1) they fall into the jurisdiction of the investment tribunal; and (2) they have adequate connection with the investor's claim).
[408] Veenstra-Kjos, *supra* note 174, at 7.
[409] Puig and Shaffer, *supra* note 174, at 397.

procedure was denied would strive to seek relief before other available forums, such as domestic courts, pending arbitration or after investment awards were issued.[410]

In addition, investment arbitrators may often lack an *ex ante* understanding of the sophistication of the domestic legal order of the host state,[411] which could decrease the efficiency of the arbitral procedure as extra time and attention would be required from these arbitrators to fill the knowledge gap. As noted above, domestic law-related issues are often unavoidable in the adjudication of investment disputes for the simple reason that foreign investments are ruled by the laws of the host state.[412] In practice, "ICSID tribunals have frequently found national law primarily to apply on account of the consideration of host state sovereignty."[413] Some commentators thus even regard investment tribunals not only as agents of international law but also that of the national legal system of the host state.[414] However, in the light of the often-limited expertise of investment arbitrators in the particular legal regime of the respondent state, the efficient performance of the investment tribunal in interpreting and applying national laws with precision should be open to question.

Moreover, concerns over inefficiency of investment arbitration have extended further to the post-award phase as "some problems have arisen with compliance with both ICSID and non-ICSID awards" in recent years.[415] The issuance of large awards by investment tribunals, such as the one of the value of US$50 billion rendered against Russia in the *Yukos* case, would aggravate the risk that the defeated state would not voluntarily comply with the award, especially when the monetary value is extremely high relative to the amount of the inbound investment in the state.[416] When voluntary compliance is not forthcoming and the pursuit of enforcement procedure becomes imperative, the high value of the award indicates that substantial costs in terms of time and money are required to seize sufficient assets to satisfy

[410] Vivian Kube, "EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection", Springer (2019), p. 185 (arguing that, in *Chevron v. Ecuador*, third-party participation was not granted "despite a high level of public interest, not least because of a broad media coverage and international mobilization"). Diane Desierto, "From the Indigenous Peoples' Environmental Catastrophe in the Amazon to the Investor's Dispute on Denial of Justice: The Chevron v. Ecuador August 2018 PCA Arbitral Award and the Dearth of International Environmental Remedies for Private Victims", Sep. 13, 2018, https://www.ejiltalk.org/from-indigenous-peoples-environmental-catastrophe-in-the-amazon-to-investors-dispute-on-denial-of-justice-the-chevron-v-ecuador-2018-pca-arbitral-award/(last visited on May 20, 2022) (arguing that "While plaintiffs (indigenous people) are mired in multiple litigations and arbitrations around the world to seek accountability from either Chevron and its affiliates or their own government in Ecuador, there is virtually no dedicated State, inter-State, regional, or public-private partnership cooperative efforts to try and achieve environmental restoration in the affected 4,400 square kilometers of the Amazon").

[411] Article 39 of the ICSID Convention provides that: "The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; …" Article 39, the ICSID Convention. Sundaresh Menon, "ICCA 2012 Congress in Singapore Keynote Address", https://www.arbitration-icca.org/AV_Library/AV_Library_textformat/ICCA_2012_Singapore_Keynote_Menon.html (last visited on May 20, 2022) (arguing that privately funded investment tribunals usually consist of foreign nationals).

[412] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before. Böckstiegel, *supra* note 365, at 580.

[413] Hedge Elisabeth Kjos, "Applicable Law in Investor-State Arbitration: The Interplay between National and International Law", Oxford University Press (2013), p. 299.

[414] *Ibid*.

[415] OECD, *supra* note 61, at 11.

[416] Kuipers, *supra* note 335, at 420-421.

the awards.[417] Therefore, enforcing an investment award against a recalcitrant state is said to be perhaps "the most difficult, lengthy, and expensive phase of an investor-state arbitration."[418]

Last but not least, keeping in mind many of the hurdles mentioned above concerning the efficiency of arbitral dispute resolution, the recurring accusation that investment arbitration proceedings are notoriously drawn out and expensive may seem a matter of course.[419] To sum up, while fairness and efficiency are traditionally perceived virtues that should go with international arbitration, whether and to what extent that perception holds true in the context of investment arbitration is uncertain.

5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied

As noted above, state compliance with substantive standards of treatment of foreign investors and their investments is central to the *raison d'être* of the investment treaty regime, the absence of which suggests that the network of IIAs would lose much of its substance in the global economic governance complex.[420] Considering that most of the common substantive provisions in investment agreements are not couched in permissive terms,[421] contracting states conceivably expect investment arbitration, as a core procedural mechanism in the investment treaty regime, to promote state compliance with the prescribed norms. In the same vein, investment arbitration is widely regarded as an enforcement tool of the substantive commitments that states undertake in their IIAs.[422] But the actual performance of investment arbitration in enforcing investment treaty norms and in promoting state compliance with good governance standards in foreign investment regulation has not been fully explored thus far in the literature.

However, from the theoretical point of view, suffice it to say that the investment arbitration mechanism has manifested itself as a seeded player in inducing contracting states to comply with investment treaty standards of good governance. First and foremost, based on the analysis above concerning the institutional features of investment arbitration, the conventional wisdom is that this mechanism provides for a neutral and unbiased dispute resolution forum.[423] The neutrality of arbitration indicates that the decision-makers are inclined to adjudicate investment disputes exclusively according to facts and applicable laws instead of some dubious factors, such as political considerations or profitable strategies.[424] The neutral decision-making pattern lays the groundwork for the prospect of a higher level of

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[417] *Ibid*, at 421.
[418] Christopher F. Dugan, et al., "Investor-State Arbitration", Oxford University Press (2012), p. 700.
[419] Carlos G. Garcia, "All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration", Florida Journal of International Law, Vol. 16, No. 2 (2004), p. 355.
[420] See 5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks.
[421] Sattorova, *supra* note 106, at 117-118 (asserting that "it could be argued that expropriation rules are an exception and that other investment treaty norms act as unequivocal prescriptions of good governance rather than pricing mechanisms allowing states to depart from the good governance standards in exchange for compensating the disaffected investors").
[422] UNCTAD, "Investor-State Dispute Settlement", UNCTAD Series on Issues in International Investment Agreements II, p. 17.
[423] See 5.4.1 Fair and Efficient Dispute Resolution: Perceptions versus Reality.
[424] UNCTAD, *supra* note 422, at 13 (arguing that investment arbitration is created as "a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations").

state compliance with investment treaty norms given that, after all, politically partisan forums are not convincingly reliable in displaying loyalty to legal norms, not to mention in contributing to compliance with them. Only if investment treaty norms are faithfully applied by the decision-makers can contracting states be influenced by these norms to feel a greater need for compliance.

Table 3 Frequency of Investment Treaty Provisions

	Investment treaties containing provision (%)
Most-favoured-nation treatment	95%
Expropriation	95%
Investor–state dispute settlement	90%
Fair and equitable treatment	90%
Free transfer of funds	80%
Full protection and security	70%
Losses sustained due to insurrection, war	70%
National treatment	60%
Arbitrary, unreasonable, and/or discriminatory treatment	45%
Umbrella clause	45%
Exceptions	10%
Performance requirements	5%

Source: Bonnitcha, et al. (2017)

Table 4 Breaches of Investment Treaty Provisions Alleged and Found in Known Investment Treaty Arbitrations

	Alleged/share of 739 arbitrations	Breach found	Success rate
Fair and equitable treatment	368/50%	93	36%
Indirect expropriation	331/45%	47	20%
Full protection and security	197/27%	19	13%
Arbitrary, unreasonable, and/or discriminatory treatment	163/22%	24	19%
Umbrella clause	107/14%	13	17%
National treatment	106/14%	8	13%
Most-favoured-nation treatment	84/11%	0/21	0%/41%
Direct expropriation	81/11%	19	42%
Other	50/7%	9	22%
Free transfer of funds	27/4%	2	10%
Performance requirements	12/2%	3	30%

Note: In the 'found' column for MFN, the '0' relates to better treatment granted to the investor/investments of a third nationality other than by virtue of another investment treaty; '21' refers to better treatment based on a third investment treaty where investors used the MFN clause as a stepping stone to another substantive guarantee (on this distinction, see the following text). Success rates are calculated as a percentage of decided cases (not shown). These rates exclude settled, pending and discontinued cases, which column 1 includes.

Source: Bonnitcha, et al. (2017)

Second, while many, if not most, national judiciaries are reluctant or unable to directly apply international law in domestic proceedings,[425] investment tribunals almost always refer to investment treaty norms as a source of applicable laws,[426] particularly considering that

[425] See 5.3.1.2 Risks of Unfairness and Inefficiency Still Exist.
[426] Yas Banifatemi, "The Law Applicable in Investment Treaty Arbitration", in Katia Yannaca-Small eds., "Arbitration under International Investment Agreements: A Guide to the Key Issues", Oxford University Press (2010), p. 204 (arguing that "by the very nature of investment treaty arbitration, certain issues can be resolved only through the application of international law").

allegations of breaches by states of treaty standards constitute the crux of many investment claims.[427] Thus, the advantage of investment arbitration in promoting state compliance with the good governance standards prescribed in IIAs becomes clear in that the direct implementation of these international instruments is a more certain way of upholding investment treaty norms. In practice, as shown in Table 3 and Table 4, most of the common substantive provisions on the treatment of foreign investments in IIAs have been frequently invoked by foreign investors as the basis of their investment claims and then interpreted and applied by investment tribunals. The most frequently addressed investment treaty norms in investment arbitration are those related to fair and equitable treatment, indirect expropriation, full protection and security, arbitrary, unreasonable, and/or discriminatory treatment, umbrella clause and national treatment. While the language of many investment treaty norms is notoriously open and vague creating tangible difficulties for their interpretation and application,[428] investment tribunals have worked out various approaches to crystallize the contents of these ambiguous norms using the broad discretion granted to them.[429] In a quantitative study of 98 ICSID arbitral decisions attempting to discern the legal reasoning pattern of ICSID tribunals, it is revealed that these tribunals privileged the reference to "legal doctrine, various forms of case law, and state practice" in their argumentation while less frequently they resorted to "the context, object and purpose, preparatory work, agreement between parties to treaties, and general principles of law."[430] It seems that ICSID tribunals prefer to adopt common law, rather than civil law, traditions when addressing interpretative issues.[431] This concurs with Richard Chen's finding that, despite the lack of appellate review and a binding precedent system, investment tribunals have routinely cited past investment awards to support their own legal reasoning since the late 1990s.[432] Thus, investment tribunals have shown encouraging potential in promoting state compliance with investment treaty norms since they have developed a rich arsenal of approaches to fill the cognitive gap left by the vagueness and ambiguity of the investment treaty language.

Third, considering that national states typically offer general consent to arbitration with foreign investors in IIAs, investment tribunals are thus granted broad jurisdiction over

[427] UNCTAD, *supra* note 422, at 132 (arguing that since "allegations of violations of IIA obligations typically form the crux of the investor's claim against the host State", "a tribunal is required to assess whether the respondent State's conduct is consistent with the relevant treaty provisions").
[428] Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", American Journal of International Law, Vol. 104, No. 2 (2010), p. 179 (arguing that "investment treaties create broad standards rather than specific rules"). Mark S. Manger, "A Quantitative Perspective on Trends in IIA Rules", in Armand de Mestral and Céline Lévesque, eds., "Improving International Investment Agreements", Routledge (2013), p. 82 (arguing that "the vague language of many IIAs makes them a poor commitment device compared to common investment contracts").
[429] Roberts, *supra* note 428, at 179 (arguing that investment tribunals have played a critical role in interpreting and developing investment treaty law). OECD, "OECD Investment Policy Reviews: Cambodia 2018", OECD Publishing (2018), p. 30 (arguing that as a result of the vagueness of investment treaty norms, investment tribunals are given "broad discretion to interpret and thereby determine the scope of protection they provide").
[430] Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis", European Journal of International Law, Vol. 19, No. 2 (2008), pp. 356-357.
[431] *Ibid*, at 357.
[432] Richard C. Chen, "Precedent and Dialogue in Investment Treaty Arbitration", Harvard International Law Journal, Vol. 60, No. 1 (2019), p. 48.

investment disputes arising out of the actions of a large number of public authorities,[433] further lending leverage to these tribunals in promoting norm compliance. Unlike domestic courts, investment tribunals are not shackled by national constitutional or legislative limitations that may be put in place to intentionally thwart the effective monitoring of some forms of state acts.[434] Figure 14 suggests that investment tribunals, in practice, have addressed a wide range of aggrievances related to the conduct or omissions of different branches of power within host states, including national and sub-national governments, legislatures at various levels, and judiciaries. Special attention should be paid to the fact that judicial acts are also rather often challenged by foreign investors before investment tribunals. Denial of justice, which may be defined as "an outcome of an inaccessible or preposterous judicial process which prevents the individual from obtaining the procedural and substantive protection granted by the law," has become the common theme to such investment claims against judicial acts.[435] In addition, it is even suggested that the misapplication of the rules of international law, including investment treaty norms, by a domestic court of the host state could become a valid basis for an investment arbitration claim.[436] Thus, investment tribunals with their broad jurisdiction would be likely to contribute to the achievement of a higher level state compliance with investment treaty norms by supposedly exerting external pressures on a wide span of public authorities within the political system of the host state.

Last but not least, the goal of promoting norm compliance would benefit from the institutional feature that investment tribunals are granted the power to render binding decisions with an effective enforcement mechanism in place to ensure compliance with arbitral awards.[437] Although both investment agreements and applicable arbitral rules usually provide little guidance regarding the subject of remedies in investment arbitration, investment tribunals in principle are empowered to order both primary and secondary remedies against host states.[438] Conceivably, the ability to award a smart mix of primary and secondary remedies would be likely to enable investment tribunals to restore *status quo ante* and deter future violations of investment treaty standards.[439] While in practice primary remedies are rarely granted in investment arbitration,[440] many commentators believe that secondary

[433] Jan Paulsson, "Arbitration without Privity", ICSID Review, Vol. 10, No. 2 (1995), p. 233. Gus van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, Vol. 17, No. 1 (2006), p. 128 (arguing that "A state general consent to investment arbitration commonly entails a broad waiver of the state's customary immunity from suit before an international tribunal or before a domestic court that is called upon to enforce an international award").
[434] Prislan, *supra* note 202, at 426.
[435] Berk Demirkol, "Judicial Acts and Investment Treaty Arbitration", Cambridge University Press (2018), pp. 234-235.
[436] *Ibid*, at 234.
[437] For instance, Article 53(1) of the ICSID Convention stipulates that: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." Article 53(1), the ICSID Convention.
[438] Stephens-Chu, *supra* note 257, at 662-668.
[439] See 5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks.
[440] Stephens-Chu, *supra* note 257, at 661 (arguing that "Although non-pecuniary remedies are, in principle, available under international law, the power to award such remedies against States has been sparingly used by international tribunals").

remedies, i.e. damages awards, are powerful tools to induce states to comply with international investment law. Indeed, a wave of narratives have emerged in the investment law scholarship arguing that, as respondent states are likely to learn a costly lesson after experiencing financial pain in the form of damages awards, these states would be simultaneously deterred from violating investment treaty norms and nudged to incorporate them into domestic law and practices.[441] Schill believes that "damages as a remedy sufficiently pressure States into complying with and incorporating the normative guidelines of investment treaties into their domestic legal order."[442] Moreover, in an attempt to figure out why states would comply with international investment law, Ryan argues that the financial liability generated by damages awards can be so daunting for countries, especially developing countries, that they would be likely to internalize the potential liability into their compliance calculus.[443] Thus, the assumption that monetary compensation awarded by investment tribunals would lead to a higher level of state compliance with investment treaty norms seems to have taken hold in the investment law literature.

Despite the presumptive potential of investment arbitration as to the promotion of norm compliance by states, some theoretical and empirical insights nonetheless suggest that such desirable effects have not (fully) come to fruition in reality. To start with, as noted above, resulting from the way that investment treaty norms are often phrased in open-ended and vague language, investment tribunals have accordingly acquired substantial autonomy in interpreting and applying treaty commitments,[444] sometimes with scant regard to the original intentions of contracting states.[445] The broad discretion combined with the lack of *stare decisis* and an appeal system create the notorious concern of inconsistency over the investment arbitral jurisprudence.[446] The inconsistent jurisprudence, in turn, indicates that states would be largely deprived of the potential benefits brought by a framework of reference with respect to their dealings with foreign investments. Consequently, the high expectations in the shaping function of international investment law could fall through and states could lose their grip on the potential outcomes of their foreign investment-related regulatory behavior at home as per investment agreements.[447] When states are confronted by rather inconsistent investment arbitral jurisprudence providing for somewhat conflicting

[441] Sattorova, *supra* note 106, at 109.
[442] Stephan Schill, "The Multilateralization of International Investment Law", Cambridge University Press (2009), p. 373.
[443] Christopher M. Ryan, "Discerning the Compliance Calculus: Why States Comply with International Investment Law", Georgia Journal of International and Comparative Law, Vol. 38, No. 1 (2009), pp. 83-85.
[444] See 5.4.1 Fair and Efficient Dispute Resolution: Perceptions versus Reality.
[445] Roberts, *supra* note 428, at 179 (arguing that the arbitral jurisprudence generated by investment tribunals "frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular").
[446] Nicolette Butler and Surya Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation", Netherlands International Law Review, Vol. 4, No. 1 (2017), p. 48 (arguing that a number of highly publicized arbitral decisions demonstrate the lack of consistency in investment arbitration).
[447] Dana Burchardt, "The Functions of Law and Their Challenges: The Differentiated Functionality of International Law", German Law Journal, Vol. 20, No. 4 (2019), p. 419 (arguing that "the perception that international law can successfully shape the major aspects of international and transnational relations has become predominant for a certain period of time, at least from a western perspective on international law").

information, the potential of investment arbitration in inducing greater norm compliance is arguably steeped in uncertainty.

More importantly, the remedy design of investment arbitration seems to stand in the way of the goal of promoting norm compliance, as shown by a wealth of knowledge generated by the Law and Development literature and some emerging empirical evidence. Before delving into the impact of the remedy design on the potential of investment arbitration to induce norm compliance, some clarification is needed for the definition of norm compliance to facilitate further analysis. Compliance is a process that takes place after the formal ratification of international treaties and "comprises ex ante internalisation of the norms contained therein as well as ex post adjustment of national legal framework in line with decisions of international adjudicatory bodies."[448] In practice, investment tribunals have largely preferred to award secondary remedies, i.e., financial compensation, as the dominant form of redress, which involves the obligation of host states to pay a sum of money to foreign investors to put them in the same financial position as if the breach had not taken place.[449] Financial compensation, which is "backward and not forward looking" by its definition,[450] aims to "undo the harm, but not the unlawful act that caused it."[451] While (usually partial) compensation is awarded to the aggrieved investor, the regulations, measures, or acts which were challenged would remain in place.[452] In other words, investment tribunals do not request respondent states to bring their measures into conformity with investment treaty norms.[453] It thus suffices to say at this stage that the heavy reliance on secondary remedies indicates that investment arbitration would be likely to fare badly in ex post adjustment, which is a critical parameter of norm compliance, since respondent states would not be compelled to rescind their measures or decrees which had been condemned.

Moreover, the theoretical assumption mentioned above that financial compensation would incentivize states to comply with investment treaty norms in order to prevent any possibility that they pay a large sum of money is also at best uncertain. While this popular assumption largely rests on the effectiveness of external financial pressures, the existing legal literature on this topic, allegedly, has largely been brushed aside by investment law scholars.[454] The Law and Development literature, for instance, has levelled considerable criticism against conditionality on financial aids as a leverage on the part of international financial institutions and developed countries to induce good governance reforms and to improve the investment climate within developing countries.[455] It often concludes that "reinforcement by reward has largely failed in attaining a genuine transformation in legal and bureaucratic systems of developing states."[456] Although reinforcement by reward is arguably a far cry from damages awards rendered by investment tribunals, the literature at least demonstrates that external

[448] Sattorova, *supra* note 106, at 113.
[449] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 75.
[450] Andrés Jana, "Reparation in Investment Treaty Arbitration", ASIL Proceedings, Vol. 110 (2016), p. 292.
[451] *Ibid*, at 289.
[452] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 75.
[453] Sattorova, *supra* note 106, at 118.
[454] *Ibid*, at 109.
[455] *Ibid*, at 109-112.
[456] *Ibid*, at 112.

financial pressures and incentives often have limitations in fostering desired legal reforms in developing countries.[457] In addition, an OECD study further identifies several factors that would hinder monetary sanctions in the form of damages awards from inducing states to comply with investment treaty norms. First, since financial compensation would be paid by host governments if foreign investors secure a victory, the monetary incentives provided by adverse awards might not be felt by individuals or entities which are directly responsible for policy-making and law enforcement.[458] Second, countervailing forces at home, such as the capture of regulatory process by political and economic elites, would be likely to offset these incentives.[459] Third, host governments may lack the requisite financial or human resources to respond to the monetary incentives.[460] Furthermore, the empirical evidence garnered by Mavluda Sattorova also suggests that "a threat of monetary sanctions is unlikely to change a host government's decision to breach an investment treaty where such a breach is seen as more expedient in economic and political terms."[461] There were cases where officials ignored the financial implications of possible adverse investment awards and chose to proceed with violations of investment treaty commitments.[462] All in all, contrary to the recurring theoretical assumption, financial compensation may often fail to provide for a sufficient incentive for host states to comply with investment treaty norms and to align their domestic legal frameworks with the good governance standards prescribed by IIAs.

Contrary to the perception that financial compensation would promote norm compliance, some commentators have argued that the reliance on secondary remedies would probably have the opposite impact on the behavior of host states.[463] Brewster cogently argues that, while the award of remedies, including primary and secondary remedies, represents "punishment and community disapproval of certain behaviors," financial compensation by putting price tags on treaty norms can also operate as "permission, even an entitlement, to undertake certain actions" and "a license to engage in behavior at a certain cost."[464] Conceivably, as a result of an overwhelming reliance on financial compensation as a form of redress by investment tribunals, host states would probably find it attractive to breach investment treaty norms if the expected benefits exceed the expected costs of the breach.[465] If host states in general, and the defaulting state in particular, get the impression that they could "buy the right to breach" investment treaty norms by the payment of compensation, the potential of investment arbitration in promoting norm compliance will be impaired and the rule of law will be flouted.[466] In addition, if we recall from the finding that investment tribunals in theory are not restricted to the order of secondary remedies, we may wonder at this stage why the great reliance on financial compensation in investment arbitration could

[457] *Ibid*, at 110.
[458] Gaukrodger and Gordon, *supra* note 4, at 14.
[459] *Ibid*.
[460] *Ibid*.
[461] Sattorova, *supra* note 106, at 116-117.
[462] *Ibid*, at 117.
[463] *Ibid*, at 116.
[464] Rachel Brewster, "Pricing Compliance: When Formal Remedies Displace Reputational Sanctions", Harvard International Law Journal, Vol. 54, No. 2 (2013), pp. 271-272.
[465] Sattorova, *supra* note 106, at 117.
[466] Stephens-Chu, *supra* note 257, at 679.

not be easily changed. After all, it appears that primary or non-pecuniary remedies are better suited to facilitate state compliance with investment treaty norms which embody good governance standards in the field of foreign investment regulation.[467] However, in practice, investment tribunals may often feel their hands are tied when it comes to the choice of appropriate remedies after a host state has been found to have breached the investment agreement. For one thing, even if investment tribunals are allowed the discretion to order primary remedies, foreign investors could face daunting challenges in seeking the enforcement and execution of these remedies in the absence of voluntary compliance.[468] To take the self-contained ICSID system as an example, contracting states of the ICSID Convention are only required to enforce the pecuniary obligations imposed by the award in question within their territories.[469] For another thing, the order of primary remedies by investment tribunals could be deemed as a more aggressive interference with the sovereignty of host states, further aggravating the widespread suspicion over the investment treaty regime in general and investment arbitration in particular.[470] Van Aaken argues that an investment tribunal "ordering a state to revoke a measure or ordering specific performance would infringe more on national sovereignty than a pecuniary award."[471] Thus, while both primary and secondary remedies are often available for investment tribunals to choose from in theory, the order of primary remedies is difficult to envision in practice for enforceability issues and sovereignty concerns.[472]

5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture.

It should be noted that the investment treaty regime is supposed to achieve multiple objectives, among which are foreign investment protection, upgrading the domestic rule of law, depoliticizing investment disputes, more cross-border capital flows, and sustainable development.[473] While investment arbitration has been called a defining character of the investment treaty regime,[474] whether and to what extent this procedural mechanism contributes to the realization of the objectives of the overall regime is rather controversial.[475] However, a systemic institutional analysis of investment arbitration with a goal-based approach should take into account its effectiveness in facilitating these objectives since investor-state dispute resolution as an all but indispensable part of IIAs is expected to serve the agenda of the overall regime.[476] Recognizing that the assessment of the fulfillment of the objectives of the investment treaty regime is in itself a challenging task from an empirical perspective, the following analysis would only focus on how investment arbitration may or

[467] Sattorova, *supra* note 106, at 122.
[468] Jana, *supra* note 450, at 290-291.
[469] Article 54(1) of the ICSID Convention provides that: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. …" Article 54(1), the ICSID Convention.
[470] Jana, *supra* note 450, at 290.
[471] Van Aaken, *supra* note 243, at 747.
[472] Jana, *supra* note 450, at 292.
[473] See 5.3.3 The Attainment of Objectives: Chances and Challenges.
[474] Alschner, *supra* note 1, at 2.
[475] Lise Johnson, etc., *supra* note 98.
[476] Actually, investor-state dispute resolution is cited as a necessary means for the achievement of the objectives of the investment treaty regime. *Ibid*.

may not facilitate the pursuit of these ends by reference to some of its institutional features and some empirical evidence in this regard.

As a corollary of the belief that international investment law is conducive to the rule of law at the domestic level, many academics and practitioners share the view that investment arbitration would improve the quality of domestic systems and institutions. Franck believes that investment arbitration provides a useful model for domestic decisionmakers to improve their adjudicative fairness and neutrality and it fuels domestic support for the rule of law.[477] The desired impact, however, is perhaps more obvious in countries where strong institutions already exist.[478] She further argues that, in a "somewhat counterintuitive" way,[479] investment arbitration would facilitate the interaction between foreign investors and the judicial institutions of host states.[480] The interaction would generate "a strong incentive to develop the rule of law in national courts and promote the integrity of the dispute resolution process."[481] Likewise, many investment arbitrators, perhaps unsurprisingly, believe in the positive role that investment arbitration may play in promoting the domestic rule of law.[482] Investment arbitration was likened to a preventive medicine on the shelf that states do not want foreign investors to use,[483] indicating that these states would be incentivized to adhere to the good governance standards prescribed in IIAs.[484] To explain the positive impact of investment arbitration on the domestic rule of law, an influential member of the arbitral community allegedly put it in a plain, inept, and somewhat offensive way by saying that "This [investment arbitration] is a good government operation. F***** little countries should be grateful! We are to teach them how to govern themselves."[485] Some of them also believe that since investment arbitration not only involves poor countries but also rich countries as defenders, investment arbitrators have an opportunity to highlight what precisely institutional excellency that renders the latter group an attractive investment destination.[486] By doing so, the experience of rich countries as model-pupils would be shared with the developing world, providing those less developed countries with a model to be used for reference in their own legal and regulatory reforms.[487] Many proponents of investment arbitration further argue that states would be given an incentive to comply with treaty standards of good governance,

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[477] Susan D. Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law", Pacific McGeorge Global Business & Development Law Journal, Vol. 19, No. 2 (2007), pp. 367 & 372.
[478] *Ibid*.
[479] Benjamin K. Guthrie, "Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law", New York University Journal of International Law and Politics, Vol. 45, No. 4 (2013), p. 1168 (arguing that "given that most BITs allow investors to avoid domestic courts through international arbitration, the claim that BITs increase interaction between investors and host state courts is somewhat counterintuitive").
[480] Franck, *supra* note 477, at 368-370 (indicating that national courts would be involved through the imposition of prior litigation before domestic courts, the enforcement of investment awards, and investment claims based on domestic law).
[481] *Ibid*, at 370.
[482] Todd N. Tucker, "Judge Knot: Politics and Development in International Investment Law", Anthem Press (2018), p. 79 (arguing that most interviewees believe that investment arbitration is not only useful for its direct effects but also for the indirect effects).
[483] *Ibid*.
[484] Sattorova, *supra* note 106, at 113.
[485] Tucker, *supra* note 482, at 79.
[486] *Ibid*.
[487] *Ibid*.

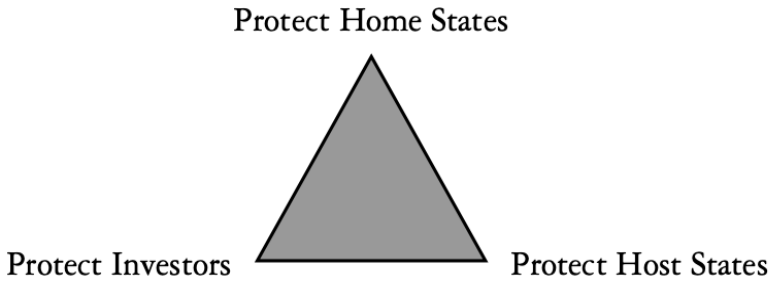
which would later spill over into much wider domestic spheres and benefit domestic investors and others.[488] In addition, as judicial misconduct is equally subject to the jurisdiction of investment tribunals, external checks could hopefully improve the quality of judicial institutions in host states. It is well-established in the practice of investment arbitration that a wide range of behavior of the judicial branch can offer a valid basis for foreign investors to file investment claims against host states. For instance, several investment tribunals have ruled that, in certain circumstances, even domestic courts refusing the recognition and enforcement of foreign arbitration awards could constitute a violation of investment agreements through breaching the "Expropriation-clause", the "Effective Means-clause" or the "Denial of Justice-clause."[489] It may be expected that, by subjecting assorted judicial misconduct that may take place in host states to the supervision of international tribunals, there could a "race to the top" for domestic courts to adjudicate disputes impartially and fairly, instead of a "race to the bottom."[490] If the quality of judicial institutions in host states is enhanced as a result, the overall rule of law reforms will benefit from it significantly.

In the discourse on the impact of the investment treaty regime in general and of investment arbitration in particular on investment promotion, many optimists seem to assume that extra international protection for foreign investors would certainly attract more overseas capital. Note that most of the observations in this regard, however, do not single out the impact of the investment arbitration mechanism from that of the overall treaty regime. For instance, when Chile ratified the ICSID Convention in 1991, the then President of Chile noted that investment arbitration and BITs would lower insurance premiums for foreign investors, allowing the country to keep an advantageous position in the competition for foreign capital.[491] This widespread optimism for the encouraging correlation between investment arbitration and more FDI inflows is in general attributed to a dual perception of the former. First, investment arbitration is often regarded as a substitute for the deficient rule of law in some certain countries,[492] indicating that the unease of risk-averse foreign investors would be quelled if they are granted a private right of action at the international level. Investment arbitrators often believe in the positive role that investment arbitration can play in promoting FDI flows, although they usually refer to stories instead of specific evidence.[493] By engaging in the investment arbitration mechanism, states send a signal to the investment community that they are countries closer to "Mexico" than to "Zimbabwe" in the sense that "When they lose (investment claims), they pay."[494] The "beautiful effect" is that investment arbitration would give states "the advantage of reducing the rate of return requested by new

[488] Arguably, if states treat foreign investors more favorably, domestic investors will demand the same treatment, "leading to a virtuous cycle of improvement." *Ibid*. Sattorova, *supra* note 106, at 113.
[489] Claudia Priem, "International Investment Treaty Arbitration as a Potential Check for Domestic Courts Refusing Enforcement of Foreign Arbitration Awards", New York University Journal of Law and Business, Vol. 10, No. 1 (2013), p. 189.
[490] Franck, *supra* note 477, at 367.
[491] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 208-209.
[492] Schultz and Dupont, *supra* note 141, at 1160.
[493] Tucker, *supra* note 482, at 78 (arguing that "In a country where investors do not 'trust the courts,' where there is high 'political risk,' or where slum dwellers 'steal the electricity,' investors either would not invest or would require a much higher rate of return").
[494] *Ibid*, at 79.

investors."[495] Second, on the assumption that investment arbitration leads to a higher level of the domestic rule of law, a more favorable environment for foreign investments is established in the host state.[496] Accordingly, the improved investment climate would improve investment confidence, attracting more FDI flows into the host state.

Figure 15 The Functional Benefits of Depoliticizing Investment Disputes



Source: Roberts (2015)

Moreover, while depoliticizing investment disputes is often considered as an objective of the investment treaty regime,[497] the procedural mechanism of investment arbitration has been widely acclaimed as the gem that makes this dream come true.[498] The typical account is that investment arbitration grants foreign investors a legal standing before an independent international forum, thus obviating the need for the intervention from their home states to espouse their claims against host states.[499] By doing so, the goal of depoliticization is achieved since the resolution of investment disputes would be based on pre-established investment rules instead of power politics.[500] Indeed, the ICSID Convention expressly objects to home states giving diplomatic protection or bringing an international claim on behalf of their investing nationals if mutual consent to ICSID arbitration has been made.[501] The depoliticization of investment disputes first and foremost serves the interests of foreign investors because they are granted direct recourse to international remedies, leaving behind the great uncertainty generated by the customary international law system of diplomatic

[495] *Ibid*.
[496] Franck, *supra* note 477, at 365.
[497] Roberts, *supra* note 59, at 373. Tucker, *supra* note 482, at 80 (arguing that many arbitrators believe that without investment agreements "gunboat diplomacy and war would proliferate").
[498] Roberts, *supra* note 59, at 389 (arguing that depoliticization of investment disputes is achieved through the introduction of investment arbitration). Ibrahim F.I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA", ICSID Review, Vol. 1, No. 1 (1986), p. 4 (arguing that the establishment of ICSID "attempts in particular to 'depoliticize' the settlement of investment disputes).
[499] Preeti Bhagnani, "Revisiting the Countermeasures Defense in Investor-State Disputes: Approach and Analogies", in Andrea K. Bjorklund ed., "Yearbook on International Investment Law & Policy, 2013-2014", Oxford University Press (2015), p. 452.
[500] Stephan W. Schill, "System-Building in Investment Treaty Arbitration and Lawmaking", German Law Journal, Vol. 12, No. 5 (2011), p. 1088 (arguing that investment arbitration "entails a move from politics to law and enables the judicialization of investor-State dispute settlement").
[501] Article 27(1) of the ICSID Convention provides that: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute." Article 27(1), the ICSID Convention.

protection.[502] In addition, as shown in Figure 15, Roberts argues that the justification for the depoliticization of investment disputes goes beyond foreign investor protection to include the benefits accruing to both home states and host states. Parallel to the idea that depoliticization spares home states from investing human and financial resources to espouse the claims of their investing nationals, host states are correspondingly immune from unwanted diplomatic pressure imposed by foreign countries, especially by the great powers.[503]

However, many critics have begun to query whether the investment arbitration mechanism genuinely contributes to the realization of the objectives of the investment treaty regime with emerging theories and empirical evidence contradicting the traditional optimistic tone. With regard to the domestic rule of law, investment arbitration as a substitute for domestic courts could lead to deterioration instead of progress, especially in those countries where the rule of law principle has not put down strong roots. The adverse impact of investment arbitration in this regard is usually attributed to two aspects by those critics. On the one hand, the ready access to international remedies provided for foreign investors and the exorbitant costs of arbitral proceedings might lead to regulatory chill, indicating that some states could retreat from legitimate policy decisions in return for the saving of arbitration costs.[504] If this is the case, issues of public interests, such as necessary legislative reforms to protect the environment, would give way to the private interests of foreign investors.[505] It is easy to guess that privileging a small group of businesses at the cost of the welfare of the general public would encroach upon the rule of law doctrine. However, this argument should be read with the caveat that the existence of, and the extent of, regulatory chill caused by investment arbitration is subject to fierce debates.[506] Although the analysis above shows that officials at work sometimes do not respond to financial costs imposed on national states,[507] the very possibility that public interests and the rule of law would be sacrificed as a result of investment arbitration is concerning enough. On the other hand, a rather large body of literature argues that investment arbitration would have an overall negative impact on the rule of law development in host states by marginalizing domestic judicial institutions and reducing the incentives to invest more in institutional quality.[508] The central pillar of this

[502] Schill, *supra* note 500, at 1088 (arguing that, under the system of diplomatic protection, "it is up to an investor's home State to espouse the claim of its national and to assert it").
[503] Roberts, *supra* note 59, at 390-391.
[504] Julia G. Brown, "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat", Western Journal of Legal Studies, Vol. 3, No. 1 (2013), p. 25.
[505] *Ibid*.
[506] Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement", Transnational Environmental Law, Vol. 7, No. 2 (2018), p. 250 (arguing that "as long as there is any ambiguity in the substantive provisions of investment agreements – allowing cases to play out over several years, cost millions, and leave governments uncertain about outcomes – there will be policy delays" in the cause of combating climate change). Tarald Laudal Berge and Axel Berger, "Does Investor-State Dispute Settlement Lead to Regulatory Chill? Global Evidence from Environmental Regulation", https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_78.pdf (last visited on May 20, 2022), p. 22 (arguing that their study "indicates that ISDS cases do not systematically lead to chilling of regulatory activity across countries – at least in the field of environmental regulation).
[507] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[508] OECD, *supra* note 61, at 12. Aisbett, et al., *supra* note 134, at 118. Puig and Shaffer, *supra* note 178, at 397. Chen, *supra* note 291, at 584-585. Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", International Review of Law and Economics, Vol. 25, No. 1 (2005), pp.

argument is that foreign investors are enabled to circumvent domestic courts with ease for the greener pastures of investment arbitration, thus reducing the interaction between these investors and the judicial institutions within host states and lowering the incentives of key stakeholders to push forward with institutional reforms.[509] In his seminal study on the impact of BITs on the domestic institutions of host states, Tom Ginsburg argues that the quality of judicial institutions is "a political outcome that requires political coalition to establish and maintain."[510] Indeed, foreign investors and host governments, according to him, turn out to be crucial players for fostering judicial independence.[511] Given the availability of ready access to investment arbitration, foreign investors would have reduced incentives to "press for improved domestic systems of investor-state dispute resolution."[512] This argument apparently assumes that foreign investors would assertively advocate institutional reforms after investing their capital, and that foreign investors are able to engender changes to the rule of law development in host states.[513] In order to prove the notable impact of foreign investors on the quality of domestic institutions of host states, Ginsburg invoked his observation that the heavy reliance of foreign investors on the China International Economic Trade Arbitration Commission for dispute settlement resulted in a two-tiered system of dispute resolution in China, namely "a relatively high quality institution for foreign investment and a relatively corrupt, low quality institution for domestic dispute resolution."[514] In the meantime, those who view investment arbitration as a threat to the domestic rule of law argue that, since this arbitral regime acts as a substitute for the deficiencies of domestic judicial procedure, host states would have less pressures and incentives to invest in judicial capacity-building.[515] Ginsburg also noted that the performance on a rule of law metric declined over the years after a BIT was signed, providing some preliminary empirical evidence for his argument that investment arbitration may perpetuate poor judicial institutions by allowing powerful actors, i.e., foreign investors, to exit.[516]

Apart from the possibility that investment arbitration might be detrimental to the development of the domestic rule of law, many commentators believe that this mechanism does little to help attract foreign investments and may even reduce FDI stocks in host states. This is certainly related to the fact that the overarching investment treaty regime *per se* has been challenged in recent years because quantitative studies on the impact of the regime on FDI flows into developing countries have shown mixed results. In a nicely organized review of 35 published quantitative studies on this topic, Bonnitcha and others revealed that, although a majority of these studies found that "investment treaties have a positive and statistically significant impact on inward FDI in at least some circumstances," a sizeable

122-123 (arguing that "the presence of international alternatives to adjudicatory or regulatory bodies may *reduce* local institutional quality under certain conditions").
[509] Guthrie, *supra* note 276, at 1169-1170.
[510] Ginsburg, *supra* note 508, at 119.
[511] *Ibid*.
[512] OECD, *supra* note 61, at 12.
[513] Guthrie, *supra* note 276, at 1169-1171.
[514] Ginsburg, *supra* note 508, at 119-120.
[515] Guthrie, *supra* note 276, at 1171 (arguing that the ready access to investment arbitration provided for foreign investors "leaves courts with 'insufficient incentives to compete with the global alternatives'").
[516] Ginsburg, *supra* note 508, at 121.

minority found that signing BITs is not likely to increase FDI inflows.[517] Likewise, although many proponents of investment arbitration insist that it can help to attract FDI,[518] some emerging empirical studies seem to suggest different if not contradictory results. In a study that aims to establish the impact of IIAs on FDI flows and purports to improve previous studies which treated these agreements as "black boxes", Berger and others found that, unlike liberal admission rules which promote bilateral FDI, investment arbitration seems to play only a minor role.[519] The same group of researchers further argue, in another publication, that a stricter form of investment arbitration-related clauses "do not necessarily result in higher FDI inflows so that the effectiveness of BITs as a credible commitment device remains elusive."[520] In a more recent econometric analysis, Shiro Armstrong and Luke Nottage argue that, counter-intuitively in their own words, while BITs in general bring more FDI flows from OECD countries to their partner host countries, the effects of BITs with stronger ISDS provisions are smaller than those with weaker ISDS provisions.[521] If this study faithfully reflects the dynamics between investment arbitration, IIAs, and FDI in reality, critics may argue that investment arbitration is a *de facto* obstruction instead of a driver for the purpose of IIAs to stimulate more FDI flows. In addition to the perception that investment arbitration may not lead to increased inward FDI in capital-importing countries, arbitration of investment disputes might even pose risks to the maintenance of foreign investments. Indeed, referring investment disputes to investment tribunals will, "in almost all cases, *result in a severance of the links between the two parties* [emphasis original]," namely the foreign investor and the host state.[522] This indicates that investor-state relationship will be almost irreversibly damaged after investment arbitral proceedings and that the foreign capitals concerned, if applicable, will very likely be diverted from the respondent host states. In the same vein, Allee and Peinhardt argue that while BITs may bring more FDI into contracting states, "governments suffer notable losses of FDI when they are taken before ICSID and suffer even greater losses when they lose an ICSID dispute."[523] This finding conforms to Hindelang's observation that the heavy reliance of investment tribunals on financial compensation is not consistent of the overall aim of state parties to IIAs which is to "establish

[517] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 159.
[518] Felix O. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States", Richmond Journal of Global Law & Business, Vol. 13, No. 2 (2014), p. 249 (arguing that "investment treaty arbitration mechanisms attract FDI" because the substantive commitments in IIAs are incomplete without the procedural mechanism).
[519] Axel Berger, et al., "Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box", Kiel Working Papers, No. 1647, September 2010, https://www.files.ethz.ch/isn/121223/kwp_1647.pdf (last visited on May 20, 2022), p. 17.
[520] Axel Berger, et al., "More Stringent BITs, Less Ambiguous Effects on FDI? Not a Bit!", WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2010-10, May 2010, https://www.wto.org/english/res_e/reser_e/ersd201010_e.pdf (last visited on May 20, 2022), p. 1.
[521] Shiro Armstrong and Luke Nottage, "The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis", Sydney Law School, Legal Studies Research Paper, No. 16/74, August 2016, p. 24.
[522] UNCTAD, *supra* note 78, at 19. Anna Joubin-Bret, "Welcome Address by Ms. Anna Joubin-Bret", in OECD, "International Investment Agreements and Investor-State Dispute Settlement at a Crossroads: Identifying Trends, Difference and Common Approaches: Symposium Proceedings", pp. 11-12.
[523] Todd Allee and Clint Peinhardt, "Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment", International Organization, Vol. 65, No. 3 (2011), p. 401.

and maintain *long term* and *stable* investment relations [emphasis original]."[524] To the extent that investment arbitration ends the amicable relationship between foreign investors and host states and creates bad precedents for both parties,[525] the FDI stocks in a given host economy could be reduced as a result of divestment in response to investment arbitral proceedings. The scale of this negative impact would in turn depend on such factors as the overall economic size of the relevant foreign investor and the value of the foreign investments made by the investor in the host economy. All in all, investment arbitration might severely damage investor-state relationship and deprive host states, especially those from the South, of precious investment opportunities.

Moreover, some commentators have expressed their concerns as to the potential negative impact of investment arbitration on the pursuit of sustainable development goals which is either implicitly or expressly integrated into IIAs. While few would doubt that FDI bears significant influence on the realization of sustainable development goals,[526] whether investment tribunals are the most appropriate venue for the deliberation and determination of sustainable development issues remains controversial.[527] However, the reality is that investment tribunals have been increasingly faced with investment disputes that indicate sustainable development issues,[528] indicating that their decisions could more broadly influence the achievement of sustainable development in host states. The question of how investment arbitration may impact the objective of promoting sustainable development in host states then becomes practically relevant. While many investment tribunals undeniably have taken into consideration sustainable development agendas, such as environmental issues,[529] concerns over investment arbitration in terms of its impact on the achievement of sustainable development are not groundless. First, we note that from the analysis above regarding the potential negative impact of investment arbitration on the domestic rule of law, some countries in certain circumstances might retreat from optimal regulation of public interest issues for fear of investment arbitral proceedings. Thus, insofar as regulatory chill is felt by host governments, investment arbitration could deter domestic legitimate policy decisions that would have served a sustainable development agenda. In other words, a host state's regulators would probably not be able to "advance the important objective of sustainable development, which calls for local participation, environmental stewardship and

[524] Hindelang, *supra* note 249, at 22.
[525] UNCTAD, *supra* note 78, at 19.
[526] UNCTAD, "Making FDI Work for Sustainable Development", UNCTAD/DITC/TED/9, 2004, p. 10 (arguing that, for instance, FDI could entail both positive and negative environmental consequences in host economies). Zakia Afrin, "Foreign Direct Investments and Sustainable Development in the Least-Developed Countries", Annual Survey of International & Comparative Law, Vol. 10, No. 1 (2004), p. 218 (arguing that many times FDI "can be seen as contradictory forces against sustainable development").
[527] Agata Ferreira, "When Sustainable Development Meets International Investment", Economic and Environmental Studies, Vol. 17, No. 2 (2017), p. 253.
[528] For instance, in a blog posted in 2017, Parlett and Ewad revealed that "More than 60 investment disputes filed since 2012 have had some environmental impact." Kate Parlett and Sara Ewad, "Protection of the Environment in Investment Arbitration – A Double-Edged Sword", Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/ (last visited on May 20, 2022).
[529] Christina L. Beharry and Melinda E. Kuritzky, "Going Green: Managing the Environment through International Investment Arbitration", American University International Law Review, Vol. 30, No. 3 (2013), p. 402 (arguing that investment "tribunals consider environmental issues as factual rather than legal matters").

economic development in a way that is beneficial to both present and future generations."[530] Second, investment arbitral jurisprudence shows that investment tribunals have responded to similar sustainable development matters with inconsistent decisions and there is not any agreed set of standards or criteria in place to guide an arbitral review of these matters.[531] The inconsistent arbitral jurisprudence suggests that perhaps not all investment tribunals have appropriated addressed sustainable development issues in the context of investment disputes. Third, the investment arbitration mechanism is lightly regulated in most IIAs according to some OECD studies, creating a risk that sustainable development concerns might not be taken into account by those in charge of interpreting and applying these treaties.[532] To give an example, although third-party participation has taken off in investment arbitration in recent years,[533] it is not commonly allowed by investment tribunals.[534] However, third-party participation could play a key role in bringing "scientific or technical points, other facts, or laws to the attention of" investment tribunals.[535] The expertise from specialized non-governmental organizations, for instance, can assist investment tribunals in making informed decisions in a case where both parties provide conflicting scientific evidence to support their own positions.[536] Alas, limited opportunities for third-party participation in investment arbitral proceedings might lead to a discouraging outcome that some investment tribunals would not be equipped with adequate knowledge and expertise to absorb and address sustainable development matters on their own. Fourth, considering that sustainable development concerns are only included in more recently concluded IIAs and broader sustainable development law has not been integrated into the normative framework of international investment law, there is a notable risk that sustainable development agenda would only have a limited influence on the adjudication of investment disputes.[537] Indeed, Ferreira argues that, in the practice of arbitration of investment disputes, sustainable development merely remains as "an additional consideration, which parties evoking it hope will add weight to their claims."[538]

5.4.4 Investment Arbitration as A Dubious Legitimacy Booster

While supporters and opponents of the present investment treaty regime may diverge in their opinions on many issues, they seemingly have achieved a consensus that the notion of

[530] Chung, *supra* note 6, at 963.
[531] Ferreira, *supra* note 527, at 253.
[532] Kathryn Gordon, et al., "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey", OECD Working Papers on International Investment 2014/01, pp. 25-26.
[533] Beharry and Kuritzky, *supra* note 529, at 414. Nicolette Butler, "Non-Disputing Party Participation in ICSID Disputes: *Faux Amici*?", Netherlands International Law Review, Vol. 66, No. 1 (2019), p. 146 (arguing that the practice of accepting amicus submissions in investment arbitration is relatively novel).
[534] Fernando Dias Simões, "Myopic Amici? The Participation of Non-Disputing Parties in ICSID Arbitration", North Carolina Journal of International Law, Vol. 42, No.3 (2017), pp. 795-796 (arguing that since investment arbitration is modelled after commercial arbitration, third-party participation is normally not allowed by tribunals in investment arbitral proceedings).
[535] Beharry and Kuritzky, *supra* note 529, at 415.
[536] *Ibid*, at 416.
[537] Ferreira, *supra* note 527, at 253. Gordon, et al., *supra* note 532, at 25.
[538] Ferreira, *supra* note 527, at 253.

legitimacy is significant for its maintenance and development.[539] Note that from the analysis in Sections 5.2.2.4 and 5.3.4, investor-state dispute resolution has a rather large impact on the legitimacy of the mentioned treaty regime.[540] Actually, in the light of a large body of literature highlighting all the loopholes of international investment law, investment arbitration may seem to stand in the way of the legitimacy-enhancement process of the underlying treaty regime at first sight. That perception, however, does not accurately nor fully reflect the genuine dynamics between the operation of investment arbitration and the ebb and flow of the legitimacy of the overarching treaty regime where this procedural mechanism is normatively rooted.

Arbitration of investment disputes, as a private enforcement mechanism for investment agreements,[541] has been hailed as a revolutionary innovation in international investment law.[542] To a great extent, investment arbitration lends more credibility to the substantive treaty commitments made by contracting states versus foreign investors.[543] Not lease due to the increased credibility engendered by investment arbitration, international investment law has scored success in that the network of investment agreements has been steadily expanded and known investment arbitration cases have surged in the past two decades or so.[544] In the meantime, investment arbitration has contributed to "enhancing the rule of law in investor-state relations," upholding one of the fundamental normative values of the investment treaty regime.[545] Perhaps more importantly, investment arbitration offers foreign investors what they would see as a neutral, independent, and impartial venue to have their grievances against host state authorities resolved. It is safe to say that, among all the relevant constituencies that the investment treaty regime concerns, the expectations of foreign investors have been most successfully met thus far, largely because of the available opportunity to arbitrate investment disputes.[546] According to Ryan, the extent to which the expectations of the participants in the international investment regime have been satisfied has significant influence over the long-term legitimacy and stability of international investment law.[547] Thus, by serving the interests of a group of important stakeholders – foreign investors, investment arbitration makes some, albeit non-quantifiable, contribution to the legitimacy of the overarching treaty regime.

On the other hand, as much broader private and public interests are involved in investor-state relations, investment arbitration acting as a substitute for domestic courts could also pose significant challenges to the legitimacy of the investment treaty regime. To begin with, we may recall that from the discussions of the legitimacy crisis of investment arbitration in

[539] Galán, *supra* note 313, at 81 (arguing that the investment law literature commonly regards legitimacy as the requisite condition for the "success" and "longevity" of the investment treaty regime).
[540] See 5.2.2.4 Legitimizing the Investment Treaty Regime and 5.3.4 Legitimizing the Investment Treaty Regime? Cautious Optimism.
[541] Stephan W. Schill, "Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement", in Michael Waibel, et al., eds., "The Backlash against Investment Arbitration: Perceptions and Reality", Wolters Kluwer (2010), p. 31.
[542] Salacuse and Sullivan, *supra* note 100, at 88.
[543] Schill, *supra* note 541, at 48.
[544] Van Aaken, *supra* note 329, at 8-9.
[545] Schill, *supra* note 51, at 1.
[546] Ryan, *supra* note 289, at 745.
[547] *Ibid*, at 761.

Chapter 2, this mechanism has been under attack by many quarters of the society for a number of points of contention.[548] All these accusations against investment arbitration, such as the lack of predictability and transparency, would tend to detract from the legitimacy of both the procedural mechanism *per se* and the overarching treaty regime, even if some of these accusations are not necessarily supported by solid empirical evidence. Among these recurring criticisms against investment arbitration, probably the alleged encroachment on public interests threatens the legitimacy of the investment treaty regime the most. While investment disputes typically go beyond the private interests of foreign investors and entail high-stakes decision-making, investment arbitration is largely modelled on how disputes between private parties are resolved in commercial arbitration.[549] Thus, investment arbitration conceptually suffers from "a tension between its public governance functions and its set-up as a private dispute settlement mechanism."[550] That, in turn, prompts a searching query which is concerned less about whether investment arbitration via the decision-making of hundreds of stand-alone arbitral tribunals erodes public interests in reality, than whether such high-stakes disputes which often have a public nature should be submitted to private decision-makers in the first place. After all, as Robert Cooter convincingly argues, "private judges should be allowed, or encouraged, to decide disputes which are truly private in the sense that the effects of the decision do not reach beyond the disputants, but public judges should have exclusive responsibility for cases such as class actions whose effects are diffuse."[551] This line of thought challenges not only the appropriateness of private tribunals as a venue for investor-state dispute resolution but also the overall legitimacy of the investment treaty regime which is known for the iconic status of investment arbitration.

Moreover, in view of the overwhelming reliance of investment tribunals on financial compensation as the form of redress, host states would normally not be requested to rescind conduct or legislation that has been found to be in violation of an investment treaty obligation.[552] Thus, if investment arbitration acts as a substitute for domestic courts, a number of questions with respect to the long-term impact of the investment treaty regime would arise. Can IIAs effectively discipline host state behavior towards foreign investors? Do IIAs engender positive changes to the investment climate in developing countries? Would IIAs promote more FDI flows across the globe in the long run by increasing investment confidence? Given that investment tribunals are not as well-positioned to grant primary remedies as domestic courts, channelling investment disputes immediately to arbitral tribunals would probably not provide soothing answers for these crucial questions. For this reason, an increasing number of stakeholders would probably start to question the necessity of the investment treaty regime in the long term, the process of which arguably has already

[548] See Chapter 2 Setting the Stage: The Legitimacy Crisis Facing Investment Arbitration and the Need to Reform Investor-State Dispute Resolution.
[549] Schill, *supra* note 51, at 3.
[550] *Ibid*.
[551] Cooter, *supra* note 373, at 108.
[552] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.

gained tremendous momentum in the light of the ongoing BIT-termination movement and plentiful critical assessments in academia.[553]

Furthermore, substituting investment arbitration for domestic courts imposes significant financial and sovereignty costs on states, increasing the possibility that more states would elect to exit the investment treaty regime over time as a response.[554] Indeed, what seems to anchor the involvement of most developing countries in the network of IIAs is not adherence to neoliberal ideals but the belief that these instruments carry the potential to encourage more inward FDI.[555] Many of these countries allegedly failed to prudently consider the costs and benefits of different substantive and procedural commitments at the time when they concluded IIAs with their developed counterparts.[556] Accordingly, Paulsson mused in 1995 that states did not appreciate the full implications of the obligations that they undertook in investment agreements.[557] Likewise, Poulsen argues that "it was not until a country was hit by the claim itself, the potency of the treaties became apparent."[558] Thus, the more host states are exposed to investment arbitration cases, the deeper they would feel the sting of the procedural mechanism. Indeed, granting foreign investors direct access to investment arbitration would likely accelerate the growth of investment arbitration cases, subjecting states to jaw-dropping expenditure, such as arbitration costs and legal fees, and incremental sovereignty costs, such as limitations on regulatory freedom and the marginalization of domestic courts. These ever-increasing financial and sovereignty costs would then markedly change a host state's ongoing cost-benefit analysis with respect to the membership of the investment treaty regime. Assuming that host states are utility maximizers, they would retreat from the regime if they feel the costs incurred exceed the expected benefits.[559] At present, if investment arbitration is kept as a substitute for litigation via domestic courts, there would be little doubt that investment treaty claims against host states at the international level would continue to rise before these states effectively withdraw themselves from the arbitration system or even the investment treaty regime. The expected rise is apparently related to a host of factors, such as the increase of FDI activities, the growing awareness of investment arbitration within the investor community, and the emergence of an unexpected crisis. For instance, against the background of the outbreak of COVID-19, elite law firms have begun to alert their clients to the possibility of challenging government measures via investment arbitration in a bid to safeguard their business interests.[560] Meanwhile, some commentators

[553] See Chapter 4 The Rise of Domestic Courts in Recent Treaty-making Practice amidst Uncertainty of Investment Arbitration.
[554] Roberts, *supra* note 428, at 192 (arguing that whether states would exit from the investment treaty regime "depends on an ongoing assessment of pros and cons, the balance or perception of which may change over time").
[555] Lauge N. Skovgaard Poulsen, "Bounded Rationality and the Diffusion of Modern Investment Treaties", International Studies Quarterly, Vol. 58, No. 1 (2014), p. 11.
[556] *Ibid*, at 12.
[557] Paulsson, *supra* note 534, at 257.
[558] Poulsen, *supra* note 555, at 12.
[559] Van Aaken, *supra* note 329, at 16 (arguing that "States will only participate in the system if the expected costs of constraining its (regulatory) sovereignty through BITs and State contracts will deliver expected (net) benefits").
[560] Mikhail Vishnyakov, "COVID-19 and Investment Treaty Protections: State Aid Needs to Be Granted on a 'fair and equitable' basis", https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/covid19-and-investment-treaty-protections-state (last visited on May 20, 2022). Emmanuel Gaillard, et al., "COVID-19

have called for states to temporarily withdraw consent to investment arbitration until multilateral solutions are found, such as exempting all COVID-19-related measures from investment arbitration or clarifying the application of necessity defenses according to international law, to minimize the risks for states across the world.[561] All in all, investment arbitration as a substitute for domestic courts would very likely lead to uncontrollable growth of investment arbitration, augmenting the risk that more states would probably exit the investment treaty regime altogether.

In addition, investment arbitration as an alternative to domestic courts would also leave a mark on the legitimacy of the investment treaty regime by creating an image that a regime that purports to do justice to a particular group of stakeholders does so by virtue of reverse discrimination.[562] In his analysis of the reasons for preferring resort to domestic courts over investment arbitration, Leon Trakman argues that foreign investors should not receive preferential treatment in comparison to domestic investors.[563] Such treatment is unfair, according to him, given that less developed countries historically accorded privileges to multinational corporations at the expense of local subjects who were competitively disadvantaged.[564] According to the neo-classical model of markets, competitive equality among producers, including that within and between industries, would lead to the most efficient organization of production.[565] If all firms, regardless of foreign ownership, are granted the same level of legal rights and protections, a situation of competitive equality would prevail.[566] However, if some firms are granted some rights which are not equally enjoyed by their competitors, the market would be distorted and an inefficient use of resources would come up.[567] As a result, these privileged firms would earn higher profits and expand their market share at the cost of their more efficient competitors.[568] Bonnitcha and others argue that investment arbitration apparently grants foreign firms preferential procedural rights that are not enjoyed by their local and foreign competitors.[569] This extra

& International Investment Protection", https://www.shearman.com/perspectives/2020/04/covid-19-international-investment-protection (last visited on May 20, 2022).

[561] Nathalie Bernasconi-Osterwalder, et al., "Protecting Against Investor-State Claims Amidst COVID-19: A Call to Action for Government", International Institute for Sustainable Development, https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf (last visited on May 20, 2022).

[562] Joseph E. Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities", American University International Law Review, Vol. 23, No. 3 (2008), p. 549 (arguing that "The real danger of the bilateral investment agreements is that they introduce an element of reverse discrimination: Foreign firms are treated more favorably, with greater protections, than domestic firms").

[563] Trakman, *supra* note 122, at 994.

[564] *Ibid*.

[565] Jonathan Bonnitcha, "Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections", in Chester Brown and Kate Miles eds., "Evolution in Investment Treaty Law and Arbitration", Cambridge University Press (2011), p. 125 (arguing that such a model bases on some simplifying assumptions, such as "perfect information about investment opportunities, zero transaction costs and no externalities to production that are not reflected in prices").

[566] *Ibid*.

[567] Kenneth J. Vandevelde, "The Economics of Bilateral Investment Treaties", Harvard International Law Journal, Vol. 41, No. 2 (2000), p. 478.

[568] Bonnitcha, *supra* note 565, at 125.

[569] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 153.

layer of procedural protection accorded to foreign investors would be likely to reduce efficiency.[570] Some of those who disagree with this argument may assert that the substantive treaty commitments are equally aimed to confer preferential treatment upon foreign investors since the investment treaty regime itself is centered on investor protection. However, despite the rarity of empirical research in this regard, those substantive treaty obligations, such as the full protection and security standard, do not necessarily accord better treatment to covered investors than the treatment of domestic investors under the national legal system.[571] Other opponents instead may invoke the economic theorem of the second best to justify the preferential treatment of foreign investors via investment arbitration, citing these investors that are discriminated against in the judiciaries of host states.[572] After all, the said economic theorem establishes that "when there is a market distortion, additional corrective distortions can increase efficiency."[573] However, this counter-argument that foreign investors are treated more poorly than domestic investors by the judiciaries of host states is mainly supported by anecdotal evidence instead of empirical evidence.[574] In addition to that some countries, such as Nigeria, actually have set up preferential procedures for foreign investors in their court systems, a study using the World Bank survey data concluded that foreign firms are *more* likely than comparable domestic investors to find the courts in host states "fair, impartial, and uncorrupt" and *no more or less* likely to find the courts an obstacle to their operation. Thus, the claim that the procedural mechanism of investment arbitration creates unequal market positions between covered investors and their local and foreign competitors in the host state is not without some merit. At the same time, given that investment arbitration has become an extremely costly dispute resolution service, this procedural mechanism arguably mainly serves the interests of those economically powerful multinational corporations instead of less well-capitalized companies.[575] Not surprisingly, it is noted that "corporations that take part in the system economically dwarf smaller states."[576] In a study to discern the beneficiaries of investment arbitration, Van Harten established that extra-large companies, extremely wealthy individuals, and large companies have financially benefitted the most from the mechanism while small and medium companies have been modest winners.[577] While any inference from these findings has to be made with caution since the disparity of financial gains between the "bigger" and the "smaller" companies could be a result of mixed variables, the findings themselves seem to corroborate the claim that access to investment arbitration is more or less a privilege for multinational companies. On top of all the competitive inequality arguably

[570] *Ibid*, at 152 (arguing that "All other things being equal, granting preferential rights to foreign investors of particular nationalities – 'reverse discrimination' – reduces efficiency").
[571] *Ibid*, at 153.
[572] *Ibid*, at 153-154.
[573] *Ibid*, at 154. Richard Lipsey and Kelvin Lancaster, "The General Theory of the Second Best", The Review of Economic Studies, Vol. 24, No. 1 (1956-1957), p. 12.
[574] Bonnitcha, Poulsen and Waibel, *supra* note 126, at 154.
[575] Kristen E. Boon, "Investment Treaty Arbitration: Making a Place for Small Claims", Journal of World Investment & Trade, Vol. 19, No. 4 (2018), p. 668 (arguing that "while the system is open to small investors, those small investors must still have large claims to make arbitration worthwhile").
[576] Sergio Puig and Anton Strezhnev, "The David Effect and ISDS", European Journal of International Law, Vol. 28, No. 3 (2017), p. 758.
[577] Gus van Harten, "Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants", Osgoode Legal Studies Research Paper No. 14, Vol. 12, No. 3 (2016), p. 13.

created by investment arbitration, let us not forget that non-disputing parties whose interests could be implicated in investment disputes more often than not cannot get their voices heard in the arbitral process.[578] To sum up, by claiming justice for foreign investors while seemingly creating more injustice along the process, one may question whether investment arbitration is "the jewel in the crown" or "a rotten apple" for the legitimacy of the overarching investment treaty regime.

Last but not least, investment arbitration as a substitute for domestic courts indicates that foreign investors are granted direct access to international remedies, thus casting a cloud over the legitimacy of the investment treaty regime by rendering its iconic procedural mechanism inconsistent with customary international law.[579] According to Cesare Romano, international courts and tribunals can rarely be resorted to directly and immediately, and international remedies are contingent in the sense that they are only available after the exhaustion of local remedies.[580] In the same vein, Mattias Kumm argues that, in order to preserve the legitimacy of international law, the principle of subsidiarity, which underpins European constitutionalism, "ought to be an internal feature of international law as well."[581] In the field of dispute resolution, the principle of subsidiarity, which is related to the so-called "jurisdictional legitimacy", objects to international remedies working as an alternative to domestic remedies on the assumption that "instruments for holding accountable national actors are generally highly developed" in those well-established constitutional democracies.[582] Indeed, the departure of investment arbitration from the established practice of other branches of international law has attracted blistering criticism, especially when a comparison is drawn between an investor's procedural right within an investment treaty with an individual's under a human right treaty.[583] Considering that victims of human rights violations have to resort to domestic courts before filing a claim with a human rights court, it is hard to explain why foreign investors should have direct and immediate access to international remedies.[584] After all, in a normative sense, property rights, which are certainly a crucial component of human rights, do not appear to deserve more vigorous protection than broader human rights, such as a right to liberty and security, freedom of expression and freedom of assembly and association. In addition, those who believe that the international responsibility of a state arises only after all existing appropriate and effective domestic remedies are exhausted without success, would also challenge investment arbitration working

[578] See 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture..
[579] Malcolm N. Shaw, "International Law", 8th edn., Cambridge University Press (2017), p. 620 (arguing that "Customary international law provides that before international proceedings are instituted or claims or representations made, the remedies provided by the local state should have been exhausted").
[580] Cesare P. R. Romano, "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures", in Nerina Boschiero, et al., eds., "International Courts and the Development of International Law", Asser Press (2013), p. 563.
[581] Kumm, *supra* note 337, at 921.
[582] *Ibid*, at 920-924.
[583] Kube, *supra* note 410, at 191 (arguing that the procedural privilege of foreign investors of direct access to international remedies has attracted sharp criticisms). Clara Reiner and Christoph Schreuer, "Human Rights and International Investment Arbitration", in Pierre-Marie Dupuy, et al., eds., "Human Rights in International Investment Law and Arbitration", Oxford University Press (2009), pp. 94-95 (arguing that while "the necessity to exhaust local remedies is the rule" in the context of human rights law, that does not apply to investment law).
[584] Kube, *supra* note 410, at 191.

as a substitute for domestic courts.[585] If direct and immediate access to investment arbitration is granted, a paradox would conceivably arise within the investment treaty regime. On the one hand, by subjecting judicial misconduct to the jurisdiction of investment tribunals, the regime recognizes that the judicial branch is an instantiation of sovereignty. On the other hand, foreign investors may bypass domestic courts in favor of international remedies with ease, depriving sovereign states of the opportunity to activate a critical national organ to achieve self-correction. In sum, considering that international investment law does not operate in a vacuum in isolation from other branches of international law, the inconsistency between investment arbitration acting as a substitute for domestic courts and the established international law practice would undermine the legitimacy of the investment treaty regime over time.

5.4.5 Summary

Despite the much more complicated reality, investment arbitration as a substitute for domestic courts has been widely viewed as a suitable representation of the investor-state dispute resolution mechanism as it stands now. Keeping in mind that there is a growing consensus on the need for the reform of the present mechanism,[586] it may not come as a surprise that an institutional analysis using a goal-based approach reveals that investment arbitration as an alternative to domestic courts does not seem to be a meritorious policy option that effectively advances the goals of treaty-based investor-state dispute resolution. To start with, investment arbitration shares many of the advantages in facilitating fair and efficient dispute resolution that are also ascribed to commercial arbitration, among which are perceived neutrality, specialized decision-makers, procedural flexibility, and an effective enforcement mechanism. However, arguments could also be made to show that, in reality, investment arbitration does not necessarily ensure fairness and efficiency in the arbitral process. Such arguments include that investment arbitrators may have a built-in pro-investor bias, that investment tribunals fail to provide for a single forum for dispute resolution, that those arbitrators may lack a sophisticated understanding of relevant domestic legal orders, and so on. Moreover, investment arbitration could be viewed as a seeded player in promoting state compliance with investment treaty norms from a number of perspectives, but it may turn out to have done little to the realization of this crucial goal if not to generate some negative impact on state compliance records. One of the main reasons is that while some may expect monetary sanctions to effectively deter host states from non-compliance with investment disciplines, financial compensation may instead merely provide these states with a chance to breach international investment law by paying damages. Furthermore, the traditional optimistic perception that investment arbitration could contribute to the achievement of the objectives of the investment treaty regime, such as the improvement of the domestic rule of

[585] Shaw, *supra* note 579, at 620 (arguing that a theoretical debate exists surrounding "whether the principle of exhaustion of local remedies is a substantive or procedural rule or some form of hybrid concept"). Silvia D'Ascoli and Kathrin M. Scherr, "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection", EUR Working Papers, Law 2007/02, p. 3 (arguing that supporters of the rule of exhaustion of local remedies as a rule of substance believes that international responsibility of a state is conditioned upon "the prior necessity for the individual to employ all the remedies available under internal law").
[586] Schill, *supra* note 51, at 1-2.

law and the increase of FDI flows, has been increasingly contradicted by critical assessments and empirical evidence. While investment arbitration arguably generates a certain and positive impact on the depoliticization of investment relationship, investment arbitration in the current form could pose challenges to the sustainable development of host states. In addition, when it comes to safeguarding the legitimacy of the overarching investment treaty regime, investment arbitration as a substitute for domestic courts seems to bring with it systemic risks. Apart from other legitimacy-related concerns, more countries would probably leave the investment treaty regime in response to the significant financial and sovereignty costs imposed upon them by a continuous surge of investment arbitration cases.

5.5 Investment Arbitration as a Complement to Domestic Courts

Sections 5.3 and 5.4 are respectively devoted to the institutional analysis of two design options for investor-state dispute resolution, namely domestic courts as the exclusive forum for the adjudication of investment disputes and investment arbitration as a substitute for domestic courts. They establish that both litigation through domestic courts and investment arbitration have unique advantages and disadvantages with respect to the achievement of the goals of investor-state dispute resolution, namely fair and efficient dispute settlement, norm compliance, facilitating the objectives of the investment treaty regime, and consolidating the legitimacy of that regime. The institutional analysis using a goal-based approach demonstrates that both design options are rather extreme and arguably could not be relied upon to advance the goals mentioned above. Such an analysis also suggests that selecting one of them over the other seems to be an imbalanced policy choice and that litigation through domestic courts and investment arbitration can be mutually complementary in many aspects. It thus puts forward a thought-provoking question: Is there a possibility to create a smart mix of domestic litigation and international arbitration that keeps many of their advantages while avoiding many of their disadvantages? If positive, it could be expected that a procedural mechanism that lies somewhere between the two extreme design options may advance the goals of investor-state dispute resolution in a more effective way. Indeed, this section is intended to conduct an institutional analysis of such a procedural mechanism, i.e., investment arbitration as a complement to domestic courts. This design option represents "a system of complementarity under which domestic and international dispute settlement are linked."[587] Under this system, foreign investors cannot easily bypass domestic courts to have their disputes with a host state's public authorities resolved by investment tribunals. Instead, domestic courts are given the first opportunity to resolve investment disputes, which means the use and development of national judiciaries of host states is prioritized.[588] However, the fulfilment of domestic proceedings does not necessarily bring an investment dispute to an end as the foreign investor would have an opportunity to refer the dispute to an investment tribunal if the domestic phase of dispute resolution is not satisfactory enough for the investor. By putting mandatory domestic proceedings before the initiation of investment arbitration, domestic courts become a primary venue for investor-state dispute resolution and investment

[587] Puig and Shaffer, *supra* note 178, at 401.
[588] *Ibid*.

arbitration acts as a backdrop.[589] Considering that under the current design investment arbitration largely works as an alternative to domestic courts, some may argue that institutionalizing a mix of domestic litigation and investment arbitration is unrealistic and retrogressive. However, against the background of the ongoing debates about the reform of investor-state dispute resolution, many academics have endorsed, either directly or indirectly, the idea of bringing domestic courts back into the landscape.[590] Perhaps more importantly, an increasing number of states have also embraced the mix of domestic litigation and investment arbitration in the ongoing efforts to adjust and reshape international investment law. We can recall that from the positive analysis of the recent investment treaty-making practice of some countries in Chapter 4, Indian Model BIT 2016 and the USMCA are typical examples that expressly condition the right to investment arbitration on prior use of local remedies.[591] According to the submission from Guinea to the UNCITRAL Working Group III, government representatives from African countries seem to share the consensus that requiring foreign investors to "exhaust local remedies before submitting their claims to arbitral tribunals" could bring significant benefits to investor-state dispute resolution.[592] In addition, Indonesia,[593] Morocco,[594] South Africa,[595] and Mali[596] also specifically recommended the exhaustion of local remedies rule as a reform proposal in their respective submissions. Thus, these states have expressed their support for the design option of bringing domestic remedies back while keeping investment arbitration in place as a complement. Those who are familiar with the investment treaty regime would find that the complement model is indeed not a ground-breaking design given that some earlier BITs did incorporate the exhaustion of local remedies rule or the prior use of local remedies rule into the dispute resolution section.[597] However, these rules do not necessarily represent a genuinely "smart" mix mentioned above. For now, this section explores why the complement model could serve as a possible solution that would help to guide the investment treaty regime in general and investor-state dispute resolution in particular out of the current predicament via a comparative institutional analysis.

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[589] *Ibid*.

[590] *Ibid*, at 408-409. Fox, *supra* note 100, at 255-256. Hindelang, *supra* note 116, at 60-62. Aisbett, et al., *supra* note 134, at 119-120. Gáspár-Szilágyi, *supra* note 153, at 411-413. Prislan, *supra* note 202, at 426-428. Van Aaken, *supra* note 243, at 753. Porterfield, *supra* note 288, at 5-7. Chen, *supra* note 291, at 586-587. Nathalie Bernasconi-Osterwalder, "Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field? The Lauder/Czech Republic Legacy", Journal of World Investment & Trade, Vol. 6, No. 1 (2005), at 70. Daniel Kalderimis, "Back to the Future: Contemplating a Return to the Exhaustion Rule", Transnational Dispute Settlement 1 (2014), pp. 1-29. Douglas Wong, "From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration", Singapore Law Review, Vol. 35 (2017), pp. 126-141.

[591] See Chapter 4 The Rise of Domestic Courts in Recent Treaty-making Practice amidst Uncertainty of Investment Arbitration.

[592] UNCITRAL, "Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Guinea", A/CN.9/WG.III/WP.183, Oct. 4, 2019, p. 9.

[593] UNCITRAL, "Possible reform of Investor-State dispute settlement (ISDS) Comments by the Government of Indonesia", A/CN.9/WG.III/WP.156, Nov. 9, 2018, p. 4.

[594] UNICTRAL, "Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Morocco", A/CN.9/WG.III/WP.161, Mar. 4, 2019, p. 3.

[595] UNICTRAL, "Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa", A/CN.9/WG.III/WP.176, Jul. 17, 2019, p. 8.

[596] UNCITRAL, "Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Mali", A/CN.9/WG.III/WP.181, Sep. 17, 2019, p. 3.

[597] See Chapter 3 The Roles of Domestic Courts in Investor-State Dispute Resolution.

5.5.1 The Complement Model Can Facilitate Fair and Efficient Dispute resolution

Whether or not the complement model can facilitate fair and efficient dispute resolution concerns not only the feasibility of this design option but also the direct interests of both disputing parties, especially that of foreign investors.[598] On the surface, the complement model adversely impacts foreign investors by depriving them of direct access to investment arbitration that they normally enjoy under the current regime. Skeptics of litigation via domestic courts are inclined to argue that an extra layer of dispute resolution would merely increase costs and drag out proceedings. However, that is based on the presumption that domestic courts are biased, inefficient and inept, which may often present an inaccurate picture of the judiciaries of many countries, particularly those countries with a good record of the rule of law. Indeed, contrasting the complement model to the other two options, which are domestic courts as the exclusive forum and investment arbitration as a substitute for domestic courts, investment arbitration as a complement to domestic courts demonstrates great potential in facilitating fair and efficient dispute resolution.

On the fairness of dispute resolution, the complement model firstly takes into consideration the changing circumstances of the modern society in terms of the rule of law development in many countries,[599] the evolution of the underlying investment treaty regime,[600] and the fading divide between traditional capital-exporting and capital-importing countries.[601] While probably no one would argue that legal and judicial institutions are well-developed in all countries, it is safe to say that the quality of the judiciaries of many developing countries has made more or less progress since several decades ago when investment arbitration started to take shape.[602] In the meantime, developed countries have increasingly been targeted by foreign investors via the initiation of investment arbitration cases since the end of the last century,[603] indicating that domestic courts from those countries which are usually perceived as neutral, independent, and efficient are also bypassed in favor of international

[598] If the result of the implementation of the complement model is that foreign investors are subjected to unfair, inefficient and costly procedures, this model is not likely to obtain support of the investor community or major capital-exporting countries. Ryan, supra note 289, at 742-745.
[599] Michael J. Trebilcock and Ronald J. Daniels, "Rule of Law Reform and Development: Charting the Fragile Path of Progress", Edward Elgar (2008), pp. 66-106 (introducing the experience of judicial reforms in Latin America, Central and Eastern Europe, Africa, and Asia with mixed results).
[600] Arjan Lejour and Maria Salfi, "The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment", CPB Discussion Paper | 298, https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-298-regional-impact-bilateral-investment-treaties-foreign-direct-investment.pdf (last visited May 4, 2020), p. 6 (arguing that there were around 500 BITs ratified between high/upper middle income countries or among developed states as of 2012).
[601] Barton Legum, "Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-U.S. FTA?", in Jean E. Kalicki and Anna Joubin-Bret eds., "Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century", Nijhoff (2015), p. 440 (arguing that both the United States and the EU member states are simultaneously capital exporters and importers).
[602] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[603] Schultz and Dupont, *supra* note 141, at 1156 (arguing that "investment arbitration has been a mixed 'developed vs developed' and 'developed vs developing' instrument, with a slight preponderance of 'developed vs developed' claims" since the mid-to-late 1990s).

proceedings.[604] That to some extent explains why many developed countries have expressed grave concerns over investment arbitration in recent years.[605] Indeed, for any efforts trying to maintain and consolidate the legitimacy of the investment treaty regime, the changing exterior environment should be internalized to guide the reform of investor-state dispute resolution. Thus, considering that judiciaries of developing countries have arguably become progressively qualified and that those of developed countries are known for their independence, neutrality, and proficiency, litigation via domestic courts should not be easily bypassed by foreign investors in favor of investment arbitration as it is at present. According to Van Harten, "foreign companies in general are protected in domestic courts and domestic law."[606] He argues that as a logical result of those who hold a skeptical view of litigation through domestic courts, foreign investors should be able to file international claims only if they were mistreated by the domestic courts of host states.[607] Thus, he asks: "Why should foreign investors not be required to go to domestic courts if they are unable to show that the courts would not provide access to justice, compensation for expropriation, and so on?"[608] The reasonable answer to his question is probably that they should be required to go to domestic courts as a default rule given that any accusations against these courts with regard to their fairness and competence should better be based on facts and evidence instead of stereotypes and fantasy. Meanwhile, unlike the design option where domestic courts act as the exclusive forum for dispute resolution, the complement model recognizes that, in practice, domestic courts, including those in developed countries, may fail to provide for neutral and unbiased decision-making at times.[609] In such a case, foreign investors will not be left unprotected since they keep the right to file an international claim before investment tribunals. In other words, the secondary international proceedings can check the possible biases of domestic courts to guarantee the right of foreign investors to fair dispute resolution.[610] However, the complement model is not a panacea for achieving fairness in investor-state dispute resolution in that bringing back local remedies can do little, if anything, to mitigate the risks of bias haunting the investment arbitration mechanism *per se*, such as the alleged pro-investor bias of arbitrators as a result of their incentive structure. That part requires the introduction of structural changes to investment arbitration via broader reform measures which of course go beyond the scope of this research.

From the perspective of efficiency in dispute resolution, the complement model gives full play to the institutional advantages of domestic courts that could lead to expeditious and

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[604] Lejour and Salfi, *supra* note 600, at 7 (arguing that most of developed countries, such as the US and Western European countries, "have well developed juridical systems and independent courts which makes a BIT unnecessary").
[605] Colin Trehearne, "Will 2018 Mark a Tipping Point for Binding Investor-State Arbitration?", Kluwer Arbitration Blog, Oct. 31, 2017, http://arbitrationblog.kluwerarbitration.com/2017/10/31/will-2018-mark-tipping-point-binding-investor-state-arbitration/ (last visited on May 20, 2022) (arguing that the United States, EU member states, Canada and Australia have expressed opposition in some form to investment arbitration).
[606] Gus van Harten, "Reforming the System of International Investment Dispute Settlement", in C. L. Lim ed, "Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah", Cambridge University Press (2016), p. 124.
[607] *Ibid.*
[608] *Ibid.*
[609] See 5.3.1.2 Risks of Unfairness and Inefficiency Still Exist. Puig and Shaffer, *supra* note 178, at 407.
[610] Puig and Shaffer, *supra* note 178, at 407.

quality decision-making by highlighting the primary role of litigation via national courts in the adjudicative process.[611] One of the key advantages is that domestic courts might be able to provide a single forum for foreign investors to file claims of both domestic law and international law characters.[612] The Tribunal in *Loewen v. USA* clearly indicates that "in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law."[613] In a case of whether host state measures are in compliance with domestic laws and international commitments can be adjudicated upon at a single forum, the efficiency of investor-state dispute resolution would likely be increased due to the corresponding reduced need for the activation of international proceedings. Not only would foreign investors benefit from the convenience brought by a single forum of dispute resolution, but also host states would be "spared from having to defend the same measure in two different forums."[614] At the same time, during the phase of domestic proceedings, host states would have a much better chance to put forward counterclaims and non-disputing parties are also more likely to have their concerns addressed by decision-makers.[615] Conceivably, a more centralized form of dispute resolution is more efficient than having interrelated claims decided by dispersed forums which simultaneously raises the risk of conflicting and inconsistent decisions. Moreover, considering that investment disputes usually involve significant domestic law elements,[616] having domestic courts take a first shot at the disputes would take full advantage of national judges' superior expertise in this regard, which is supposed to facilitate efficient dispute resolution by reducing error costs and requesting less information transfer from disputing parties.[617] Furthermore, the prevalent presence of an appeals procedure within the court systems of many jurisdictions arguably provides for an extra layer of guarantee for decisional accuracy which certainly relates to the achievement of genuinely fair and efficient dispute resolution.[618] In addition, if investment disputes are resolved at the domestic level to the satisfaction of foreign investors, costly investment arbitral proceedings would be avoided and the overall financial costs incurred by disputing parties, especially by the state party, could be (much) lower. Allegedly, it is "much less expensive for the host state to go through the process of its own courts than to resort to an international instance, particularly if the dispute is settled at the lowest level in the adjudicatory system."[619] In the meantime, this could also be beneficial to foreign investors since they would be spared from the usually incredible costs caused by the involvement of elite international law firms and costly arbitrators in investment arbitration.[620] Parallel with the decrease in private costs, the complement model could also reduce the social costs of investment arbitration by ensuring domestic courts have a more certain chance to produce positive externalities, such as more clarity in domestic norms and

[611] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[612] Hindelang, *supra* note 116, at 61. Dodge, *supra* note 164, at 33.
[613] *Loewen v. USA*, ICSID Case No. ARB(AF)/98/3, Award (Jun. 26, 2003), para. 162.
[614] Dodge, *supra* note 164, at 33.
[615] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[616] Kalderimis, *supra* note 590, at 8.
[617] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[618] *Ibid.*
[619] Chittharanjan Felix Amerasinghe, "Local Remedies in International Law", Cambridge University Press (2004), p. 61.
[620] Gáspár-Szilágyi, *supra* note 153, at 404.

rule and more developed coherent jurisprudence, through the adjudication of investment disputes.[621]

Notwithstanding all the institutional advantages associated with domestic courts, those who oppose mandatory prior domestic litigation often argue that bringing back local remedies will end up imposing extra costs on disputing parties, especially the investor party, and further lengthening the dispute resolution process.[622] This argument actually rests on the presumption that domestic courts are inherently incapable of delivering quality decision-making in investment disputes and such disputes will persist anyway because foreign investors will not be content with the final judgments.[623] However, this presumption is full of bias and prejudice against national judiciaries and does not necessarily mirror the reality of dispute resolution. As Prislan cogently argues, "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 [sic] bring their claims to arbitration."[624] Thus, it can be expected that domestic proceedings may properly deal with the grievances of foreign investors, obviating the need for recourse to investment arbitration thereafter. Even if an investment dispute persists after the completion of mandatory prior domestic litigation and foreign investors are ready to initiate arbitration, that extra layer of proceedings does not seem to add too much financial burden to disputing parties in terms of the overall costs, especially when compared to the iconic exorbitant costs of investment arbitration.[625] Furthermore, if investment arbitration becomes necessary after domestic proceedings, the failed domestic litigation does not necessarily make the overall duration of investor-state dispute resolution any longer. There is a shared consensus among many commentators that the prior involvement of domestic courts is likely to improve the efficiency of the subsequent arbitral proceeding by providing investment tribunals with valuable information.[626] Such information includes the development of the facts and the law, particularly those domestic law issues on which investment arbitrators often lack expertise.[627] For example, in *Metalclad v. Mexico*, whether the denial of a construction permit breached the minimum standard of treatment in NAFTA partially depended on whether the relevant municipality had authority over hazardous waste matters under Mexican law.[628] Although the Tribunal found that the municipality had no such authority, Dodge argues that "it clearly would have benefited from an analysis of the issue by the Mexican courts."[629] Aisbett and others indicated that many investment disputes are dependent on the extent to which regulatory changes in host states interfere with the legitimate expectations of foreign investors of the value of their investments.[630] They argue that domestic courts are better positioned than investment tribunals to analyze whether a foreign investor's expectations are legitimate against the

[621] Landes and Posner, supra note 195, at 236-240.
[622] Prislan, *supra* note 202, at 427.
[623] *Ibid*.
[624] *Ibid*.
[625] *Ibid*.
[626] Aisbett, et al., *supra* note 134, at 120. Dodge, *supra* note 164, at 34. Porterfield, *supra* note 288, at 6.
[627] Dodge, *supra* note 164, at 34.
[628] *Ibid*.
[629] *Ibid*.
[630] Aisbett, et al., *supra* note 134, at 120.

relevant factual background and the legal framework within which the investment was established in the first place.[631] Porterfield likewise maintains that national judiciaries are able to elucidate domestic standards of protection for property rights, which can provide investment tribunals with relevant state practice that is necessary for a reasonable understanding of many treaty clauses, such as fair and equitable treatment and indirect expropriation, which are supposed to reflect customary international law. Therefore, investment tribunals are likely to benefit from the previous work done by domestic courts on many issues, although they are certainly not officially obliged to accept the findings of national judges. Considering that valuable information provided by prior domestic proceedings may as well be applied in investment arbitral proceedings, the process of investor-state dispute resolution can be accelerated as a result.

5.5.2 The Complement Model May Promote Norm Compliance Better

As indicated earlier, norm compliance in the context of international investment law denotes that contracting states would *ex ante* internalize investment treaty norms in their dealings with foreign investors and *ex post* adjust their national legal framework in line with the decisions of adjudicatory bodies.[632] We may recall that from the analysis of the impact of financial compensation on norm compliance, damages awards may often fail to promote state compliance with the good governance standards prescribed in IIAs.[633] The experience of conditioning foreign aids on domestic legal and judicial reforms reveals that these programs have often produced little effect and that external financial pressures are barely a reliable tool to induce good governance reforms.[634] While monetary sanctions in theory may incentivize states to comply with investment treaty norms faithfully, studies have shown that there are some factors in place that could prevent host states from responding to the financial incentive properly.[635] Instead, damages awards could even act as a pricing mechanism for violations of investment treaty commitments, enabling host states to buy the right to breach simply by paying compensation to foreign investors.[636] If that is the case, financial compensation may "facilitate breach, rather than deter it."[637] In addition to the great uncertainty of financial compensation in promoting *ex ante* compliance with investment treaty norms, an overwhelming reliance on secondary remedies would also do little to guarantee *ex post* adjustment of state behavior.[638] Although damages awards represent disapproval and discouragement from investment tribunals, state measures, such as a discriminatory decree issued by a local authority, that have been identified as violations of investment treaty obligations would likely remain untouched. Primary remedies, nevertheless, are directly targeted at the challenged state's behavior, be it an administrative act or a legislative act.[639] They are applied with the intention to restore state compliance with the requirements of

[631] *Ibid.*
[632] Sattorova, *supra* note 106, at 113.
[633] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[634] *Ibid.*
[635] *Ibid.*
[636] *Ibid.*
[637] Sattorova, *supra* note 106, at 116.
[638] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[639] Van Aaken, *supra* note 243, at 724.

(international) law or, in other words, the *status quo ante*.[640] It follows that, compared to secondary remedies, primary remedies not only offer foreign investors a stronger version of protection but also hold more potential in promoting state compliance with investment treaty norms, at least from the perspective of *ex post* adjustment of state behavior with international obligations.[641] The analysis in Section 5.4.2, however, reveals that while investment tribunals in theory retain the power to order primary remedies, they overwhelmingly rely on financial compensation as the form of redress in practice for such concerns as enforceability of non-pecuniary remedies and intrusion into state sovereignty.[642] Evidently, compared to investment arbitration as a substitute for domestic courts, the complement model privileges the use of litigation via those courts and thus the application of primary remedies. On the assumption that domestic courts are able to adjudicate investment disputes in an independent and impartial manner, state compliance with the good governance standards prescribed in IIAs is more likely to be achieved under the complement model. Van Aaken notably argues that the most likely and most efficient way to reintroduce primary remedies into investment law is "a combination of the national and international levels in the use of remedies."[643] This argument precisely provides support for the complement model which emphasizes the use of primary remedies instead of secondary remedies via the mandatory prior domestic litigation requirement. In addition, while the complement model cannot solve the problem that investment tribunals are reluctant to order primary remedies, the existence of mandatory prior domestic litigation would to some extent deter host states from viewing investment arbitration as a pricing mechanism. All in all, a combination of primary and secondary remedies with the former as a priority is not only consistent with domestic administrative law and international law practice but also arguably carries more potential in promoting state compliance with investment treaty norms.[644]

At the same time, the complement model recognizes that, in some certain cases, domestic courts may fail to effectively monitor the behavior of other state apparatus and/or the applicable law in domestic proceedings may not live up to investment treaty standards. In such circumstances, investment arbitration would step in as a fallback since foreign investors keep the right to bring their claims to international tribunals under the complement model. Through the international arbitral proceedings, investment tribunals would largely base their decision-making on the interpretation and application of investment treaty norms.[645] If a violation of investment treaty obligations is found, investment tribunals will at least send a disapproving signal to the respondent states by ordering financial compensation. Thus, compared to domestic courts as the exclusive forum for dispute resolution, the complement model is more promising in promoting norm compliance when national judiciaries fail to work effectively. Furthermore, the introduction of an extra layer of international proceedings

[640] See 5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks.
[641] *Ibid*.
[642] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[643] Van Aaken, *supra* note 243, at 749.
[644] *Ibid*, at 725-733.
[645] Ole Spiermann, "IV. Investment Arbitration: Applicable Law", in Marc Bungenberg, etc., ed., "International Investment Law: A Handbook", Hart and Nomos (2015), p. 1390 (arguing that regardless of "whether there is a specific treaty provision, it is necessary to apply international law to treaty claims").

expands the scope of state apparatus that is under review given that judicial behavior is equally subject to the jurisdiction of investment tribunals.[646] As a result, in the complement model, the compliance of the judicial branch with investment treaty norms is also brought to the table while that could not happen if investment arbitration is eliminated altogether. Last but not least, as Puig and Shaffer argue, the complement model triggers interaction between national and international adjudicatory bodies, which can "facilitate greater congruence between international and national norms."[647] Keeping domestic norms consistent with investment treaty norms undoubtedly constitutes a critical component of the endeavor of contracting states to comply with international investment law. In sum, as compared to the other two options, the complement model is more likely to generate positive impact on state compliance with the good governance standards prescribed in IIAs.

5.5.3 A Utility Player in Facilitating the Objectives of the Investment Treaty Regime

The reader may recall that from the analysis in Sections 5.3.3 and 5.4.3, domestic courts and investment arbitration have respective advantages and disadvantages in facilitating the achievement of the objectives of the overarching investment treaty regime.[648] For instance, while the use of investment arbitration may to a large extent depoliticize investment disputes, it may surprisingly inhibit the development of the domestic rule of law by marginalizing the domestic courts of host states.[649] However, the complement model, by creating a mix of litigation via domestic courts and investment arbitration, seems to be able to keep many of their advantages and avoid many of their disadvantages in facilitating the realization of the goals of investment agreements.

First of all, compared to the design option where investment arbitration acts as a substitute for domestic courts, the complement model is more likely to facilitate the domestic rule of law in the sense that national judiciaries are fully involved in the overall dispute resolution process. Considering that domestic courts would retain the primary competence over investment disputes that arise out of their home jurisdiction under the complement model, the judicial branch of host states, particularly that of developing states, is likely to benefit from the accumulating experience of adjudicating investment disputes that are often rather complicated and demanding. As Fox argues, the handling of investment disputes is actually a learning opportunity for national judges in the sense that they are confronted with high-stakes disputes that usually involve both private and public interests and pertain to both domestic and international law.[650] In the adjudicative process of investment disputes, judges would have "the opportunity to grapple with and learn from a dynamic array of local and international law."[651] If investment arbitration acts as a substitute for domestic courts, judges will be deprived of the chance to develop their expertise and competence or at least have less chance to do so by losing business to investment tribunals. Suppose that domestic courts in

[646] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[647] Puig and Shaffer, *supra* note 178, at 406.
[648] See 5.3.3 The Attainment of Objectives: Chances and Challenges and 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture.
[649] See 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture.
[650] Fox, *supra* note 100, at 256.
[651] *Ibid*.

some countries are incompetent in adjudicating such complicated cases as investment disputes, seeking an international alternative to these courts would be likely to perpetuate their poor quality. That is why some developing countries assert that the establishment of the exhaustion of local remedies rule in international investment law can strengthen their domestic courts.[652] Moreover, by involving domestic courts in the investor-state dispute resolution process, these courts are likely to produce positive externalities that benefit the society at large via decision-making.[653] Throughout the process, they would have the opportunity to create a coherent jurisprudence that is based on precedents in the relevant legal areas and to increase the clarity of a variety of domestic rules and standards.[654] For instance, the clarification of legal standards such as "the regulatory approval procedures for licenses and permits and the rules governing the vesting of development or resource extraction rights" would obviously contribute to the domestic rule of law by making these standards more specific and precise.[655] Furthermore, on the assumption that foreign investors are a critical driving force for the institutional reforms in developing countries,[656] the complement model is likely to provide host states with more incentive to invest in domestic legal and judicial reforms.[657] For one thing, by requiring mandatory prior domestic litigation, foreign investors would be more incentivized to press for improved legal and judicial institutions in host states as they could not readily bypass the domestic regime.[658] For another thing, host states would also have a stronger incentive to invest in domestic institutional reforms considering that the introduction of the local remedies rule would make it more difficult for them to "attract international investment without having to put in place effective domestic government and judicial procedures."[659] The refined incentive structure of host states brought by the complement model precisely constitutes the underlying rationale for Chen's argument that the reinstatement of the exhaustion requirement would accelerate the institutional reforms within host states.[660] Additionally, to the extent that the complement model can better promote state compliance with the good governance standards prescribed in IIAs,[661] there is an extra reason to believe that this model can contribute more to the domestic rule of law. In the meantime, while the complement model prioritizes the role of domestic courts in adjudicating investment disputes, it maintains an international accountability mechanism in place as an external source of control.[662] It is precisely the existence of this international control mechanism, which is supposed to check state apparatus, including domestic courts, that makes the complement model a much better choice than the design option where domestic courts become the exclusive forum for dispute resolution. If investment arbitration can generate benefits to domestic governance reforms in the way arbitrators tend to

[652] UNCITRAL, *supra* note 596, at 3.
[653] Landes and Posner, *supra* note 195, at 241.
[654] *Ibid*.
[655] Porterfield, *supra* note 288, at 5-6.
[656] Randall Peerenboom, "China's Long March toward Rule of Law", Cambridge University Press (2002), p. 1 (arguing that foreign investors "keep up a steady drum calling for" the realization of the rule of law in China).
[657] Aisbett, et al., *supra* note 134, at 120. Chen, *supra* note 291, at 587.
[658] OECD, *supra* note 61, at 12.
[659] *Ibid*.
[660] Chen, *supra* note 291, at 585-587.
[661] See 5.5.2 The Complement Model May Promote Norm Compliance Better.
[662] Puig and Shaffer, *supra* note 178, at 406.

believe,[663] these benefits will be kept under the complement model. Last but not least, there are more reasons to believe that the complement model could do better in promoting the domestic rule of law. One is that a combination of litigation via domestic courts and investment arbitration will increase interaction between national and international adjudicative bodies, which is then likely to bring national norms in line with investment treaty norms.[664] In the same vein, if a combination of litigation and investment arbitration is institutionalized, a more frequent dialogue will probably happen between domestic courts and investment tribunals. Thus, it can be expected that domestic courts will be more likely to cite investment arbitral jurisprudence in their judgments for the purposes of disciplining host state behavior, including judicial behavior, and further developing a national legal framework.[665]

When it comes to the promotion and preservation of FDI flows, the complement model tends to combine the advantages of domestic litigation and investment arbitration in this regard and avoid their disadvantages to a large degree. As mentioned above, compared to investment arbitration acting as a substitute for domestic courts, the complement model is more likely to boost the development of the legal and judicial institutions within host states. According to Chen, while the existence of investment agreements *per se* appears to have minimal effects on FDI flows, the quality of a host state's domestic institutions is likely to make a more significant difference on this score.[666] Likewise, the dominant view in recent economic studies is that "countries with good governance can attract more FDI, whereas an environment of weak governance cannot protect investments."[667] It follows that the complement model holds more potential in attracting more inward FDI into developing host states in the long run by providing support for the much desired institutional reforms in these countries. Meanwhile, by privileging the recourse to litigation via domestic courts, the complement model is more likely to preserve investor-state relationship and maintain FDI stocks after dispute resolution by emphasizing the application of primary remedies, encouraging amicable dispute settlement between disputing parties, and avoiding confrontation between the foreign investor and the entire host state.[668] If the relationship between the foreign investor and the host state is not ruined by investor-state dispute resolution, it will be a win-win solution in the sense that the continuing presence of the foreign investor in the host state is likely to create more benefits for both sides. In addition, if an extra layer of procedural rights – the private right of action at the international level – can in any sense lift the confidence of foreign investors in investing in a given economy,[669] the assumed potential of investment arbitration in promoting FDI flows will apparently be retained under the complement model.

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[663] See 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture..
[664] *Ibid*, at 406.
[665] Wayne Sandholtz, "How Domestic Courts Use International Law", Fordham International Law Journal, Vol. 38, No. 2 (2015), p. 613 (arguing that domestic courts can "recognize international court decisions as relevant guides for specifying the content and meaning of international legal norms").
[666] Chen, *supra* note 291, at 549.
[667] Mihaela Peres, et al., "The Impact of Institutional Quality on Foreign Direct Investment Inflows: Evidence for Developed and Developing Countries", Economic Research, Vol. 31, No. 1 (2018), p. 628.
[668] See 5.3.3 The Attainment of Objectives: Chances and Challenges.
[669] See 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture.

With respect to the depoliticization of investment disputes, the complement model can also be expected to have a no-less-good performance in comparison to investment arbitration as a substitute for domestic courts. We can recall that from the analysis in Section 5.3.3, designating domestic courts as the exclusive forum for dispute resolution is likely to augment the risk of politicizing investment disputes.[670] This is due to the fact that, in case domestic proceedings fail to provide for expected neutral and unbiased decision-making, (powerful) foreign investors would have limited options other than seeking the intervention of their home states into the dispute resolution process. Politicization of investment disputes not only requires more devotion of resources from both the host state and the home state but also poses higher risks for the harmony and peace of the international community. Kriebaum sent a warning, by reference to historical experience, that "Even after the use of force as a means to enforce public international law had been prohibited, disputes about foreign investments had at times the potential to turn into military conflicts."[671] On the contrary, enabling foreign investors to file their own claims at the international level without the espousal from their home states has been widely regarded as an effective tool to depoliticize investment disputes.[672] Depoliticization not only benefits foreign investors themselves but also saves both home states and host states from fierce diplomatic rows and harmful inter-state antagonism.[673] There is a rich literature that demonstrates the depoliticizing effects of investment arbitration in reality. For instance, Maurer found that, not least due to the availability of access to investment arbitration for US investors, the US government had far less involvement in investment disputes over the last two decades before 2013.[674] Brazil, which has not been integrated into the investment arbitration system, allegedly resorted on a rather frequent basis to foreign policy tools, such as diplomatic intervention, to protect the interests of their investing nationals in neighboring Latin American countries.[675] Likewise, Kriebaum argues that "it is possible to say that the number of inter-State conflicts in the context of investment disputes has decreased substantially since the introduction of investment arbitration."[676] However, to present a more balanced picture, it should be noted that a counterargument has been raised in the investment law scholarship. Gertz and others found that, by conducting an analysis of US diplomatic actions in 219 investment disputes and leaked US diplomatic cables, the availability of investment arbitration has no impact on the likelihood of the US government intervening in developing countries on behalf of the interests of their investing nationals.[677] But they argue that the investment treaty regime in general and investment arbitration in particular, probably helps to make the style of US diplomatic intervention less aggressive and coercive.[678] Their research neither outright dismisses the depoliticizing effects of investment arbitration nor universally applies to the

[670] See 5.3.3 The Attainment of Objectives: Chances and Challenges.
[671] Kriebaum, *supra* note 310, at 16.
[672] See 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture.
[673] *Ibid*.
[674] Noel Maurer, "The Empire Trap: The Rise and Fall of US Intervention to Protect American Property Overseas, 1893-2013", Princeton University Press (2013), pp. 428-433.
[675] *Ibid*, at 447-449.
[676] Kriebaum, *supra* note 310, at 26.
[677] Gertz, et al., *supra* note 310, at 239.
[678] *Ibid*, at 248.

experience of other countries.[679] Until further empirical research is done to sufficiently prove the contrary, there are reasons to believe that the case of the US, as a superpower that is known for coercive diplomacy,[680] cannot represent the broader landscape and that investment arbitration can bring benefits ensuing from the depoliticization of investment disputes. All in all, by retaining foreign investors' access to investment arbitration, the complement model holds encouraging potential to depoliticize investment disputes.

On top of the points mentioned, the complement model is also likely to quell the concerns over the negative impact of investment arbitration on the sustainable development of host states by increasing the interaction between national and international adjudicatory bodies. As discussed above, there are mainly four reasons cited by commentators to account for the alleged tension between investment arbitration and sustainable development: (1) the phenomenon of regulatory chill; (2) inconsistent arbitral jurisprudence; (3) the lack of third-party participation; and (4) the separation of sustainable development law from the investment treaty regime.[681] Apparently, bringing back local remedies will not be a panacea for all these problems that supposedly raise the tension. For example, a reasonable solution for the inconsistency across the decisions of investment tribunals appears to be an international mechanism, such as an appeals procedure, that effectively coordinates the decision-making at the international level; it does not seem to be much related to the adjudicative process before domestic courts. However, previous discussions reveal that the complement model will increase the interaction between domestic courts and investment tribunals and that domestic proceedings are bound to improve arbitral decision-making by providing arbitrators with valuable information, especially those related to domestic law issues.[682] On the assumption that domestic courts are more inclined to take sustainable development-related matters into consideration by adjudicating investment disputes against the whole domestic legal system,[683] it can be expected that sustainable development concerns will be better addressed by investment tribunals if prior and mandatory domestic litigation is put in place as the first line of resort. For one thing, the analysis of sustainable development-related issues by domestic courts is likely to inform the deliberations of investment tribunals, encouraging arbitrators to pay more regard to these issues in the decision-making process and in the drafting of arbitral awards. This is rather encouraging considering that the benefits of third-party participation, such as the knowledge and expertise of specialized environmental NGOs, are more assured in the proceedings before domestic courts.[684] For another thing, the domestic legal system that mirrors the elaborate, complex, and refined balance between sustainable development and property rights protection may arguably be integrated into the investment treaty regime given that a dialogue between domestic courts and investment tribunals is promoted by the complement model.[685] With the knowledge that it is more certain

[679] *Ibid*, at 248 (referring to some anecdotal evidence to show that the US experience is probably not a single case).
[680] Robert Jervis, "Getting to Yes with Iran: The Challenges of Coercive Diplomacy", Foreign Affairs, Vol. 92, No. 1 (2013), pp. 106-108.
[681] See 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture.
[682] See 5.4.1 Fair and Efficient Dispute Resolution: Perceptions versus Reality.
[683] Hindelang, *supra* note 116, at 61.
[684] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[685] Hindelang, *supra* note 116, at 61.

for investment tribunals to earnestly consider sustainable development-related matters, host governments are less likely to refrain from optimal regulation of environmental protection and other critical issues because of regulatory chill. In sum, compared to investment arbitration as a substitute for domestic courts, the complement model may to a large extent avoid the plausible negative impact of investment arbitration on the achievement of sustainable development goals in host states.

5.5.4 A Major Step towards a More Legitimate Investment Treaty Regime

While investment arbitration in no way represents the entirety of international investment law, the preceding analysis reveals that the current design of investor-state dispute resolution largely accounts for the legitimacy-related attacks against the overarching treaty regime.[686] If the legitimacy of the investment treaty regime continues to be encumbered by investor-state dispute resolution, that regime is bound to gradually lose what Thomas Franck sees as a property that "exerts a pull toward compliance on" national states.[687] The complement model, by incorporating the local remedies rule into the overall investor-state dispute resolution process, makes up for the legitimacy gap left by the over-use of investment arbitration. Thus, the complement model should be considered and implemented as a major step towards a more legitimate investment treaty regime that benefits not only foreign investors but also host states and beyond. However, it should be clarified in advance that the complement model cannot magically conjure away all the legitimacy-related controversies surrounding investment arbitration. Even if that task is in any sense possible, it would require radical reforms of the structural arrangements of investment arbitration *per se* not only the cushioning effect generated by the co-operation of domestic courts. Having said that, what the introduction of the local remedies rule can do is toning down the prevailing legitimacy-related criticisms against investment arbitration. For instance, although mandatory and prior domestic litigation would not change the fact that investment arbitration as it stands mirrors the structure of commercial arbitration, the involvement of domestic courts is likely to reduce the number of investment disputes that would be later referred to investment tribunals.[688] It also underlies that the overall process of investor-state dispute resolution, due to the presence of domestic litigation proceedings, is in a much more appropriate position to adjudicate investment disputes which usually indicate significant public interest in comparison to investment arbitration functioning alone. To take another example, although investment tribunals would probably continue to award financial compensation as the form of redress overwhelmingly, the involvement of domestic courts indicates that there would be more instances where primary remedies would be granted.[689] It thus generates more confidence that, in the long term, state compliance with investment treaty norms will be improved and the investment climate of developing countries will be upgraded.[690] That increased

[686] See 5.4.4 Investment Arbitration as A Dubious Legitimacy Booster.
[687] Franck, *supra* note 318, at 24.
[688] See 5.5.1 The Complement Model Can Facilitate Fair and Efficient Dispute resolution.
[689] See 5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks and 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[690] See *5.4.4 Investment Arbitration as A Dubious Legitimacy Booster* for how an overwhelming reliance on financial compensation may have negative impact on the public's confidence of the ability of the investment treaty regime to improve the investment climate in developing countries.

confidence would apparently contribute to the overall legitimacy of the investment treaty regime.

Additionally, there are more specific reasons supporting the argument that the complement model would advance the legitimacy of the overarching treaty regime. First of all, by introducing the local remedies rule, the financial and sovereignty costs incurred by host states as a result of investor-state dispute resolution would be largely cut down. We recall from the analysis in Section 5.4.4, that the number of investment disputes is all but certain to continue to rise as a result of mixed factors.[691] It also has to be noted that, for host governments, investment arbitration is usually a much more costly dispute resolution option than litigation in their own domestic courts.[692] If investment arbitration continues to act as a substitute for domestic courts, a rather certain outcome is that host states have to set aside an incredible amount of financial resources for preparing for investment arbitral proceedings. Considering that investment tribunals almost always award financial compensation instead of primary remedies, host states equally have to be prepared for paying an enormous amount of damages to foreign investors. For this reason, Wittich argues that the tendency towards excessive awards is likely to "undermine the political legitimacy of investment arbitration and that may also be responsible for an increasingly dismissive attitude against investor-State arbitration."[693] At the same time, a combination of more instances of investment disputes and direct access to investment arbitration is a recipe for much higher sovereignty costs as domestic courts would be more frequently bypassed. In the face of these significant financial and sovereignty costs, more national states are likely to exit the investment treaty regime after a meticulous cost-benefit analysis.[694] Under the complement model, however, prior domestic proceedings would act like a sieve, which holds great promise in decreasing the demand for investment arbitration. Conceivably, foreign investors will not pursue investment arbitration in at least the following scenarios: (1) the disputing parties achieved amicable resolution of their disputes; (2) domestic courts resolved investment disputes in favor of foreign investors; and (3) the reasonable analysis dissuaded foreign investors and their lawyers from pursuing investment arbitration in the case that host states won. This "sieve effect" echoes the view of Romano that, without the exhaustion of the local remedies rule, "international judicial bodies would be flooded by hundreds of thousands of cases, leading to the collapse of the system."[695] Although the collapse of the investment treaty regime in the near future sounds rather dramatic, heavier blows to the regime in the form of reduced membership does not. Hence the complement model would significantly decrease the burdens imposed on host states by the investment treaty regime and thus contribute to the long-term stability and legitimacy of modern international investment law. After all, as Bernasconi-Osterwalder cogently argues, the requirement of the exhaustion of local remedies "could be a way to create and bring back some confidence to the BIT system."[696]

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[691] *Ibid.*
[692] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before..
[693] Stephan Wittich, "V. Investment Arbitration: Remedies", in Marc Bungenberg, et al., eds., "International Investment Law: A Handbook", Hart and Nomos (2015), p. 1430.
[694] See 5.4.4 Investment Arbitration as A Dubious Legitimacy Booster.
[695] Romano, *supra* note 580, at 569.
[696] Bernasconi-Osterwalder, *supra* note 590, at 70.

Second, compared to investment arbitration as a substitute for domestic courts, the complement model is less likely to raise concerns of reverse discrimination and unequal competition. The analysis in Section 5.4.4 reveals that there are concerns that access to investment arbitration is likely to bring about reverse discrimination in the sense that only foreign investors are granted the procedural privilege.[697] Likewise, given that investment arbitral proceedings are remarkably costly, investment arbitration to some extent exclusively serves the interests of multinational companies and wealthy individuals.[698] As a result of granting a privilege to some firms but not to the others, market competition is likely to be distorted and efficiency decreased.[699] Probably more importantly, a procedural privilege for a specific group of stakeholders is arguably contrary to the general public's expectation of "justice for all." In addition, as mentioned in the preceding analysis more than once, non-disputing parties often cannot express their reasonable concerns in investment arbitral proceedings, further casting doubt on whether investment arbitration is a just dispute resolution mechanism.[700] Under the complement model, investment arbitration continues to exist, indicating that the privilege serving the interests of wealthy foreign investors is not discarded. However, by introducing mandatory and prior domestic litigation, the perceived inequality between domestic and foreign investors and SMEs and MNCs is moderated since none of them can easily bypass domestic courts whatsoever. In the meantime, the complement model would at least provide domestic courts as a more certain forum for non-disputing parties to set out their concerns and claims. To sum up, by making investor-state dispute resolution more consistent with the public's perception of justice, the complement model contributes to the overall legitimacy of the investment treaty regime.

Third, the complement model is conducive to enhancing the legitimacy of the investment treaty regime by bringing its key procedural mechanism in line with the widely accepted practice in international law – the subsidiary role of international remedies. As argued by Kalderimis, "international law remedies should in principle be available only as a last resort, because the gravity and exceptional character of international responsibility is best respected by limiting claims to those 'really worthy of consideration'."[701] Indeed, the subsidiary role of international courts/tribunals has taken hold in a number of branches of public international law.[702] For instance, in the domain of international criminal law, the preamble and Article 1 of the Rome Statute of the International Criminal Court expressly provides that the International Criminal Court (the ICC) is "complementary to national criminal jurisdictions".[703] The complementary relationship means that "the ICC does not have primary jurisdiction over national authorities, but plays a subsidiary role and supplements the domestic investigation and prosecution of the most serious crimes of international

[697] See 5.4.4 Investment Arbitration as A Dubious Legitimacy Booster.
[698] *Ibid.*
[699] *Ibid.*
[700] *Ibid.*
[701] Kalderimis, *supra* note 590, at 8.
[702] Tzanakopoulos, *supra* note 158, at 152 (arguing that "international law acknowledges the international judicial function of domestic courts as dispute-settlers and law-enforcers, and reserves a mere subsidiary monitoring function for the international instance").
[703] The Rome Statute of the International Criminal Court, Preamble and Article 1.

concern."[704] In the same vein, in many other fields of international law, such as international human rights law, the primary role of national courts and the subsidiary role of their international counterparts have been gradually established.[705] While a breakthrough of orthodox international law practice is not a sin in itself, the real problem is that the property rights of foreign investors are not so normatively superior to other significant interests and values, such as the international fight against impunity and human rights protection, that foreign investors deserve an exceptional treatment in the international legal system. Obviously, by establishing the primary role of domestic courts and domestic remedies in investor-state dispute resolution and aligning international investment law with other branches of international law, the complement model generates more benefits towards the investment treaty regime with respect to its long-term stability and legitimacy.

Last but not least, compared to designating domestic courts as the exclusive forum for dispute resolution, the complement model takes into account the private interests of foreign investors by keeping investment arbitration in position as a fallback. Evidently, what foreign investors expect from the investment treaty regime is not only the substantive commitments on paper but also more assured enforceability of these treaty-based protections.[706] By meeting the expectation of an important group of stakeholders – foreign investors, the complement model further contributes to the legitimacy of the underlying treaty regime.[707]

5.5.5 Summary

The complement model of investor-state dispute resolution denotes that domestic courts would have primary jurisdiction over investment disputes while international mechanism(s) would play a subsidiary role. It is clear that the complement model is not established under the current design of investor-state dispute resolution, although there are some limited earlier BITs that stipulate such provisions as the exhaustion of local remedies rule and the prior domestic litigation rule. By creating a mix of litigation via domestic courts and investment arbitration, the complement model seems to keep many of their advantages in advancing the goals of investor-state dispute resolution while avoiding many of their disadvantages in this regard. The complement model first and foremost strikes a balance between the fact that many national judiciaries have progressed since the 1960s and the domestic courts of developed countries have been increasingly at stake and the undeniable truth that domestic courts may fail to deliver neutral and unbiased decision-making in some cases. By making litigation in domestic courts mandatory as a default rule, the complement model gives full play to the potential of domestic courts in facilitating efficient dispute resolution. It is especially worthy of note that national judges are likely to provide valuable information for investment tribunals, especially those related to domestic law issues for which international arbitrators often lack expertise. Moreover, combining domestic proceedings with investment arbitral proceedings to some extent equates to combining primary and secondary remedies.

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[704] Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", in A. von Bogdandy and R. Wolfrum eds., "Max Planck Yearbook of United Nations Law Volume 7", Brill (2003), p. 592.
[705] Tzanakopoulos, *supra* note 158, at 153.
[706] See 5.4.4 Investment Arbitration as A Dubious Legitimacy Booster.
[707] Ryan, *supra* note 289, at 745.

The emphasis on the application of primary remedies by domestic courts increases the probability that the record of state compliance with investment treaty norms will be improved. Furthermore, the complement model also holds more promise in facilitating the objectives of the investment treaty regime than the other two design options in terms of promoting the domestic rule of law, attracting and preserving FDI flows, depoliticizing investment disputes, and achieving sustainable development goals. Lastly, the long-term stability and legitimacy of the overarching treaty regime is likely to benefit significantly from the complement model thanks to the sequential combination of domestic and international proceedings.

5.6 Concluding Remarks

From the perspective of the involvement of domestic courts, there are basically three design options facing national states in the reform of investor-state dispute resolution: (1) designating domestic courts as the exclusive forum for dispute resolution (a marginal but growing approach); (2) maintaining investment arbitration as a substitute for domestic courts (an approach that is dominant in the current investment treaty regime); and (3) establishing investment arbitration as a complement to domestic courts (the complement model). Before delving into the pros and cons of these three design options and making any policy recommendations to the international community, it is necessary to establish a reasonable analytical framework for the effectiveness analysis of these options. While previous international law literature seems to provide rather limited guidance in this regard, a goal-based approach, by reference to social science literature, is suitable for analyzing the effectiveness of international courts and tribunals in particular and international adjudication in general. The innovative approach provides for a fitting analytical framework for the purpose of assessing the effectiveness of the three design options mentioned. As an initial step of using a goal-based approach to conduct comparative institutional analysis, four goals of investor-state dispute resolution in the eyes of mandate providers, national states, are established: (1) fair and efficient dispute resolution; (2) promoting state compliance with investment treaty norms; (3) facilitating the achievement of the objectives of the investment treaty regime; and (4) strengthening the legitimacy of the overarching treaty regime. Through a comparative institutional analysis using the goal-based approach, it is evident that both designating domestic courts as the exclusive forum for dispute resolution and investment arbitration as a substitute for domestic courts have great potential as well as major deficiencies in advancing the goals of investor-state dispute resolution. Although the complement model is neither a perfect alternative nor a panacea, it appears to combine many of the advantages of litigation and arbitration in advancing the goals of investor-state dispute resolution and avoid many of their disadvantages. There is preliminary evidence to argue that the complement model is the best among the three design options mentioned. However, the complementary role of investment arbitration and a mix of litigation and arbitration has been an abstract idea without specific structural proposals. How can a smart mix of litigation via domestic courts and investment arbitration be created? Actually, that would involve a series of institutional arrangements which aims to achieve a delicate balance between competing

concerns, such as the efficiency of dispute resolution and the practical value of prior domestic litigation.

Chapter 6 Judicial Review of Investment Awards by Domestic Courts *Loci Arbitri*

6.1 Introduction

While Chapter 4 identifies that the adjudicative role of domestic courts vis-à-vis investment disputes has increased in the recent treaty-making practice of some major economies, this chapter focuses its attention on the supervisory role of domestic courts – judicial scrutiny of investment awards rendered out of non-ICSID arbitration.[1] We can recall that from the efforts in Chapter 3 to uncover the multiple roles of domestic courts in investor-state dispute resolution and their legal foundations, domestic courts at the seat of arbitration may be called upon to review investment awards issued by arbitral tribunals.[2] Although arbitral awards have been subject to some degree of judicial scrutiny since arbitration emerged as an alternative to litigation,[3] the judicial review mechanism has not evolved without debates and doubts with regard, among others, to its desirability and the scope of review.[4] On this score, Professor Christie made it clear that, over the centuries, the law of arbitration has swayed on the issue of the extent to which domestic courts should intervene in the process of arbitration, leading to distinct or even contrary policy choices in the arbitration legislation across different times and jurisdictions. At the end of the spectrum lie the two extremes of legislative inclination, i.e., the constant intervention and the non-intervention approaches, representing fundamentally conflicting attitudes and stances towards the relevance of domestic courts in relation to the arbitral process.[5] Although ICSID arbitration awards are not subject to court review, judicial scrutiny of arbitral awards has not been entirely removed from investment arbitration. To be more precise, non-ICSID arbitration is the confined context in which domestic courts *loci arbitri* wield the power to review arbitral awards issued by investment tribunals at the request of disputing parties or *ex officio*.

Over time, academic discussions of the judicial review mechanism have flourished and a host of scientific publications have sprung up. Indeed, the judicial review of commercial arbitral awards, as a recurrent topic of debate, has mustered a substantial amount of scholarly attention.[6] However, the mechanism of the judicial review of investment awards has arguably

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[1] It should be noted that investment awards in this context also include preliminary decisions or interim awards affirming the jurisdiction of investment tribunals over the underlying investment disputes. While decisions upholding the jurisdiction of investment tribunals cannot be submitted to *ad hoc* annulment committees before those decisions become a part of the final award in the context of ICSID arbitration, disputing parties to non-ICSID arbitration are generally allowed to submit such decisions to domestic courts *loci arbitri* for judicial review. Barbara H. Steindl, "ICSID Annulment vs. Set Aside by State Courts – Compared to ICSID ad hoc Annulment Committees, Is It the State Courts That Are Now More Hesitant to Set Aside Awards?", Yearbook on International Arbitration, Vol. 4 (2015), p. 198.

[2] See 3.3.3 Authorization by Arbitration Rules.

[3] Albert Jan van den Berg, "Should the Setting Aside of the Arbitral Award be Abolished?", ICSID Review, Vol. 29, No. 2 (2014), p. 265.

[4] Hossein Abedian, "Judicial Review for Arbitral Awards in International Arbitration: A Case for An Efficient System of Judicial Review", Journal of International Arbitration, Vol. 28, No. 2(2011), p. 590 (arguing that judicial scrutiny of arbitral awards by domestic courts at the seat of arbitration other than enforcement courts is controversial, leading to various views and practices in different states).

[5] R H Christie, "Arbitration: Party Autonomy or Curial Intervention: The Historical Background", South African Law Journal, Vol. 111, No. 1 (1994), p. 144.

[6] There are a large body of publications that have been produced with regard to the judicial review of commercial arbitration awards. Scholars and practitioners have discussed this issue from different perspectives. For example, some seem to be intrigued by the rules in this area of a specific jurisdiction, while others prefer to

not met with the same level of academic interest, not least due to the fact that investment arbitration is not comparable to its commercial counterpart in terms of the number of cases.[7] With that said, the setting-aside proceedings of investment awards in the wake of the underlying arbitral proceedings, as a critical form of post-award remedy, are not negligible. In the case that the claim of the moving party is backed by the review court, the investment award at issue will in all likelihood be fully or partially vacated. Given that the number of investment arbitration cases, including non-ICSID arbitration cases, continue to increase at a rather rapid pace,[8] the relevance of the judicial review mechanism in investor-state dispute resolution would presumably grow in proportion. Meanwhile, the ongoing charged debates about investment arbitration prompt us to embrace the mechanism of the judicial review of investment awards. After all, the understanding and evaluation of the judicial review mechanism would feed into the overall efforts to put investment arbitration in perspective and to mull over the related reform proposals. For instance, with regard to the establishment of an appellate review mechanism, whether such a proposal is reasonable and desirable to a large extent hinges on the trade-offs of the judicial scrutiny of investment awards. If the judicial review mechanism works well, the introduction of appellate review sounds less attractive.

In order to fill the gap in the literature on this topic and to contribute to the overarching debates of the reform of investment arbitration, this chapter delves into the institutional design and the practical operation of the judicial review of investment awards by virtue of text analysis, empirical evidence, and case law analysis. That, in turn, lays the groundwork for a normative assessment of the judicial review mechanism in the context of investment arbitration which sheds light on the path forward for the reconstruction of the post-award remedy. The rest of this chapter first looks at the origin of the judicial review of investment awards, uncovering the rationale behind the mechanism in which disputing parties are permitted to challenge those awards before domestic courts at the seat of arbitration (Section 6.2). The next section details the scope of review in the setting-aside proceedings against investment awards. In doing so, the arbitration legislation of different jurisdictions is categorized on the basis of the scope of review, and the review grounds laid out in the Model Law are dissected by referring to the analysis of domestic courts in such proceedings (Section

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demonstrate the advantages/disadvantages of the judicial review of commercial arbitration awards. But in general, the scope of review and the standards of review are the most dominant themes of these publications. Jessica L. Gelander, "Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations", Marquette Law Review, Vol. 80, No. 2 (1997), pp. 625-644. Kenneth R. Davis, "When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards", Buffalo Law Review, Vol. 45, No. 1 (1997), pp. 49-140. Stephen P. Younger, "Agreements to Expand the Scope of Judicial Review of Arbitration Awards", Albany Law Review, Vol. 63, No.1 (1999), pp. 241-262. Stephen K. Huber, "State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts", Cardozo Journal of Conflict Resolution, Vol. 10, No. 2 (2009), pp. 509-578.

[7] There are nevertheless an increasing number of articles that have shed some light on a range of important issues involved in the setting-aside proceedings of investment awards. Jack J. Coe, "Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA", Journal of International Arbitration, Vol. 19, No. 3 (2002), pp. 185-207. Noah Rubins, "Judicial Review of Investment Arbitration Awards", in Todd Weiler, ed., "NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects", Brill – Nijhoff (2004), pp. 359-390. Lars Markert and Helene Bubrowski, "National Setting Aside Proceedings in Investment Arbitration", in Marc Bungenberg et al., eds, "International Investment Law", Nomos (2015), pp. 1460-1481.

[8] See 2.2 The Accruing FDI Stocks and the Resulting Demand for Dispute Resolution.

6.3). That detailed analysis is followed by an overview of investment arbitration cases the awards/decisions which have been subject to judicial review by domestic courts at the seat of arbitration (Section 6.4). In addition, an in-depth study of several high-profile setting-aside proceedings is conducted to capture more nuances of the judicial review mechanism, particularly the occasionally divergent opinions on the same point of contention between lower courts and higher courts within a specific jurisdiction (Section 6.5). The preceding sections combine to provide a foundation for a normative assessment of the judicial review of investment awards, which highlights the flaws of that mechanism despite the recognition of its contributions without an arrangement of appellate review within the investment arbitration system (Section 6.6). This chapter concludes with some thoughts on the reform of the post-award remedy in relation to investment arbitration, such as the implications of the findings in this chapter for the proposal to establish a centralized appellate review mechanism (Section 6.7).

6.2 The Genesis of the Judicial Review of Investment Awards

A judicial review of arbitral awards, as the appellation itself suggests, is a mechanism in which domestic courts are invited to scrutinize the decisions made by arbitral tribunals, implying that court supervision could contribute to the dispute resolution process. Given that arbitration and litigation via courts are commonly understood as alternative dispute resolution methods, the conception of domestic courts reviewing the work of arbitral tribunals is likely to bring about confusion. Notwithstanding the swelling voice that arbitration is entangled in a process of "judicialization",[9] the distinguishing characteristics of arbitration present disputing parties with an opportunity to avoid the hassles of court litigation.[10] Thus, the choice of arbitration over court litigation to some extent signals the reluctance of disputing parties to engage domestic courts in the overall dispute resolution process. In addition, those parties enter into an agreement to arbitrate often in the hope that the legally binding decisions rendered out of the arbitral process would bring the underlying disputes between them to a stop and provide timely redress for their grievances.[11] The judicial review mechanism, however, enables the losing party to initiate a challenge against an arbitral award before domestic courts at the seat of arbitration, and these are often located in a jurisdiction that does not have a close connection to the underlying dispute. By doing so, the finality of arbitral awards is brought into question and the battlefield of the bitter fight between disputing parties is extended from arbitral bodies to judicial organs. Having said that, the judicial mechanism does not come from nowhere. Instead, the introduction of the judicial scrutiny of arbitral awards is deeply rooted in some policy considerations, such as the pursuit of fairness and the avoidance of procedural deviation. Therefore, an understanding of the genesis of the judicial

[9] Thomas J. Stipanowich, "Arbitration: The 'New Litigation'", University of Illinois Law Review, Vol. 2010, No. 1 (2010), p. 9 (arguing that "the arbitration experience has become increasingly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant).
[10] Michael Faure and Wanli Ma, "Investor-State Arbitration: Economic and Empirical Perspectives", Michigan Journal of International Law, Vol. 41, No. 1 (2020), pp. 4-7 (detailing the incentives for disputing parties to choose arbitration over court litigation).
[11] Steven C. Bennet, "Non-binding Arbitration: An Introduction", Dispute Resolution Journal, Vol. 61, No. 2 (2006), pp. 22-27 (arguing that in addition to binding arbitration, disputing parties may also resort to non-binding arbitration or be ordered to do so).

review of arbitral awards is a precondition for a comprehensive and objective assessment of the application of this mechanism in the context of investment arbitration.

6.2.1 The Call for Delocalization in Arbitration

Despite the boom of mediation and other competing dispute resolution alternatives, arbitration has become a dominant method for commercial dispute settlement in the sense that provisions for the binding arbitration of disputes are found in virtually all kinds of contracts.[12] Amidst an era of economic globalizations where business transactions are often conducted across borders, arbitration seems to be irreplaceable if business disputes cannot be resolved amicably. In effect, in comparison to court litigation and other alternatives, arbitration is allegedly a preferred method of the business community for resolving international disputes.[13] The popularity and recognition of arbitration can equally be evidenced by both the enormous and ever increasing amount of arbitral caseload and the continuous establishment of new arbitral institutions around the world.[14] In a large number of jurisdictions, arbitration has not only been admitted but also supported and a rather harmonious form of interaction between arbitral tribunals and domestic courts has been nurtured in general.[15] However, the constructive symbiosis between those two adjudicatory bodies has not always been the case in the sense that national judiciaries in many countries used to treat arbitration as a threat to their authority in dispute resolution.[16]

In the United States, the judicial attitude towards arbitration has allegedly varied in the past two centuries with the pendulum swinging between rejection and encouragement.[17] In the 19th century, the US took an encouraging attitude towards the employment of arbitration, not least due to the fact that the number of arbitral proceedings at that time was very limited.[18] When it came to the first half of the 20th century, the country switched to a hostile view against arbitration.[19] The more recent practice, however, is that a more supportive and favorable attitude towards arbitration has again taken hold in the US.[20] In England, the

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[12] Stipanowich, *supra* note 9, at 1.
[13] School of International Arbitration, Queen Mary University of London, "2013 International Arbitration Survey: Corporate Choices in International Arbitration: Industry Perspectives", https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf (last visited on May 20, 2022), p. 6.
[14] Quentin Loh, "The Limits of Arbitration", McGill Journal of Dispute Resolution, Vol. 1, No. 1 (2014), p. 67.
[15] Mauro Rubino-Sammartano, "International Arbitration: Law and Practice", Second Edition, Kluwer Law International (2001), p.1 (arguing that a large majority of legal systems have embraced the concept of arbitration, which, however, takes varied forms in different countries). Kenneth M. Curtin, "An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards", Ohio State Journal on Dispute Resolution, Vol. 15, No. 2 (2000), p. 338 (arguing that the enactment of legislation that favorably recognizes agreements of both domestic and international arbitration, and the corresponding arbitral awards attests to the determination of states to allow or even encourage the use of arbitration).
[16] Roy Goode, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration", Arbitration International, Vol. 17, No. 1(2001), p. 20 (arguing that hostility towards arbitration was a widespread phenomenon that existed in many jurisdictions). Susan Randall, "Judicial Attitudes toward Arbitration and the Resurgence of Unconscionability", Buffalo Law Review, Vol. 52, No. 1 (2004), p. 185 (arguing that "The common law traditionally rejected arbitration as a deprivation of the jurisdiction of the courts and therefore contrary to public policy").
[17] Rubino-Sammartano, *supra* note 15, at 5.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

treatment of arbitration has gone through the evolutionary trajectory of complete repulsion at the beginning to gradual acceptance afterwards.[21] The English courts had for centuries kept a watchful eye on the spreading use of arbitration because they feared that arbitration, as a form of private adjudication, would encroach upon their own jurisdiction.[22] The opposition from domestic courts against arbitration inevitably confronted the increasing willingness of the commercial community to adopt arbitration as a dispute resolution method. Under the pressure applied by the civil society, arbitration was later greeted with wary acceptance, but the closest scrutiny from the courts was maintained.[23] It was not until the 1980s that English courts started to come to terms with the fact that judicial intervention could only happen in exceptional circumstances, both in the arbitral process and in the judicial review of arbitral awards.[24]

But those who promote the idea of complete liberation of international arbitration, particularly some leading French scholars, appear not to be satisfied by a somewhat looser form of control by municipal laws and domestic courts, because they consistently advocate "anational", "stateless", "delocalized", "detached" or "floating" arbitration.[25] Over time, a distinct school of thought emerged in the domain of international arbitration with proponents thereof converging in their common belief in what is known as the "delocalization" theory.[26] That ground-breaking theory in international arbitration was initially developed during the 1960s and subsequently triggered impassioned debates about the delocalization of arbitration in the past five decades.[27] Those in favor of the delocalization theory deem the interference from the national legal system of the forum state into international arbitration, such as the application of the municipal procedural law and the supervision of the courts *loci arbitri* of the arbitral process, undue and undesirable.[28] In the same vein, international arbitration

[21] Goode, *supra* note 16, at 19-20.
[22] *Ibid*, at 20.
[23] *Ibid.*
[24] *Ibid*.
[25] *Ibid*, at 21.
[26] Another closely related but not identical concept in relation to delocalization is "denationalization". Denationalization envisages a circumstance where no national legal system should have any bearing on in the course of arbitral process or the remaining issues related to arbitration. In other words, arbitration should proceed exclusively pursuant to generally accepted international or transnational rules. But sometimes denationalization and delocalization are used interchangeably in the discourses on international arbitration as some scholars are not liable to distinguish the two concepts, wittingly or unwittingly. Loukas Mistelis, "Delocalization and Its Relevance in Post-award Review", in Frederic Bachand and Fabien Gelinas eds., "The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration", JurisNet (2013), pp. 167-168. Julian D.M. Lew QC, "Achieving the Dream: Autonomous Arbitration", Arbitration International, Vol. 22, No. 2(2006), p. 179 (arguing that "The ideal and expectation is for international arbitration to be established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration agreements and awards should be recognized and given effect, with little or no complication or review, by national courts").
[27] Loukas Mistelis, *supra* note 26, at 167. Renata Brazil-David, "Harmonization and Delocalization of International Commercial Arbitration", Journal of International Arbitration, Vol. 28, No. 5(2011), p. 454.
[28] Pippa Read, "Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium", American Review of International Arbitration, Vol. 10, No. 2 (1999), p. 185 (arguing that "Delocalization of an award entails removing (or limiting) the power of local courts to make a globally effective declaration of the award's nullity"). Alexander J. Bélohlávek, "Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as An Outdated Myth", ASA Bulletin, Vol. 31, No. 2

should be freed from the constraints of the procedural law of the forum state, leading to a result that it would "float" free of national jurisdiction.[29] The main argument of the proponents of the delocalization theory is that parties to arbitration often choose the place of arbitration for reasons of convenience and this choice does not necessarily indicate the parties' preference for the local rules of arbitration of that particular place.[30] While delocalization has been firmly rejected by traditionalists at the early stage, this theory has gained considerable support of many commentators over time.[31] However, in practice, most national laws do not recognize delocalized arbitration, which means the national legal system of the place of arbitration continues to play an important role in international arbitration.[32] That the judicial review of arbitral awards as a form of post-award remedy remains a common practice is an illustrative example.

6.2.2 Choice of a Middle Ground: A Trade-off between Finality and Fairness

Despite the popularity of the delocalization theory among some of leading academics and arbitration practitioners, the arbitration legislation of most jurisdictions permits the losing party to challenge awards rendered out of arbitration proceedings seated therein before their judiciaries. That is to say, the delocalization theory has not been widely accepted by the broader legal community and a certain level of judicial scrutiny over arbitration is deemed necessary by domestic policy-makers. In his seminal work *Why Courts Review Arbitral Awards*, Park argues that the establishment and maintenance of the judicial review mechanism is a trade-off between the principles of finality and fairness.[33] Accordingly, the divergent opinions on whether domestic courts at the seat of arbitration should address challenges against arbitral awards to a great extent reflect the intrinsic tensions between the rival goals of finality and fairness in arbitration.[34] While freeing arbitration from the judicial control of *situs* courts promotes finality, some measure of court supervision with respect to arbitral awards promises to enhance fairness.[35]

The dilemma is presented by the fact that both finality and fairness are key to the success of arbitration.[36] Without finality, arbitration would become a mere prelude to court litigation and parties to arbitration would be sucked into a lengthy and costly dispute resolution process.[37]

(2013), pp. 268-269 (arguing that the delocalization of international arbitration indicates that the judicial control of the arbitral process at the place of arbitration would be eliminated).

[29] Read, *supra* note 28, at 177.

[30] Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why It Matters", International and Comparative Law Quarterly, Vol. 32, No. 1 (1983), p. 55 (arguing that "the *situs* is chosen for its geographic appropriateness given the context of a particular case, with the respective domiciles of the parties being of central importance").

[31] Brazil-David, *supra* note 27, at 454.

[32] *Ibid*, at 466.

[33] William W. Park, "Why Courts Review Arbitral Awards", in Karl-Heinz Böckstiegel, et al., eds., "Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel", Carl Heymanns Verlag (2001), p. 596.

[34] *Ibid*.

[35] *Ibid*.

[36] *Ibid*.

[37] Alan Redfern and Martin Hunter, "Law and Practice of International Commercial Arbitration", 2nd edn., Sweet and Maxwell (1991), p. 435 (arguing that "If a court is allowed to review this decision on the merits, then the speed and, above all, the finality of the arbitral process is lost").

Without fairness, the raison d'être of arbitration would be questioned by the legal community and commercial actors would not see arbitration as a reliable dispute resolution method.[38] In recognition of the value of both finality and fairness, achieving a satisfying balance between these two competing goals in arbitration is an onerous task and probably "no system will perfectly reconcile these rival goals of finality and fairness."[39] The considerable difficulty involved in the balancing process can be showcased by the fact that even parties to arbitration can have conflicting thoughts on their preference for these two goals at different stages of the arbitral proceeding. To be more precise, parties presumably aspire to seek both finality and fairness before the end of the arbitral proceeding though, and the winner of the arbitration would insist on the finality of the award while the loser would likely not miss out on any opportunity to challenge the unfavorable award on any grounds that they deem promising.[40]

The balancing between finality and fairness in arbitration is not only a theoretical bone of contention but also a far-reaching policy choice for countries to make in their arbitration law. For instance, the experience of Belgium has shown that going to the extreme by choosing finality while ignoring fairness in arbitration is most likely a bad policy choice. The amendment to its arbitration statute in 1985 introduced by Belgium provided that the losing party would not be able to challenge before the Belgian courts an arbitral award made in international arbitral proceedings sited in that country without any Belgian connection.[41] However, this experiment failed in the sense that the new system raised nothing but a wave of apprehension, indicating that the business community desires a certain level of judicial scrutiny at the place of arbitration.[42] In 1998, Belgium reversed this decision as a response to the apparent failure, by reintroducing a safety net of judicial review in its arbitration statute as the default rule.[43]

Despite the evident challenges, policy-makers have gone to great length to strive for a delicate balance between finality and fairness in arbitration. To preserve the finality of arbitration, appeal rights that are characteristic of court litigation are not granted to the losing party in arbitration.[44] In other words, it has been established in many jurisdictions that parties to arbitration, having selected arbitration instead of litigation to resolve their disputes, cannot easily escape the burden and finality of unfavorable arbitral awards.[45] Indeed, the principle of finality is alleged to be the functional cornerstone of arbitration in that it ensures that arbitration has developed as a private, flexible, and self-contained system that appeals to disputing parties eager to break free of court litigation.[46] Finality is also widely acclaimed as

[38] Park, *supra* note 33, at 596.
[39] *Ibid*.
[40] *Ibid*. Abedian, *supra* note 4, at 591.
[41] Theodore C. Theofrastous, "International Commercial Arbitration in Europe: Subsidiarity and Supremacy in light of the De-localization Debate", Case Western Reserve Journal of International Law, Vol. 31, No. 2 (1999), p. 476.
[42] Park, *supra* note 33, at 599-600.
[43] *Ibid*, at 600.
[44] E.D.D. Tavender, "Considerations of Fairness in the Context of International Commercial Arbitration", Alberta Law Review, Vol. 36, No. 3(1996), p. 527.
[45] *Ibid*.
[46] Amy J. Schmitz, "Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis", Georgia Law Review, Vol. 37, No. 1 (2002), p. 133.

a distinguishing feature of arbitration that makes arbitration a preferable choice of dispute resolution for commercial actors in comparison to court litigation.[47] At the same time, policy-makers deeply realize that completely freeing arbitration from the control of *situs* courts would be likely to pare down the business community's confidence in arbitrating their disputes since gross unfairness that could arise out of the arbitral process would not be redressed. As a result, while the arbitration legislation of most jurisdictions denies the losing party's right to challenge an arbitral award on the grounds of errors of fact or misapplication of law, the judicial review of arbitration awards by domestic courts *loci arbitri* on a narrow scope of grounds is in general available as a form of post-award remedy.[48] While to what extent finality and fairness is well-balanced through the judicial review mechanism is hard to tell, this mechanism stands for a middle ground that is meant to avoid what are perceived to be the unpalatable consequences of extreme policy choices.

6.2.3 Why Parties Resort to Judicial Review for Post-Award Remedy?

The observation made by Park and Abedian reveals that losers of arbitral proceedings are, though not surprisingly at all, prone to call for fairness that was allegedly not (sufficiently) achieved in the procedure and to request domestic courts to intervene in the name of justice.[49] The reason that lies at the core of this choice by the losing party might be summarized as the money-driven enthusiasm to have a second bite at the cherry in the hope that their attempt to invalidate the adverse arbitral award would strike the right note with the judges from the domestic courts at the seat of arbitration. In effect, considering the high stakes that usually go hand in hand with cross-border transactions, the resolution of disputes arising out of the underlying transactions would be likely to have profound implications for the business of parties to international arbitration. The enormous economic interests often implicated in the dispute resolution process are arguably more evident in the context of investment arbitration, as an empirical study on that score found that the mean amount of damages awarded to the successful investors in cases since 2013 onwards is US$1.08 billion.[50]

In practice, national arbitration legislation and arbitration rules often provide for multiple choices of post-award remedies that can be availed by parties to arbitration, such as rectification, supplementation, revision, and interpretation with regard to arbitral awards.[51] However, these arguably moderate remedies, not least due to the mere fact that all the applications thereof are directed towards the tribunal itself, seemingly cannot serve the ambitious goal of the losing party to get rid of the adverse consequences of the arbitral award. Therefore, the judicial review by domestic courts *loci arbitri* manifests itself as the one, and arguably the only, appealing and realistic approach for the losing party in non-ICSID

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[47] Di Jiang-Schuerger, "Perfect Arbitration = Arbitration + Litigation?", Harvard Negotiation Law Review, Vol. 4 (1999), pp. 231 & 252. Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?", Journal of International Arbitration, Vol. 30, No. 5 (2013), p. 531.
[48] Park, *supra* note 33, at 597. Platt, supra note 47, at 532.
[49] Park, *supra* note 33, at 596. Abedian, *supra* note 4, at 591.
[50] Matthew Hodgson and Alastair Campbell, "Damages and Costs in Investment Treaty Arbitration Revisited", Global Arbitration Review Online News, http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf (last visited on May 20, 2022), p. 5.
[51] Sundra Rajoo, "Annulment of Investment Arbitration Awards", in Barton Legum eds, "The Investment Treaty Arbitration Review", Second Edition, Law Business Research Ltd. (2017), p. 211.

arbitration to address its discontent with the arbitral award. If the moving party of the setting-aside proceeding manages to obtain a favorable judgment, the arbitral award at issue would most likely be deprived of its legally binding force, at least within the confines of the place of arbitration.[52]

Although the mercenary attitude of commercial actors might be the root cause, there are also other considerations that serve to prompt the losing party, very probably after consultations with its legal counsels, to go after judicial review. The first reason might be that once the losing party is contemplating non-compliance with the terms of an award, judicial review may rid the losing party of the putative heavy burden of defending itself repetitively at the enforcement stage in some circumstances. Owing to the sweeping applicability of the New York Convention in a vast array of jurisdictions, an effective legal instrument is in place to facilitate the recognition and enforcement of arbitral awards for the good of the international business community.[53] Thus, even if the losing party succeeds in defending its own case in an enforcement proceeding launched by the winning party, it will not absolve the losing party's duty to honor the award since the winning party is very likely to litigate again in another jurisdiction. On the contrary, the annulment decision made by the domestic courts *loci arbitri* in most circumstances will be respected by the courts of other jurisdictions where the enforcement is sought, meaning the winning party often cannot rely on the original award anymore.[54] While the enforcement court does not necessarily defer to the *situs* court's decision to vacate the arbitral award, a favorable judgement made by the *situs* court will increase the chance for the losing party to resist the winning party's enforcement efforts around the world.

The presumptive waiver implication of not challenging an award, via a judicial review by the domestic courts at the seat of arbitration, can be another explanation. Although it is not a universal practice, there are cases in which the enforcement court held the opinion that some defenses cannot be raised at the enforcement stage unless the party has referred to that defense in the previous annulment proceeding before domestic courts *loci arbitri*. In other words, should a losing party fail to challenge an award by invoking certain defenses in the setting-aside proceeding, the party cannot reasonably base its argument on those defenses to resist its obligation to enforce the award in an enforcement proceeding.[55] The judgment delivered by the Singapore High Court in *Astro Nusantara International BV v PT Ayunda Prima Mitra* is an illustrative example in this regard. In this judgment, the court dismissed the claim of PT First Media to challenge the award on jurisdictional issues, holding that its failure to challenge the preliminary decision on jurisdiction through the setting-aside proceeding within the prescribed time limit necessarily deprived it of the right to resist the

[52] Juan Fernández-Armesto, "Different Systems for the Annulment of Investment Awards", ICSID Review, Vol. 26, No. 1 (2011), p. 142 (arguing that "Once annulled, the award ceases to exist for all legal purposes, but the underlying dispute remains unsettled, there being no *res judicata* with regard to the merits of an annulled award").
[53] Linda Silbersman, "The New York Convention After Fifty Years: Some Reflections on the Role of National Law", Georgia Journal of International and Comparative Law, Vol. 38, No. 1(2009), p. 26.
[54] Johan Billiet, et al., "International Investment Arbitration: A Practical Handbook", Maklu-Publishers (2016), p. 314.
[55] *Ibid*, at 309-311.

enforcement of the award on this ground.[56] Therefore, it is understandable that a losing party will make use of the judicial review mechanism as a necessary and significant step to resist the award rather than risk the deprivation of its right to raise certain defenses at the enforcement stage.

Another relevant consideration might be that doing nothing on the part of the losing party would cede the upper hand to the winning party. The latter can then on its own seek the recognition and enforcement of the award and have the possible challenges against the award adjudicated at a forum that is highly unfavorable to the losing party.[57] For instance, the arbitration legislation of that specific forum may be known for a much better record of the recognition and enforcement of arbitral awards than that of other forums.[58] In addition, the grounds provided by the national arbitration legislation of the jurisdiction where the arbitration is seated that a losing party can rely on to challenge the award can be more favorable than those enshrined in the New York Convention for the purpose of resisting enforcement.[59]

6.2.4 Transposing Judicial Review from Commercial Arbitration to Investment Arbitration

Compared to commercial arbitration, investment arbitration is a relatively novel phenomenon in the domain of international dispute resolution.[60] There are a number of notable divergences between commercial and investment arbitration. One of these differences would be that while commercial arbitration is founded on an agreement to arbitrate between private parties, investment arbitration is in many cases initiated on the basis of investment agreements.[61] Despite all the aspects that distinguish investment arbitration from commercial arbitration, these two types of arbitration share a multiplicity of procedural similarities between them.[62] Wilske and others argue that, on balance, the similarities between commercial and investment

[56] PT First Media understandably appealed the judgment of the Singapore High Court to the Singapore Court of Appeal (SCA). The SCA considered in detail the purposes of the Model Law and the legislative background of the Singapore International Arbitration Act. The court then found in favor of PT First Media, holding that waiving the opportunity of filing a jurisdictional challenge at the setting-aside proceeding should not preclude the party from doing so at the enforcement stage. Dylan Mckimmie and Meriel Steadman, "Singapore Court of Appeal: New Ruling on Active and Passive Remedies for Challenging Jurisdiction", Norton Rose Fulbright, International Arbitration Report, No.2 (2014), http://www.nortonrosefulbright.com/files/singapore-court-of-appeal-115920.pdf (last visited on May 20, 2022), pp. 26-28.
[57] Billiet, et al., *supra* note 54, at 313.
[58] *Ibid*.
[59] *Ibid*, at 314.
[60] The first known treaty-based investment arbitration case was launched by a British investor against Sri Lanka under the Sri Lanka-UK BIT 1987 over the alleged damage to its investment by a military operation by the country's security forces. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/ 87/3. Jonathan Bonnitcha et al., "The Political Economy of the Investment Treaty Regime", Oxford University Press (2017), p. 1 (arguing that the investment treaty regime and investment arbitration went virtually unnoticed until a few years ago).
[61] Anthea Roberts, "Divergence between Investment and Commercial Arbitration", Proceedings of the Annual Meeting (ASIL), Vol. 106 (2012), p. 298.
[62] Gary G. Born, "A New Generation of International Adjudication", Duke Law Journal, Vol. 61, No. 4 (2012), p. 834 (arguing that virtually all investment arbitrations are conducted pursuant to procedures that parallel international commercial arbitration procedures).

arbitration prevail over their divergences.[63] Indeed, the judicial review mechanism which provides parties to non-ICSID arbitration with an opportunity to challenge arbitral awards attests to the statement that commercial arbitration and investment arbitration are "close relatives."[64] In other words, the applicability of judicial review of investment awards by domestic courts *loci arbitri* demonstrates that the procedures of investment arbitration, especially non-ICSID arbitration, are largely modelled on those of commercial arbitration.[65]

The ICSID Convention and the associated ICSID Arbitration Rules are known for the establishment of a self-contained system for ICSID arbitration by creating a specific set of arbitration rules covering issues that range from request for arbitration to the recognition and enforcement of arbitral awards.[66] The ICSID system is also characterized by a unique annulment procedure where an ad hoc annulment committee established by the ICSID Secretariat is charged with the task of reviewing awards arising out of ICSID arbitration proceedings.[67] The ICSID annulment procedure is notably not meant to operate as an appeals system.[68] Although the recent practice of the annulment procedure has attracted waves of criticisms,[69] domestic courts *loci arbitri* are prevented from scrutinizing ICSID awards.[70] However, the awards rendered outside the ICISD arbitration regime, including those out of arbitration proceedings based on the ICSID Additional Facility Rules, cannot benefit from the exclusive annulment procedure for ICSID arbitration. At the same time, although IIAs often offer investors a few options of arbitration rules that they can choose from to launch an arbitration,[71] no treaties have created a tailor-made annulment procedure for awards rendered out of non-ICSID arbitration proceedings. [72]

As a consequence, the mechanism of the judicial review of non-ICSID awards is governed by the legal framework of the forum state, as some believe that this is the result of the application of the general principle of international law that "*locus regit processum* (procedure is governed by the *lex fori*)".[73] Foy argues that the decision of the seat of

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[63] Stephan Wilske, et al., "International Investment Treaty Arbitration and International Commercial Arbitration – Conceptual Difference or Only A 'Status Thing'?", Contemporary Asia Arbitration Journal, Vol. 1, No. 2(2008), p. 228.
[64] *Ibid*.
[65] Born, *supra* note 62, at 835.
[66] Rajoo, *supra* note 51, at 212. Piero Bernardini, "ICSID versus Non-ICSID Investment Treaty Arbitration", http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf (last visited on May 20, 2022), p. 5 (arguing that the ICSID arbitration as a self-contained regulation "covers all aspects of the arbitral proceedings and extends to the challenge of the awards, the latter being regulated only by the Convention, without any interference by national courts or other national authorities, no room for the application of the New York Convention being made regarding enforcement of an ICSID award").
[67] Dohyun Kim, "The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-based System", New York University Law Review, Vol. 86, No. 1 (2011), p. 250.
[68] *Ibid*.
[69] Kateryna Bondar, "Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review", Journal of International Arbitration, Vol. 32, No. 6 (2015), pp. 621-622.
[70] Kim, *supra* note 67, at 250.
[71] For instance, Article 1120 (Submission of a Claim to Arbitration) of NAFTA stipulates that satisfying certain conditions, an investor may submit the claim to arbitration under the ICSID Convention, the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules. Article 1120, Chapter Eleven: Investment, the NAFTA.
[72] Fernández-Armesto, *supra* note 52, at 131-132.
[73] *Ibid*, at 132-133. Rajoo, *supra* note 51, at 213.

arbitration, which is a jurisdictional conception and thus not necessarily where the hearings are conducted, is of great importance in that it will inform the legal system that governs the arbitral proceedings and identify the court that supervises the arbitral process, and, in due course, will review the arbitral award.[74] In the absence of a specialized annulment procedure for non-ICSID awards at the international level,[75] the pursuit of the *vacatur* of a non-ICSID award is governed by the rules applicable to the annulment of awards out of international commercial arbitration proceedings.[76] In other words, the legal norms applicable to the judicial review of commercial arbitration awards equally apply to the setting-aside proceedings in relation to investment awards before domestic courts *loci arbitri*.[77] Thus, the overlapping regime, that simultaneously regulates the challenges against commercial arbitration and investment arbitration awards, provides a strong argument that these two types of arbitration are "two sides of the same coin."[78]

6.3 The Scope of Judicial Review of Investment Awards

Since the authority to exercise control over non-ICSID awards is granted to domestic courts *loci arbitri*, a set of predetermined benchmarks should be put in place to allow the courts to decide whether the award should be vacated. In other words, the scope of judicial review or the grounds for the annulment of awards should be specified in national arbitration legislation, so that the relevant courts can navigate the rather complex legal challenge brought in front of them with the help of some measure of precision of norms. The scope of judicial review stands out as a matter of great significance in modern arbitration law, because it not only serves to curtail the arbitrariness that might emerge during the exercise of judicial scrutiny but also delineates the extent of the courts' discretion in reviewing investment awards.[79] That said, the grounds for *vacatur* are also closely related to the balance of power between the arbitral authority and the domestic courts at the seat of arbitration in an arbitrated case. The more expansive the grounds are, the higher is the degree in which domestic courts could intervene in arbitration is. More expansive grounds also indicate an increased likelihood that the arbitral authority's dominance over the outcome of the underlying dispute would be circumscribed. On the contrary, the limitations imposed on the grounds for the setting aside of arbitral awards would enhance the control of the arbitral authority over the outcome of an arbitrated case. Thus, any study of the judicial review mechanism in the

[74] Patrick G. Foy, "An Introduction to Judicial Review of International Arbitration Awards", Singapore International Arbitration Academy (Nov. 26 – Dec. 14, 2012, Singapore), https://cil.nus.edu.sg/wp-content/uploads/2012/11/PatrickFoy-An_Introduction_To_Judicial_Review_Of_International_Arbitration_Awards-for-5-DECEMBER.pdf (last visited on May 20, 2022), p. 35.
[75] Fernández-Armesto, *supra* note 52, at 132.
[76] J. Christopher Thomas and Harpreet K. Dhillon, "The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards", ICSID Review, Vol. 32, No. 3 (2017), p. 493 (arguing that "States have adopted different substantive and procedural rules for the review of arbitral awards and generally have not distinguished between the review of regular international commercial arbitration awards and those rendered by investment treaty tribunals").
[77] Fernández-Armesto, *supra* note 52, at 132. Rajoo, *supra* note 51, at 213.
[78] Roberts, *supra* note 61, at 298.
[79] Amokura Kawgaru, "Exercising Discretion under Article 34 and 36 of the Model Law: A Review of Practice", in Frederic Bachand and Fabien Celinas eds, "The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration", Jurisnet (2013), p. 109.

context of investment arbitration cannot bypass the step of figuring out the grounds for the *vacatur* of investment awards, on which domestic courts *loci arbitri* base their judgments in the setting-aside proceedings. This section intends to identify the existence of different modalities of judicial review in terms of the grounds for setting-aside, and to elaborate on those grounds that might lead up to the *vacatur* of an investment award by referring to the relevant provisions in the Model Law.[80] To avoid any perplexity that might arise due to the adoption of the Model Law as an analytical object, it should be stressed again that the judicial review of investment awards is conducted in the same vein as that of commercial arbitration awards. The grounds set forth initially for the annulment of commercial arbitration awards extend to the setting aside of investment awards in a way that no major differences are identified.[81] The Model Law, due to its nature of a recommended template for national arbitration legislation, certainly cannot cover all the variations that might exist in various jurisdictions with respect to the judicial review of arbitral awards. But it at least provides some common grounds for setting aside an arbitration award that are adopted or incorporated in a multiplicity of national arbitration acts. The approach of selecting Article 34 of the Model Law for the purpose of examining the common grounds for the *vacatur* of investment awards, including among those jurisdictions that frequently host non-ICSID arbitration, is also adopted in other research expounding on the judicial review of investment awards.[82]

6.3.1 The Modalities of the Judicial Review of Investment Awards

Despite a certain measure of uniformity of the provisions relating to the judicial review of arbitral awards across different jurisdictions, not least due to the introduction of the Model Law,[83] sovereign states are entitled to frame the legal structure of judicial review in a way that they deem appropriate. Based respectively on the grounds for the judicial review of arbitral awards and the possibility to eliminate/waive judicial review, there are a few modalities that can be identified among the arbitral regimes set up around the world. The arguable consensus within the arbitration community and upheld by most arbitral regimes is that the judicial control of domestic courts *loci arbitri* over arbitral awards should be restricted insofar as the merits of arbitral decision-making are immune from review, distinguishing the judicial review mechanism from the appeal system that is common to national judiciaries.[84] However, the categorization of arbitral regimes in relation to the

[80] Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) specifies the grounds for setting aside an arbitral award during the stage of the judicial review by domestic courts *loci arbitri*. The norms enshrined in the Model Law are quoted here, perhaps as the best option for the purpose of illustration, because a considerable number of jurisdictions have adopted the provisions of the Model Law *verbatim*, with respect to the judicial review of arbitral awards, while most non-Model Law jurisdictions that frequently host international arbitrations have adopted arbitration legislation in line with the relevant provisions in the Model Law on this front. Abedian, *supra* note 4, at 559. Kaj Hober and Nils Eliasson, "Review of Investment Treaty Awards by Municipal Courts", in Katia Yannaca-Small ed, "Arbitration Under International Investment Agreements: A Guide to the Key Issues", Oxford University Press (2010), p.639.
[81] Thomas and Dhillon, *supra* note 76, at 493.
[82] Markert and Bubrowski, *supra* note 7, at 1460-1481. Fernández-Armesto, *supra* note 52, at 128-146. Rubins, *supra* note 7, at 359-390.
[83] Abedian, *supra* note 4, at 559 (arguing that the degree of uniformity that was created by the relevant norms in the Model Law cannot be underestimated). Hober and Eliasson, *supra* note 80, at 639.
[84] Mistelis, *supra* note 26, at 180. Foy, *supra* note 74, at 110. This opinion advocating "merit-excluded judicial review" was also identified in the 1966 Report from the Secretary-General of the United Nations on

judicial review of arbitral awards might reflect that the consensus might not be necessarily true as the nuances of the judicial review mechanism in some jurisdictions may endow domestic courts *loci arbitri*, at least to some extent, with the power to revisit the merits of an arbitral award.[85]

6.3.1.1 Categorization on the basis of Review Grounds

A majority of jurisdictions covered in this research are found, through the enactment of their national arbitration legislation (either for arbitration in its entirety or specifically for international arbitration), to confine the scope of the judicial review of arbitral awards to significant procedural defects arising out of the arbitral process and severe violations of public policy of the forum state. However, there are also identified outliers where domestic courts could carry out a more intrusive judicial review of arbitral awards by reverting to the merits of an arbitral award.

6.3.1.1.1 Standard Pattern of Review Grounds

The grounds for the *vacatur* of arbitral awards provided for in Article 34 of the Model Law are defined here as the "standard version" of the grounds for judicial review. The "standardized impact" of the Model Law reaches many parts of the world, contributing to the increased unification of modern arbitration law across jurisdictions, including the grounds for the setting aside of arbitral awards.[86] In addition, there are also many jurisdictions that have imported the review grounds enumerated by Article 34 word by word into their own national arbitration legislation.[87] This model of the judicial review mechanism based on the Model Law often allows the losing party in arbitration to challenge unfavorable arbitral awards by reason of excess of authority, procedural irregularities and breaches of public policy.[88] Article 34(2) of the Model Law sets out the following grounds for parties to arbitration and arbitrators to refer to in the setting-aside proceedings: (i) incapacity of a party to the arbitration agreement or invalidity of an arbitration agreement under the applicable law; (ii) inability for a party to present his case; (iii) excess of authority by the arbitral tribunal; (iv) irregularities in relation to the composition of the arbitral tribunal; (v) non-arbitrability of the

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international commercial arbitration. The report mentioned that: "On the other hand, no control by the courts seems necessary or desirable over the merits of the arbitral award. Persons engaged in international trade often prefer to settle their disputes by arbitration rather than by judicial proceedings owing primarily to the greater speed of the arbitration process. This advantage is wiped out where the losing party is allowed to appeal to the courts against the merits of an arbitral award or where the courts are entitled to review the award *ex-officio*. In such cases the intervention of the courts, in addition to delaying the settlement of a dispute, impedes arbitration by depriving the arbitrators, whose judgment was trusted by the parties, of the power to render a final and binding award." "Steps to be Taken for Promoting the Harmonisation and Unification of the Law of International Commercial Arbitration: Report of the Secretary-General of the United Nations, 1966", reproduced in Chia-Jui Cheng edited, "Basic Documents on International Trade Law", Second revised edition, Kluwer Academic Publishers, 1990, p. 761.

[85] Abedian, *supra* note 4, at 557-558.

[86] Christopher R. Drahozal, "Diversity and Uniformity in International Arbitration Law", Emory International Law Review, Vol. 31, No. 3 (2017), p. 398 (arguing that many commentators believe that the Model Law has been highly successful in unifying the standards of arbitral procedure across the world).

[87] Abedian, *supra* note 4, at 559.

[88] Park, *supra* note 33, at 597.

subject matter; and (vi) breaches of public policy.[89] The investigation of the arbitral regimes of several selected jurisdictions reveal that some legal jurisdictions integrate the grounds for the *vacatur* of arbitral awards laid out in the Model Law into their national arbitration acts *verbatim*; such jurisidctions include Canada,[90] Russia,[91] and Germany[92].

6.3.1.1.2 Slightly Modified Pattern of Review Grounds

There are several identified jurisdictions that opt for self-drafted grounds for the setting-aside of arbitral awards, which might slightly narrow, expand or change the review grounds laid out in the Model Law, in the hope of having their own specific policy considerations integrated, especially those arbitration-related policies.[93] However, these tailor-made grounds to a great extent cling to the standard pattern pioneered by the Model Law, avoiding significant deviation from the substance of Article 34(2). Notably, these jurisdictions stick to the principle of excluding the merits of an arbitral award from the scope of court review, which is one of the pillars of the judicial review mechanism envisioned by the Model Law. The jurisdictions that fall within the parameters of this pattern can be further divided into three smaller groups. These jurisdictions have mildly modified the grounds for the setting-aside of arbitral awards stated in Article 34(2) of the Model Law by narrowing down, expanding or simply adjusting the scope of judicial review in their own arbitration legislation.

(a) narrowly restricted

France, Switzerland, and Denmark are among the countries whose arbitration laws, in one way or another, reduce the grounds for the *vacatur* of arbitral awards accepted by the Model Law. Ever since the arbitration reforms took place in France at the beginning of the 1980s, the arbitral regime of that country has been widely known for its arbitration friendliness. The latest round of the arbitration reform in France, embodied in *Decree N. 2011-48 portant reforme de l'arbitrage* of 13 January 2011, allegedly has exalted the pro-arbitration stance of the country to a new level.[94] One of the reasons could be that the 2011 decree makes it unambiguous that once an arbitral award is rendered out of international arbitration

[89] Article 34, the Model Law. See *infra 6.3.2 The Common Grounds for the Judicial Review of Investment Awards* for a detailed analysis of the review grounds spelt out by Article 34 of the Model Law.
[90] Pierre Bienvenu and Martin Valasek, "Arbitration Guide: Canada", International Bar Association, IBA Arbitration Committee, Feb., 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=5A3BA1C8-73A9-4EBD-A160-69D43D25A8FA (last visited on May 20, 2022), pp. 20-21 (noting that "An arbitral award that is rendered in Canada may be challenged on the grounds set out in Article 34 of the Model Law (which has been implemented across Canada)").
[91] Ilya Nikiforov, "Arbitration Guide: Russia", International Bar Association, IBA Arbitration Committee, Jan., 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=31C1EA3C-2164-427C-B144-5A0B87E8F27D (last visited on May 20, 2022), p. 20 (noting that Russian arbitration laws and procedural orders adopt the review grounds set out by the Model Law, applying to the judicial review of both domestic awards and international awards).
[92] Richard Kreindler, et al., "Arbitration Guide: Germany", International Bar Association, IBA Arbitration Committee, Feb., 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=72111D60-6585-412C-B239-189ABF22108F (last visited on May 20, 2022), p. 19 (noting that the catalogue of grounds for setting aside an arbitral award contained in German Arbitration Act matches those drafted in Article 34(2) of the Model Law).
[93] Park, *supra* note 33, at 597. Abedian, *supra* note 4, at 559-560.
[94] Guido Carducci, "The Arbitration Reform in France: Domestic and International Arbitration Law", Arbitration International, Vol. 28, No. 1(2012), p. 157.

proceedings seated in France, an action to set it aside becomes the only possible way to invalidate the arbitral outcome.[95] Article 1520 of the Civil Code of Procedure (CCP) of France provides for an exhaustive list of the grounds for the setting-aside of an award arising out of international arbitration proceedings.[96] The scope of the judicial review of an international arbitral award in France is confined to: (i) the arbitral tribunal wrongly upheld or declined jurisdiction; (ii) the arbitral tribunal was not properly constituted; (iii) the arbitral tribunal ruled without complying with the mandate conferred upon it; (iv) due process was violated; or (v) recognition or enforcement of the award is contrary to international public policy.[97]

Switzerland, like France, is also known for its status as a prestigious hub for international arbitration,[98] which, in any case, by far outnumbers Swiss domestic arbitration.[99] Thus, unsurprisingly, judicial scrutiny over international arbitral awards rendered in Switzerland, as the seat of arbitration, is circumscribed so as to favor international arbitration by preserving the finality of arbitral outcomes. While international arbitral awards, whether final, partial, or interim, are subject to potential judicial review, Article 190(2) in Swiss Federal Statute on Private International Law expressly spells out the limited grounds that may be relied upon to annul such an award. The article provides that an international arbitral award may only be annulled if (i) the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted; or (ii) the arbitral tribunal wrongly accepted or declined jurisdiction; or (iii) the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim; or (iv) the principle of equal treatment of the parties or the right of the parties to be heard was violated; or (v) if the award is incompatible with public policy.[100]

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[95] Kenneth Weissberg and Sabra Ghayour, "Recourses against Arbitral Awards in ICC Arbitration Held in Paris: Review of Novelties of the French Laws of Procedure after 2011", https://www.weissbergavocats.com/en/2015/03/23/recourses-against-arbitral-awards-in-icc-arbitration-held-in-paris-review-of-novelties-of-the-french-laws-of-procedure-after-2011/ (last visited on May 20, 2022) (arguing that though the law of 1981 also offers the possibility of setting aside an award, other options, such as an appeal, are not explicitly excluded from the picture).

[96] The French Code of Civil Procedure differentiates domestic arbitration and international arbitration, applying different set of rules to the two forms of arbitration respectively. Article 1504 defines international arbitration in a way that "an arbitration is international when international trade interests are at stake." Article 1504, Code of Civil Procedure, as enacted by *Decree N. 2011-48 portant reforme de l'arbitrage* of 13 January 2011, http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf (last visited July 17, 2020).

[97] Article 1520, Code of Civil Procedure, as enacted by *Decree N. 2011-48 portant reforme de l'arbitrage* of 13 January 2011. *Ibid.*

[98] Matthias Scherer, "Arbitration Guide: Switzerland", International Bar Association, IBA Arbitration Committee, Jan., 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=8DA26206-5B7E-49A5-A69F-4BEF37D6408A (last visited on May 20, 2022), p. 1 (arguing that many factors have contributed to the feat achieved by Switzerland in the domain of international arbitration, such as extraordinary neutrality, a secure and predictable legal framework, full access to seasoned arbitrators (Swiss and foreign), and a developed infrastructure).

[99] *Ibid* (arguing that while Swiss parties rarely resort to domestic arbitration to resolve disputes, litigation remains their preferred option as compared to arbitration).

[100] Article 190(2), Swiss Federal Statute on Private International Law, https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf (last visited on May 20, 2022).

The Danish Arbitration Act in its Section 37 almost includes all the identical grounds provided by Article 34(2) of the Model Law for the judicial review of an arbitral award, except that improper composition of the arbitral tribunal, i.e. the fourth ground mentioned in Article 34(2), is somehow excluded in the Danish context as a basis on which to challenge an arbitral award.[101]

(b) mildly expanded

There are also jurisdictions that, as opposed to the pattern represented by France and Switzerland which pares back the review grounds contained in Article 34(2) of the Model Law, opt to mildly expand these grounds. Singapore, which is a burgeoning center for international arbitration partly due to the government's ambition to develop the arbitration industry,[102] is a proper example that showcases this legislative inclination in arbitration law. The grounds for setting aside an arbitral award in Singapore mirror Article 34(2) of the Model Law, but two extra grounds that are not considered by the Model Law are also included therein. An arbitral award may also be set aside if (i) the making of the award was induced or affected by fraud or corruption; or (ii) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.[103]

Although the Czech Arbitration Act is not modelled on the Model Law,[104] the part in the Act that prescribes the grounds for the setting-aside of arbitral awards bears much resemblance to the relevant part of the Model Law. With that said, the Act also covers some other grounds that are not seen in Article 34(2) of the Model Law. Kudrna from the Ministry of Finance of the Czech Republic identified that the grounds for setting aside an arbitral award in the Czech Republic include: (i) the subject matter of the dispute is not arbitrable; (ii) the arbitration agreement is invalid for other reasons, has been terminated or does not cover the dispute at hand; (iii) the tribunal included an arbitrator who was not authorized by the arbitral agreement or otherwise did not have the capacity to act as arbitrator; (iv) the arbitral award was not approved by the majority of the arbitrators; (v) there was a violation of the right to be heard; (vi) the arbitral award orders relief not requested by one of the parties or orders a party to do something which is impossible or illegal under Czech law; or (vii) there are grounds to

[101] Jens Rostock-Jensen and Sebastian B. Poulsen, "Arbitration Guide: Denmark", International Bar Association, IBA Arbitration Committee, Sep. 2014, https://www.ibanet.org/Document/Default.aspx?DocumentUid=F639F5A3-9300-442A-9F28-14302C40886E (last visited on May 20, 2022), pp. 14-15 (stating that parties to arbitration may challenge an arbitral award on the ground that "The party making the application was not given proper notice of the appointment of an arbitrator").
[102] Alvin Yeo and Lim W. Lee, "Arbitration Guide: Singapore", International Bar Association, IBA Arbitration Committee, Jan. 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=21CE7804-1003-4E5C-965C-7BAE72749128 (last visited on May 20, 2022), p. 3 (arguing that the rapidly growing arbitration caseload at the Singapore International Arbitration Centre (SIAC) is largely a function of the Government's policy to develop Singapore as an international arbitration centre).
[103] *Ibid*, at 21.
[104] Jaroslav Kudrna, "Arbitration Guide: Czech Republic", International Bar Association, IBA Arbitration Committee, Jan. 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=04296388-C288-4A09-BA82-EC543F49F3EF (last visited on May 20, 2022), p.4.

request the reopening of proceedings under the Civil Procedure Code (e.g. discovery of new evidence which could lead to a materially better outcome for one of the parties).[105]

(c) simply adjusted

There is another type of jurisdictions in which the grounds for setting aside an arbitral award may still cling to the main idea of the design of the Model Law but vary from the contents of Article 34(2) in a more noticeable manner. These jurisdictions might have included in their arbitration legislation additional grounds for the judicial review of arbitral awards that are not seen in the Model Law, but their arbitration laws might not at the same time have covered all the grounds listed by Article 34(2). Thus, it is hard to decide whether the arbitration laws in these jurisdictions expand or restrict the scope of judicial review when compared with Article 34(2) of the Model Law. The legislative nuances identified in the Dutch and Swedish arbitration legislation are proof to categorize these two countries as jurisdictions under this group.

The Dutch Arbitration Act, as Schellaars and Marsman put forward, is in significant part based on the Model Law, but it also contains deviations from the Model Law regime.[106] The grounds for setting aside an arbitral award adopted in the Dutch law attest to this argument. An award arising out of arbitration proceedings seated in the Netherlands may be challenged for (i) lack of a valid arbitration agreement; (ii) constitution of a tribunal in violation of the rules applicable thereto; (iii) gross breaches of mandate; (iv) lack of signature and/or reasoning; or (v) violations of public policy by the award or the manner in which it was made.[107] While a high degree of identity is noticeable between the grounds listed in the Dutch Arbitration Act and those in the Model Law, there are also visible divergences in existence between the two arbitral regimes. For instance, the Dutch Arbitration Act opens the possibility for an arbitral award to be set aside for the mere fact of the lack of a signature, which is not included in Article 34(2) of the Model Law. Another instance is that the inability for a party to present his case is not explicitly included in the Dutch law as grounds to challenge an arbitral award.

The Swedish case seems to depart further away from the pattern laid down by the Model Law. Under the Swedish Arbitration Act, the circumstances that render an arbitral award void and those that render it open to challenge are expressly differentiated. These two situations not only are distinct by name but also entail practical implications. While an action to strip an arbitral award of its validity through proving that the award is void is not subject to any time limits, an action to challenge an award must be commenced within three months from the date on which the party received the award.[108] But for the purpose of this research,

[105] *Ibid*, at 15.
[106] Rogier Schellaars and Albert Marsman, "Arbitration Guide: The Netherlands", International Bar Association, IBA Arbitration Committee, Jan. 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=771279FD-6BA6-4A4B-8A5B-7A0A3D9FC62C (last visited on May 20, 2022), p. 3.
[107] *Ibid*, at 17.
[108] Robin Oldenstam, "Arbitration Guide: Sweden", International Bar Association, IBA Arbitration Committee, Jan. 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=323447B0-3A0B-4D25-B53C-206E55E35F51 (last visited on May 20, 2022), pp. 21-22.

proceedings to void and challenge an arbitral award are both counted as the setting-aside proceedings of arbitral awards. Although non-arbitrability of the dispute is removed as a specific ground to annul an arbitration award under the Swedish Arbitration Act, some extra review grounds that are not included by Article 34(2) of the Model Law are added to it. For example, an arbitral award may be set aside by domestic courts if the underlying arbitral proceedings, according to Section 47 of the Arbitration Act, should not have taken place in Sweden in the first place.[109]

6.3.1.1.3 Extended Pattern of Review Grounds

The previous two patterns of judicial review, either referring *verbatim* to the Model Law language or introducing slight modifications based on it, both opt to confine the grounds for setting aside an arbitral award to non-substantive issues and keep the review of the merits of an award at bay. However, as a fundamental departure from the prevailing model of the judicial review of arbitral awards, some arbitral regimes extend the scope of judicial review to the substantive reconsideration of arbitrated cases. In those arbitral regimes, the opportunity to reopen the merits of an arbitral award remains, either by the application of a broad arbitration statute or the broad interpretation of a narrow one, as Rubins argues.[110] Despite the fact that this is mostly the case in relation to domestic arbitrations, the substantive review of awards rendered out of international arbitration proceedings is also made possible in certain jurisdictions, such as England and the United States.[111]

S.67, S.68 and S.69 of the Arbitration Act 1996, the legal force of which extends to England, Wales and Northern Ireland, lay down the core ground rules for a party to an arbitration seated in England to file an application to challenge the arbitral award before a court.[112] While S.67 opens up the possibility for a party to attack the decision on substantive jurisdiction made by the arbitral tribunal,[113] a party may also rely on S.68 to fight serious irregularities that may have arisen in relation to the tribunal, the proceedings or the award.[114]

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[109] The circumstances rendering an award void are the following: (i) the award includes determination of an issue, which under Swedish law, is not arbitrable; (ii) the award or the manner in which the award arose is patently incompatible with fundamental principles of the Swedish legal system; and (iii) the award does not fulfil the requirements with regard to written form and signing. The circumstances in which an award is challengeable include: (i) the award is not covered by a valid arbitration agreement between the parties; (ii) the arbitration have made the award after the expiration of a period of time stipulated by the parties or have otherwise exceeded their mandate; (iii) the arbitral proceedings, according to Section 47 of the Arbitration Act, should not have taken place in Sweden; (iv) an arbitrator has been appointed in a manner contrary to the agreement between the parties or the provisions of the Arbitration Act; (v) an arbitrator was unauthorized owing to any circumstance set forth in Section 7 or 8 of the Arbitration Act; or (vi) through no fault of the party, any other irregularity has occurred in the course of the proceedings which probably influenced the outcome of the case. *Ibid*.

[110] Rubins, *supra* note 7, at 361.

[111] Abedian, *supra* note 4, at 560-562. Angeline Welsh, "Arbitration Guide: England & Wales", International Bar Association, IBA Arbitration Committee, Jan. 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=D49BD82B-83AA-47C3-A238-F7E165D03891 (last visited on May 20, 2022), p. 4 (arguing that "The Arbitration Act 1996 governs all arbitrations seated in England, Wales and Northern Ireland, both domestic and international").

[112] The Arbitration Act 1996, http://www.legislation.gov.uk/ukpga/1996/23/data.pdf (last visited July 17, 2020), pp. 31-34.

[113] *Ibid*, at 31-32.

[114] S.68(2) states that serious irregularity must be a type which, as considered by the court, "has caused or will cause substantial injustice to the applicant". The kinds of serious irregularity included therein are: (i) failure by

However, it is S.69 that individualizes the English arbitral regime among a pool of arbitration laws, because a party is thereby permitted, though in a limited manner, to appeal a question of law to a court. To be more precise, a question of law is confined to those related to the law of England, Wales or Northern Ireland.[115] As distinct from the challenges under S.67 and S.68 which are mandatory, the right to appeal a point of law can be contracted out via the agreement of the parties to an arbitration. A party is able to launch an appeal through two venues, either with the agreement among all the parties to the arbitration or with the leave granted by a court. The leave to appeal will not be granted by a court unless the appellant can pass the fourfold tests set out in S.69(3). The appellant has a statutory obligation to show that: (1) the determination of the question is so critical that it will substantially affect the rights of one party or more; (2) the question was brought before the tribunal for determination; (3) the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, taking into consideration the findings of fact in the award; and (4) it is just and proper for the court to determine the question.[116]

However, an appeal on a question of law under S69 is not a mechanism which goes without controversy. On the contrary, there are indeed conflicting ideas on the continued relevance of S69, involving a combination of the judiciary and the arbitration industry. Lord Thomas, the previous Lord Chief Justice of England and Wales, argues that the test under S69 should be more flexible, thus granting more possibility for English courts to review arbitral awards in respect of a question of law.[117] The rationale behind his judgment is that arbitration, due to its private nature and apparent lack of transparency, is impeding the development of the common law system.[118] Nyandoro added a new piece of argument to this stance by concluding that the latest trends have seen an obvious growth in the complexity of arbitration (notably the rise of multi-party and multi-contract arbitrations and those involving states and state entities), which in turn further justify the legitimacy of the extra procedural layer that S69 creates.[119] By contrast, Lord Saville and Sir Bernard Eder, both former judges and now

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the tribunal to comply with Section 33 (general duty of tribunal); (ii) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction); (iii) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (iv) failure by the tribunal to deal with all the issues that were put to it; (v) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (vi) uncertainty or ambiguity as to the effect of the award; (vii) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (viii) failure to comply with the requirements as to the form of the award; and (ix) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award. *Ibid*, at 32-33.

[115] For a court in England and Wales, a question of law refers to a question of the law of England and Wales. For a court in Northern Ireland, a question of law refers to a question of the law of Northern Ireland. *Ibid*, at 43.

[116] *Ibid*, at 33-34. Welsh, *supra* note 111, at 18. Simon Milnes, "Appeals and Challenges to Arbitral Award under the English Arbitration Act 1996", LMAA Seminar, May 16, 2016, Singapore, http://www.lmaa.london/uploads/documents/Simon%20Milnes%20paper.pdf (last visited on May 20, 2022), pp. 1-11.

[117] John Thomas, "Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration", The Bailii Lecture, Mar. 9, 2016, http://www.bailii.org/bailii/lecture/04.pdf (last visited on May 20, 2022), pp. 8-9.

[118] *Ibid*, at 9-10.

[119] Tonderai Nyandoro, "Why the English Right to Appeal an Arbitral Award on a Point of Law is not Anachronistic?", Kluwer Arbitration Blog, May 30, 2016,

arbitrators, voiced their concerns about the negative effects of S69. Sir Bernard Eder responded to Lord Thomas by arguing that a more flexible test under S69 might force parties to arbitration to wield their autonomy to leave out the right to appeal on a question of law, or, in a worse scenario, to give up England as the chosen seat of arbitration.[120] Lord Saville simply repeated the conventional wisdom that arbitration is an alternative to litigation, thus the judiciary should avoid meddling in arbitration because disputants have made a choice when they agree to arbitrate their disputes.[121]

In the United States, another common law jurisdiction, judges are also granted the possibility to revisit the legal merits of an arbitrated case in the follow-up judicial review proceedings on the premise that the award might "manifestly disregard the law" – a term meaning that the arbitrator(s) knew the law yet deliberately ignored its application.[122] The manifest disregard of the law, a doctrine that is often quoted to showcase the level of difficulty for non-American lawyers to penetrate the American arbitral regime,[123] is not derived from S10 of the Federal Arbitration Act (the FAA), which lists limited statutory grounds for the *vacatur* of an arbitral award,[124] but rather from the case law tradition. To be precise, this doctrine originated from the dictum of a 1953 US Supreme Court decision in *Wilko v. Swan*, but not in a straightforward way,[125] which accounts for the truth that it was not taken as grounds for *vacatur* until at least 1960. Although the *Wilko* decision was overruled around thirty years ago, the manifest disregard of the law doctrine managed to survive the demise.[126] In fact, whether this doctrine, alongside with other factors, such as public policy, should be relied upon to vacate an award is still under debate in the US.[127] There are commentators and judges, notably Judge Richard Posner, who do not grudge their doubt against the doctrinal footing of this doctrine.[128] The unsettled status surrounding the application of the doctrine of

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http://arbitrationblog.kluwerarbitration.com/2016/05/30/english-right-appeal-arbitral-award-point-law-not-anachronistic/ (last visited on May 20, 2022).

[120] *Ibid*.

[121] *Ibid*.

[122] Abedian, *supra* note 4, at 561-562. Michael H. LeRoy, "Are Arbitrators Above the Law? The 'Manifest Disregard of the Law' Standard", Boston College Law Review, Vol. 52, No. 1(2011), p. 138.

[123] Jack Coe, "The Curious Case of Manifest Disregard [of the Law]", Kluwer Arbitration Blog, May 17, 2010, http://arbitrationblog.kluwerarbitration.com/2010/05/17/the-curious-case-of-manifest-disregard-of-the-law/?print=pdf (last visited on May 20, 2022).

[124] The grounds listed there include: (i) the award was procured by corruption, fraud or undue means; (ii) there was evident partiality or corruption in the arbitrators, or either of them; (iii) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (iv) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. §10.

[125] A scrap of the dictum of this decision reads that, "……the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation". 346 U.S. 427, 436-437 (1953).

[126] Coe, *supra* note 123.

[127] Mark W. Friedman and Floriane Lavaud, "Arbitration Guide: United States", International Bar Association, IBA Arbitration Committee, Jan. 2018, https://www.ibanet.org/Document/Default.aspx?DocumentUid=939CE0D4-8D8A-4350-81D7-B7FEFE923C11 (last visited on May 20, 2022), p. 18.

[128] Judge Richard Posner once wrote: "A number of courts, including our own, have said that they can set aside arbitral awards if the arbitrators exhibited a "manifest disregard of the law." …. We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none – that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire

the manifest disregard of the law, however, can be largely attributed to the US Supreme Court's decision in *Hall Street Associates v. Mattel, Inc*. This decision is surprisingly muddling in the sense that, though it made clear that the grounds listed in S10 of the FAA are exclusive, it added to the perplexity of the status of that doctrine rather than the reverse by including a statement to the effect that maybe the doctrine was meant to name a new ground of review, or maybe it just referred to the S10 grounds collectively.[129] Consequentially, *Hall Street* has aroused great academic passion and led to a split among federal circuit courts in their decisions with regard to the application of the manifest disregard of the law.[130] Empirical studies have revealed that manifest disregard of the law has been consistently and frequently quoted as the ground to challenge an award more than most other grounds, though those claims rarely won support from the courts.[131] Despite the low success ratio, the doctrine of manifest disregard of the law, which "opens the door to judicial review of the legal merits of arbitral awards", has found its own place in the framework of the US arbitration law and in the expectations of arbitration practitioners, as Professor Aragaki argues.[132]

6.3.1.2 Categorization on the basis of Possibility of a Waiver

Judge Abedian noted that France and Belgium used to introduce mandatory elimination of judicial review in the hope that "a completely laissez-faire system" would bring in more international arbitration, but to no effect.[133] My research finds that nowadays most jurisdictions, if not all, have no arrangements in their arbitration laws to prohibit judicial control of arbitral awards. However, one can imagine that the right to waive judicial review on the part of disputing parties could still remain as a thorny issue. On the one hand, disputing parties deserve the right to decide for themselves whether the judicial review of arbitral awards is desirable owing to the private nature of dispute settlement and the fact that review proceedings would impose more burdens in terms of the cost and time inflicted. On the other hand, a review of the jurisdictions covered in this research indicates that policy makers across the globe are rather divided on whether disputing parties should be empowered to waive judicial review by agreement.

6.3.1.2.1 Complete Freedom to Exclude Judicial Review

Jurisdictions of this type seem to accord high deference to the autonomy of arbitration users by granting them full freedom to exclude judicial review, usually at any time, subject to the requirement of a clear and unequivocal agreement between the parties. France and Singapore

modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles – whether the arbitrators "exceeded their powers" – it is superfluous and confusing." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (United States Court of Appeals, Seventh Circuit, 1994). Hiro N. Aragaki, "The Mess of Manifest Disregard", Yale Law Journal Online, Vol. 119 (2009-2010), p. 14.

[129] 552 U.S. 576, 585 (2008).

[130] LeRoy, *supra* note 122, at 180-181 (arguing that The *Hall Street* ruling caused federal circuit courts of appeals to split in their treatment of the manifest disregard standard. For instance, appellate courts in the Fifth Circuit and Eleventh Circuit recently ruled that *Hall Street* ended the use of this test to review awards under the FAA. In contrast, the Second, Sixth, and Ninth Circuits treated "manifest disregard" as part of a court's reviewing power under the FAA. … Likewise, state courts have had differing reactions to *Hall Street*).

[131] Aragaki, *supra* note 128, at 14.

[132] *Ibid*, at 1 & 14.

[133] Abedian, *supra* note 4, at 563-564.

are among those jurisdictions that opt to "indulge" parties on this issue. For instance, Article 1522 of the CCP of France which allows parties to arbitration to waive their right to bring an action to set aside an award is said to be inspired by the relevant provisions in foreign statutes such as those of Switzerland and Belgium.[134]

6.3.1.2.2 Conditional Freedom to Exclude Judicial Review

There are jurisdictions that neither grant an unconditional right to waive judicial review nor completely prohibit the contractual exclusion of judicial control. As an alternative, their arbitration laws permit parties to arbitration to exclude the possibility to bring an action to set aside the award by agreement only if the pre-set statutory conditions are met. However, an examination of the jurisdictions included has found that the conditions specified in different arbitral regimes demonstrate notable variety. Russia stands out as a unique jurisdiction on this issue by providing that insofar as an arbitration is held under the auspices of a permanent arbitration institution, the parties may agree to waive the right to challenge an arbitral award. In other words, parties going for *ad hoc* arbitration are deprived of the right to contract out the judicial review of an arbitral award by agreement.[135] As distinct from conditioning the right to the exclusion of judicial review on the nature of arbitration, some jurisdictions only allow parties to waive the right to launch setting-aside proceedings when none of the parties is closely related to the forum state. For instance, in Switzerland, Article 192 of the law governing international arbitration spells out that "if neither party has a domicile, a place of habitual residence, or a place of business in Switzerland", they may effectively waive the right to pursue judicial remedy against an arbitral award, in whole or in part, either through an express declaration in the arbitration agreement or in a subsequent written agreement.[136] The Swedish adopt the same approach by providing that only non-Swedish parties are entitled to give up the opportunity to challenge an arbitral award as per S34 of the Arbitration Act.[137] However, German and Canadian jurists appear to be more concerned with limiting arbitration users' ability to waive judicial review by virtue of differentiating the grounds that they can rely upon to challenge an award. In Germany, parties to arbitration may waive the right to invoke the first-category of setting-aside grounds, which are identical to the grounds listed in Article 34(2)(a) of the Model Law, to challenge an award. However, they cannot do the same with regard to the second-category setting-aside grounds, which are identical to the grounds listed in Article 34(2)(b) of the Model Law, because "these grounds are based on notions of non-derogable public policy".[138] Canada seems to assume that Article 34 of the Model Law is not a mandatory provision, thus parties, in principle, may waive the right to pursue judicial remedy against an arbitral award. Nevertheless, the exceptions remain such as "the arbitral tribunal has itself breached a mandatory provision of the Model Law" or "allowing the award to stand would be contrary to the public policy of the relevant Canadian

[134] Alexis Mourre, "Arbitration Guide: France", International Bar Association, IBA Arbitration Committee, Mar. 2012, https://www.ibanet.org/Document/Default.aspx?DocumentUid=D44F7671-12B3-4FE5-8B59-9203D7EAD2AD (last visited on May 20, 2022), p. 19.
[135] Nikiforov, *supra* note 91, at 20.
[136] Scherer, *supra* note 98, at 19.
[137] Oldenstam, *supra* note 108, at 22.
[138] Kreindler, et al., supra note 92, at 20.

jurisdiction".[139] England and Wales, which are in general not generous with regard to the empowerment of parties to arbitration to eliminate judicial review, allow parties to waive the right to challenge an award on a question of law. Parties may expressly announce their agreement to exclude such challenges or reach the same effect by incorporating the arbitration rules, such as those of the ICC and LCIA, that are incompatible with such challenges.[140]

6.3.1.2.3 No Freedom to Exclude Judicial Review

Some jurisdictions seem to be averse to according the freedom to parties to arbitration to decide whether they would retain or waive the right to bring an action to set aside an arbitral award. Notably, both Danish and Czech arbitration acts deny the possibility for parties to waive the right to challenge an arbitral award.[141] The Netherlands takes the side of the two jurisdictions mentioned, but it grants parties the freedom to waive the right to appeal any judgment made by any court of appeal to the Supreme Court.[142] By virtue of this method, parties are enabled to take the initiative to ameliorate the ordeal arising out of setting-aside proceedings before domestic courts *loci arbitri* as a result of the applicability of the appeals system. In addition, in the US, a waiver of the right to challenge an arbitral award stands little chance of securing support from the judiciary, because, as Judge Parker argues, "federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with § 10(a)."[143]

6.3.2 The Common Grounds for the Judicial Review of Investment Awards

We can recall that from the typology in the preceding section, national arbitration legislation across different jurisdictions sometimes sets down divergent grounds for the judicial review of investment awards. In those jurisdictions where the Model Law is not taken as a template for arbitration law, the grounds incorporated domestically for the *vacatur* of investment awards could demonstrate notable differences from the pattern set by Article 34 of the Model Law. However, the variety in national arbitration legislation in this regard does not preclude a search for the common grounds for the judicial review of investment awards. In the light of the significance that the Model Law bears on the current landscape of international arbitration, the grounds for setting aside an award specified by Article 34 constitute an appropriate medium to carry out an in-depth analysis of the common grounds for the judicial review of investment awards. The common grounds upon which domestic courts *loci arbitri* may set aside an investment award would largely reveal the scope of judicial review, which, in turn, provides for an essential prerequisite for an assessment of the judicial review mechanism.

6.3.2.1 Lack or Invalidity of An Agreement to Arbitrate

[139] Bienvenu and Valasek, *supra* note 90, at 21-22.
[140] Welsh, *supra* note 111, at 19.
[141] Rostock-Jensen and Poulsen, *supra* note 101, at 15. Kudrna, *supra* note 104, at 16.
[142] Schellaars and Marsman, *supra* note 106, at 18.
[143] *Hoeft v. MVL Group, Inc*, 343 F.3d 57, 64-65 (United States Court of Appeals, Second Circuit, 2003). Friedman and Lavaud, *supra* note 127, at 18.

The first ground noted in Article 34(2) of the Model Law for setting aside an investment award is "*a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State*."[144] An arbitration agreement is a consensual declaration of will from the parties to a specific dispute to voluntarily submit the unsettled issues to the competence of an arbitral authority. The agreement to arbitration, also known as the consent of parties, is the cornerstone of arbitration,[145] be it commercial arbitration, investment arbitration or interstate arbitration. Thus, an investment award rendered out of an arbitration tainted with the defects in relation to the agreement to arbitrate is vulnerable to judicial denial.

Unlike commercial arbitration, in the context of investment arbitration, an agreement to arbitrate is not necessarily, and in most circumstances is not, reached by contracts.[146] Instead, in investment treaty arbitration, which is a dominant variety of investment arbitration, the state party expresses its consent by virtue of arbitration clauses contained in IIAs, while the investor party consents to arbitration simply by submitting the dispute to arbitration.[147] Therefore, the incapacity of a party to the arbitration agreement would in practice be extremely hard to prove by the moving party. For one thing, domestic courts are highly unlikely in any event to deny the capacity of a sovereign state to enter into an international treaty with other subjects of international law, in this case, with reference to investment promotion and protection. For another thing, the investor party often turns out to be "legal entities or relatively sophisticated business persons",[148] which are legally capable of indicating their consent to have the disputes in which they are involved arbitrated. In the same vein, the invalidity of the arbitration agreement under the law to which the parties have subjected it or under the law of the forum state, is no easy to sustain.[149] In practice, challenges in relation to the lack of a valid arbitration agreement are often raised in case that the arbitration agreement underpinning an arbitration was pathological.[150] An arbitration agreement is believed to be pathological when it lacks the necessary specificity or clarity or conflicts with other dispute resolution clauses included in the contract.[151] However, in the context of investment arbitration, challenges against investment awards on the grounds of pathological arbitration agreements are unlikely to come off. The reason is that treaty negotiators and drafters, in recognition of the significant legal implications that IIAs bear on signatory states, usually endeavor to ensure the necessary specificity and clarity and to avoid conflicts between arbitration clauses and other dispute resolution clauses. Even in the case of a lack of precision in relation to an arbitration agreement, domestic courts *loci arbitri*, as evidenced by their past practice, would normally tend to favor the validity of the arbitration

[144] Article 34(2)(a)(i), the Model Law.
[145] Rubins, *supra* note 7, at 363.
[146] Bonnitcha, et al., *supra* note 60, at 61.
[147] *Ibid*.
[148] Markert & Bubrowski, *supra* note 7, at 1464.
[149] *Ibid*.
[150] UNCITRAL, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (hereinafter the 2012 Digest), http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (last visited on May 20, 2022), p. 142.
[151] *Ibid*.

agreement by taking a pro-arbitration approach.[152] A probable explanation for this pro-arbitration approach could be that the forum state is anxious to develop its arbitration industry by marketing itself to the international business community as an arbitration-friendly jurisdiction.

Since the lack of a valid arbitration agreement is recognized as grounds to set aside an award, it is submitted that a complete lack of arbitration agreement, though not explicitly announced in Article 34(2)(a)(i), is *a fortiori* a valid ground to vacate an investment award.[153] Consequently, a respondent state should be entitled to open a challenge proceeding before domestic courts *loci arbitri* to set aside an investment award if there is no arbitration agreement in place in accordance with the dispute resolution provisions of the underlying investment agreement. That in essence refers to the circumstances in which investment tribunal have erred in jurisdictional rulings by assuming jurisdiction over disputes that are not properly covered under the arbitration agreement. In fact, in the judicial review proceedings in relation to investment awards, respondent states often rely on the lack of jurisdiction of arbitral tribunals to seek the *vacatur* of investment awards.[154] Measured against arbitral tribunals in commercial arbitration in terms of deciding jurisdictional issues, investment tribunals often have to confront issues that are more challenging and complex. In order to make a ruling on their jurisdiction over a dispute, arbitral tribunals in commercial arbitration often only need to determine whether the dispute "arose out of or in connection with" the contract containing the arbitration clause.[155] However, investment tribunals normally have to be more prudent in making a jurisdictional ruling, because there is a variety of parameters that they have to take into consideration to decide whether they could assume jurisdiction over an investor-state dispute. The nature of investment treaties, being part of public international law, also adds to the burden of investment tribunals in deciding their jurisdiction considering that they are expected to apply the rules of international law applicable to treaty interpretation to analyze the relevant provisions in those treaties.[156] Consequently, investment tribunals are often confronted with issues such as whether the claimant qualifies as an "investor" and/or whether the claimant has made an "investment" as defined by the underlying investment treaty.

The judicial review proceeding in relation to *Sedelmayer v. The Russian Federation* is representative of the state party challenging the jurisdiction of investment tribunals. Mr. Sedelmayer, as a German, claimed that his assets within the territory of Russia had been confiscated by Russian authorities between 1994-96. On January 15, 1996, Mr. Sedelmayer requested the launch of an investment arbitration against Russia under the auspices of the Arbitration Institute of Stockholm Chamber of Commerce, pursuant to Article 10 of the Germany-the Soviet Union BIT, which was succeeded by Russia. The Tribunal in 1998 decided that Russia should compensate Mr. Sedelmayer in the sum of US$ 2.35 million.[157]

[152] *Ibid*, at 142-143.
[153] Markert & Bubrowski, *supra* note 7, at 1464.
[154] Hober & Eliasson, *supra* note 80, at 665.
[155] *Ibid*.
[156] *Ibid*, at 662.
[157] *Sedelmayer v. The Russian Federation*, Arbitration Award (July 7, 1998), available at https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf (last visited on May 20, 2022), p. 118.

Russia moved to challenge the award on the basis of lack of jurisdiction of the arbitral tribunal before the Stockholm District Court. Russia argued that the assets of Mr. Sedelmayer were indirect investment, which fell outside the definition of "investment" under the German-Soviet BIT. It also insisted that Mr. Sedelmayer could not be treated as an "investor" under the BIT because he did not have his "permanent place of residence" in Germany. The District Court declined to embrace the arguments of Russia, arguing that according to the so-called "doctrine of assertion",[158] the statements made by Mr. Sedelmayer with regard to his "investment" and identity of "investor" were sufficient for the Tribunal to establish jurisdiction. Russia later appealed the judgement of the District Court to the Svea Court of Appeal only to see that judgment was upheld.[159]

While complete lack of an arbitration agreement, i.e., lack of jurisdiction on the part of arbitral tribunals, is proper grounds for setting aside investment awards, an investor's allegation that the arbitral tribunal wrongly denied jurisdiction over the dispute for which it should have assumed jurisdiction may have a bleak outlook to secure support from the review court in some jurisdictions. For instance, in the judicial review proceeding in relation to *Bayview Irrigation District et al. v. United Mexican States,* though the ultimate goal of the applicants was to set aside the arbitral award which denied the jurisdiction of the investment tribunal, the applicants did not rely on denial of jurisdiction *per se* in pursuit of the *vacatur* of the award. Instead, they argued that the award should be set aside because a handful of statutory grounds had been activated by the tribunal's denial of jurisdiction.[160] According to the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (hereinafter the 2012 Digest), the German Federal Court of Justice in a review proceeding held that negative jurisdictional rulings are reviewable awards under Article 34.[161] But the Court maintained that none of the exhaustively listed grounds in Article 34 allowed the Court to set aside an arbitral award on the sole basis that the tribunal erred in denying jurisdiction.[162] The Court of Appeal of Singapore took a rather different approach, arguing in a judgment that negative jurisdictional rulings are not arbitral awards, thus leaving out the possibility of the judicial review of those rulings in the first place.[163] To sum up, an investment tribunal wrongly claiming jurisdiction is usually proper grounds for setting aside an arbitral award, but the tribunal wrongly denying jurisdiction usually does not seem to be recognized as grounds for that purpose.

Pal Wrange, "Sedelmayer v. Russian Federation", American Journal of International Law, Vol. 106, No. 2(2012), p. 348.

[158] The "doctrine of assertion" is a procedural law principle that originates from the jurisdiction of Sweden, which means that "the dispute falls within the jurisdiction of the arbitral tribunal if one of the parties asserts that its claim comes within the scope of the agreement which contains the arbitration clause, provided that such assertion is not completely without foundation and provided that there is no dispute as to the validity of the arbitration agreement". Hober & Eliasson, *supra* note 80, at 645.

[159] *Ibid*, at 643-645.

[160] *Bayview Irrigation District #11 et al. v. Mexico*, Ontario Superior Court of Justice, Reasons for Judgment, Court File No: 07-CV-340139-PD2, available at https://www.italaw.com/sites/default/files/case-documents/ita0078_0.pdf (last visited on May 20, 2022), paras. 64-78.

[161] UNCITRAL, *supra* note 150, at 143.

[162] *Ibid*.

[163] *Ibid*, at 144.

Another practical issue concerns the state party's waiver of objections to jurisdiction, which precludes a state's right to challenge the jurisdiction of the arbitral tribunal at the judicial review stage. The Digest 2012 noted that decisions have seen that if a party does not "raise objections to the existence of an arbitration agreement at the latest in the submission of the statement of defence", that party may be deprived of the right to challenge the jurisdiction of the tribunal during the setting-aside proceedings. However, the court practice in this regard differs across jurisdictions. German courts have upheld the idea that the failure to object to the jurisdiction of an arbitral tribunal during the arbitral proceeding in a right manner would effectively preclude the party from raising the objection to jurisdiction for the purpose of judicial review.[164] However, courts in Singapore and Hungary have come to a different conclusion on this specific issue.[165] In any event, a respondent counsel is advised to bring objections to the arbitral tribunal's jurisdiction at the stage of investment arbitration proceedings for the sake of assurance.[166]

6.3.2.2 Inability to Present the Case

Article 34(2)(a)(ii) of the Model Law provides that an arbitral award may be set aside if "the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case."[167] A party's inability to present the case is also referred to as the violation of the right to be heard or of due process or of "natural justice",[168] indicating that the party was deprived of the possibility to be effectively engaged in the process of the adjudication of the dispute by the arbitral tribunal. Unless a party to arbitration itself is the one that should take the blame for the inability to present its case, lack of involvement in the handling of the dispute is not in line with the fundamental tenets of natural justice, thus qualifying as grounds for setting aside an arbitral award.

It is made clear in this Article that a party that was not given proper notice of the appointment of an arbitrator or of the proceedings is supposed to be unable to present his case. However, in the context of investment arbitration, that is a negligible probability for both the state party and the investor party to succeed in setting aside an investment award based on those two allegations. The common avenue for an investor to properly notify the respondent state is sending a notice of arbitration or a request for arbitration to the embassy of the host state in the home state of the investor concerned, or to an authorized representative in the respondent state, such as the ministry of foreign affairs or the office of the prime minister or the president.[169] In addition, the appointment of an arbitrator by the investor is often already contained in the notice of or request for arbitration directed to the respondent state.[170] Thus, as long as an investor properly sends the notice of or request for the arbitration to the

[164] *Ibid*.
[165] *Ibid*.
[166] Rubins, *supra* note 110, at 372.
[167] Article 34(2)(a)(ii), the Model Law.
[168] UNCITRAL, *supra* note 150, at 145.
[169] Markert & Bubrowski, *supra* note 7, at 1468.
[170] *Ibid*.

respondent state as required, the state can hardly base their argument for setting aside the investment award on the two scenarios mentioned above.

The scope of inability to present the case is not limited to a lack of proper notice and also includes other aspects in relation to an arbitral proceeding. In practice, a party may invoke a lack of participation or representation in the arbitral proceeding to set aside an investment award, but this argument is not likely to be supported by domestic courts *loci arbitri* unless that is due to circumstances that are attributable to the arbitral tribunal or to extraneous events beyond the party's control.[171] An allegation of inability to present the case may also be based on the tribunal's rejection of evidence offered or presented or on a lack of an opportunity to comment on relevant evidence. Evidence understandably lies at the core of any form of dispute resolution, providing the building blocks for adjudicators to explore the facts upon which they would make the final decision. An arbitral tribunal's arbitrary refusal of evidence presented or offered by a party would correspondingly diminish or deprive the party of its ability to plead its case, circumstances that should qualify as grounds to set aside an arbitral award. However, arbitral tribunals are supposed to withhold the discretion to determine whether a certain piece of evidence is relevant and should be admitted for the purpose of the adjudication of the dispute. Thus, where the refusal to take evidence into account made by an arbitral tribunal can be justified by procedural or substantive reasons, domestic courts *loci arbitri* would in all likelihood be reluctant to back the allegation of a violation of the right to be heard.[172] Another integral right for a party to arbitration, closely related to the right to present one's own case, is the opportunity to comment on relevant evidence. Where a piece of evidence is submitted by another party or collected by the tribunal on its own motion, on the condition that the evidence may have an impact on the arbitral award, a party should be able to provide its own views on the evidence at issue.[173] In addition, the judicial practice of domestic courts *loci arbitri* has shown that the mere existence of inability to present one's case might not be enough to convince a court to set aside the arbitral award; some courts are likely to require proof from the party making the application of a causation between inability to present its case and the rendering of the arbitral award, in other words, that the award was based on a violation of the right to be heard.[174]

In *Bayview Irrigation District et al. v. United Mexican States,* an investment arbitration conducted pursuant to the ICSID Additional Facility Rules, the 46 claimants argued that their water rights under a treaty signed by the United States and Mexico in 1944 to allocate the water of the Rio Grande were infringed by Mexico, since Mexico had captured, seized and diverted water which they claimed to own, for the use of Mexican farmers. They submitted the dispute to arbitration in 2005, alleging that the practice of Mexico was in breach of Articles 1102, 1105 and 1110 of Chapter 11 of NAFTA. The Tribunal denied jurisdiction over the dispute as it agreed with Mexico that the claimants' water rights under the treaty could not constitute ownership of personal property rights that amounts to an "investment"

[171] UNCITRAL, *supra* note 150, at 146.
[172] *Ibid*, at 148.
[173] *Ibid*.
[174] *Ibid*, at 150.

under Chapter 11 of NAFTA.[175] The applicants attempted to set aside the arbitral award which precluded the Tribunal from hearing the merits of the dispute before the Ontario Superior Court of Justice. One of the grounds that the claimants mentioned was that the Tribunal had breached a settled practice, that is the "doctrine of assertion", by denying its jurisdiction, stripping them of a fair opportunity to present their case. Thus, in the applicants' view, the investment award should be set aside under Article 34(2)(a) (ii).[176] The Court first made clear that its role in judicial review is not to "conduct a hearing *de novo* of the merits of the Tribunal's decision on jurisdiction" and "the standard of review is narrower in scope than that governing the review by a domestic court of the decision of a domestic administrative tribunal."[177] The Court went on by stating that while the losing party of an arbitration is entitled to pose a challenge to the arbitral award, such a challenge is subject to "the 'powerful presumption' that the tribunal acted within its authority."[178] As to the applicants' allegation of lack of an opportunity to present their case, the Court did not agree because it found that "the applicants were provided a full opportunity to know the case they had to meet and fair opportunity to present their case."[179] In addition, there was no indication on the record that the applicants objected or asked for an adjournment, allowing them to submit more evidence to sustain their own case.[180]

The failed experience of Saar Papier in a judicial review proceeding before the Swiss Supreme Court in relation to the saga of its second arbitration with Poland would also provide insights into how domestic courts *loci arbitri* view violations of the right to be heard as grounds for setting aside an investment award.[181] In the second arbitration initiated by Saar Papier against Poland to seek further compensation as the Polish authorities allegedly continued to block Saar Papier's operation, the Tribunal ruled that it had jurisdiction over the dispute submitted to it in an interim award. Poland applied to set aside the interim award before the Swiss Federal Court but failed.[182] Although Saar Papier sealed interim victory in

[175] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Final Award (June 19, 2007), available at https://www.italaw.com/sites/default/files/case-documents/ita0076_0.pdf (last visited on May 20, 2022). David M. Quealy, "*Bayview Irrigation District et al. v. United Mexican States*: NAFAT, Foreign Investment, and International Trade in Water – A Hard Pill to Swallow", Minnesota Journal of International Law, Vol. 17, No. 1 (2008), pp. 99-119.
[176] See *supra* note 160, paras. 43, 46-47, & 49.
[177] *Ibid*, para. 60.
[178] *Ibid*, para. 63.
[179] *Ibid*, para. 61.
[180] *Ibid*, para. 71.
[181] The dispute between Saar Papier and Poland concerned a factory established by Saar Papier in Poland in order to produce recycled paper products with imported used paper in 1990. While Saar Papier had obtained a required license from the Polish Agency for Foreign Investment for its operation in Poland, the Polish environmental authorities in 1991 blocked Saar Papier from importing used paper from Germany. In 1994, Saar Papier brought the first arbitration against Poland on the basis of German-Poland BIT (1989), in accordance with the UNCITRAL Arbitration Rules and with the seat of arbitration in Zurich. The investment tribunal in October 1995 decided that Poland's treatment towards Saar Papier had been "tantamount to an expropriation" and "ordered compensation". Hober & Eliasson, *supra* note 80, at 640. Matthias Scherer, et al., "Domestic Review of Investment Treaty Arbitrations: The Swiss Experience", ASA Bulletin, Vol. 27, No. 1(2009), pp. 267-268.
[182] For more detailed information on the setting aside proceeding of the interim award rendered out of *Saar Papier v. Poland (II)*, see Hober & Eliasson, *supra* note 80, at 640-641. See also Scherer, et al., *supra* note 181, at 268-270.

the jurisdictional phase of the arbitral proceeding, the Tribunal in the final award dismissed the monetary claims of Saar Papier in its entirety and confirmed that "any other or further claims of the parties are denied." The release of the final award had seen Saar Papier, instead of Poland, resort to the Swiss Federal Court for judicial review and argue that, *inter alia*, its right to be heard was violated during the arbitral proceeding. The Court noted that one of the requirements of the right to be heard is to give parties the right to "comment on all material facts" and to "present their legal positions." It also considered that a party would automatically lose the right to object to a violation of the right to be heard in the setting-aside proceeding if it did not raise an objection during the arbitration in a timely fashion. In the case at hand, the Tribunal closed the proceedings by a procedural order after allowing parties to present their own arguments and comment on each other's case through many rounds of pleadings. Although the Tribunal refused the subsequent application by Saar Papier to conduct a hearing, the Court held that the refusal did not constitute a violation of the right to be heard.[183]

6.3.2.3 Excess of Mandate

Article 34(2)(a)(iii) provides that an arbitral award may be (partially) set aside if "the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration."[184] In view of the consensual nature of arbitration, the scope of the submission to arbitration, also referred to as the scope of the mandate of the arbitral tribunal, is primarily decided by the parties.[185] Arbitral tribunals are supposed to fulfil duties within the parameters of the parties' consent and should not exceed the mandate conferred upon them by those parties. Markert and Bubrowski argue that, in order to effectively protect the consent of the parties, an arbitral award out of the arbitral proceeding in which the tribunal overstepped this consent has to be set aside.[186] Courts have stated that for the purpose of the determination of the "terms of the submission" to arbitration and "scope of the submission," the arbitration agreement, other relevant contractual provisions, the notice of request for arbitration and the pleadings exchanged between the parties, are to be taken into account.[187]

In practice, a challenge under Article 34(2)(a)(iii) may relate to "the subject matter of the issues the arbitral tribunal has decided" and "whether they fall within the scope of the agreement to arbitrate."[188] In these circumstances, the review grounds of excess of mandate is basically identical to that of lack of a valid agreement to arbitrate under Article 34(2)(a)(i) in its substance, since a challenge based on that ground is directed against the jurisdiction of the arbitral tribunal over the dispute. The 2012 Digest concluded that, in the context of investment treaty arbitration, where alleged breaches of only certain provisions of a treaty should be settled by arbitration, the tribunal would be found to be dealing with an issue not falling within the terms of the submission if the arbitral award was based on other provisions

[183] Scherer, et al., *supra* note 181, at 270-271.
[184] Article 34(2)(a)(iii), the Model Law.
[185] UNCITRAL, *supra* note 150, at 151.
[186] Markert & Bubrowski, *supra* note 7, at 1469.
[187] UNCITRAL, *supra* note 150, at 151.
[188] Rubins, *supra* note 7, at 364.

of the treaty. However, if the decision was also made on other grounds, it was held that the award would not be set aside.[189] The 2012 Digest also revealed that there were allegations that an arbitral tribunal exceeded its mandate by erroneously assuming jurisdiction though the arbitration agreement was not valid, had been terminated or the applicant was not a party to the arbitration agreement, in the judicial review practice of arbitral awards.[190] While in some jurisdictions the line between challenges under paragraphs (2)(a)(i) and (2)(a)(iii) is difficult to draw, the courts in Singapore explicitly excluded cases where an arbitral tribunal lacked jurisdiction to hear disputes from the ambit of the latter. Thus, the scope of that paragraph only extends to cases where an arbitral tribunal had the jurisdiction to hear the dispute but exceeded (or failed to exercise) the authority granted to it.[191]

In the judicial review proceeding with respect to the three arbitral decisions rendered by the Tribunal in *S.D. Myers v. Canada*,[192] Canada, the claimant, and Mexico, the intervener, attempted to set aside the decisions on the basis that the Tribunal exceeded its authority before the Federal Court of Canada. Canada argued that the respondent in this judicial review case and the claimant in the arbitral proceeding, i.e., the US company S.D. Myers, Inc. (SDMI), was not an "investor", and the Canadian company, Myers Canada, was not an "investment of the investor", as defined under Chapter 11 of NAFTA, which led to the conclusion that the arbitration claim was beyond the scope of the tribunal's jurisdiction.[193] This argument by Canada was discussed under the rubric of "matters beyond the scope of the submission to arbitration."[194] The Court found that in this case the tribunal's decision had not expressly addressed "jurisdiction" and the Canada's argument that SDMI had no "standing" was discussed as a mixed question of fact and law, not as a question of jurisdiction.[195] The Court then moved to argue that:

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[189] UNCITRAL, *supra* note 150, at 152.
[190] *Ibid*, at 153.
[191] *Ibid*, at 151.
[192] S. D. Myers Inc., (SDMI) was a family-held corporation headquartered in Ohio, the US, owned by Mr. Dana Myers (who held 51 percent of the share capital and was the CEO), and his three brothers. The business of SDMI concerned treating or remediating toxic wastes contaminated with polychlorinated biphenyls (PCBs). SDMI entered Canada's remediation market in the 1990s by establishing a Canadian affiliate, Myers Canada. Myers Canada competed with local companies and solicited orders in Canada, and then exported the Canadian-owned PCBs to the US for destruction at SDMI's US facilities. In November 1995, the minister of the environment took regulatory action, banning the export of PCBs on the basis of a purportedly "significant danger to the environment and to human life and health." Contemporaneously, the minister articulated a policy that the remediation of Canadian PCBs should be performed in "Canada by Canadians." The Canadian government reversed that policy and lifted the export restrictions in February 1997. In an arbitration initiated in 1998 on the basis of the NAFTA's investment chapter, SDMI challenged Canada's sixteen-month export ban as an expropriation, an unlawful performance requirement, a denial of national treatment, and a denial of fair and equitable treatment. In the first partial award, the tribunal held that Canada had breached its obligations to provide national treatment to investors from another NAFTA party and accord to investments of investors of another NAFTA party treatment in accordance with international law, including fair and equitable treatment and full protection and security under Article 1105 of NAFTA. In the second partial award and the final award, SDMI was respectively awarded damages and arbitration costs. Hober & Eliasson, *supra* note 80, at 646. Charles H. Brower II, "S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc., [2004] F.C. 38", American Journal of International Law, Vol. 98, No. 2(2004), pp. 339-342.
[193] *The Attorney General of Canada v. S.D. Myers, Inc. v. The United Mexican States*, Reasons for Order, Federal Court of Canada, 13 January 2004, available at https://www.italaw.com/sites/default/files/case-documents/ita0756.pdf (last visited on July 29, 2020), para. 76.
[194] *Ibid*, para. 46.
[195] *Ibid*, paras. 51-52.

> "Jurisdiction is a term of art and a legal objection must be raised clearly at the outset of the arbitration. Canada failed to do so in this case, and cannot now argue that the Tribunal did not have jurisdiction to render the three decisions which are the subject of these applications for judicial review. To find otherwise would undermine the clear and express procedures incorporated in NAFTA for the resolution of disputes."[196]

Thus, the Court agreed with SDMI in this regard and reached the conclusion that Canada had lost its right to the judicial review of the jurisdictional decision of the Tribunal by not expressly raising an effective objection to the Tribunal's jurisdiction during the arbitration. Although there was no need for the Court to conduct a review of the jurisdictional objections that Canada submitted, the Court proceeded to do so in the alternative that it was wrong in the decision that Canada had lost its right to challenge the Tribunal's jurisdiction.[197] The judge decided to review the award with respect to the legal meaning of the word "investor" and "investment of an investor" in NAFTA by the standard of correctness and with respect to the application of the facts to the definitions by the standard of reasonableness.[198] The Court ultimately confirmed that the Tribunal had interpreted the pertinent definition correctly and reasonably applied the facts to the definitions.[199]

Mexico, which intervened in the case, along with Canada submitted that the respondent's activities in Canada could be properly characterized as cross-border trade in services and should be governed by Chapter 12 of the NAFTA. With that being said, they argued that the application of Chapter 11 to cross-border trade in services exceeded the tribunal's mandate.[200] The Court was of the view that the chapters of NAFTA overlap, and the NAFTA rights are cumulative, unless there is a direct conflict. Although SDMI's business in Canada fell into the scope of trade in services, the company also had investment in Canada with respect to waste remediation services and thus was entitled to the protection accorded by Chapter 11 of the NAFTA. Considering that the rights and obligations under Chapters 11 and 12 were not mutually exclusive or inconsistent, and the arbitral award was based on SDMI's rights under Chapter 11, the Court decided that the tribunal had not exceeded its mandate.[201]

Also common in the practice of the judicial review of investment awards is that parties to investment arbitration sometimes claim that an arbitral tribunal's action in applying the wrong source of law in deciding the dispute constitutes excess of the tribunal's mandate, with the intention to set aside the award. The choice of applicable law by parties to arbitration, as an element that is often seen in the legal text containing the arbitration agreement, provides for the substantive basis for an arbitral tribunal to render a decision.[202] IIAs, as the legal instrument that underlies a majority of investment arbitrations, sometimes contain provisions with respect to the applicable law that should be relied upon by arbitral tribunals to decide

[196] *Ibid*, para. 53.
[197] *Ibid*, para. 57.
[198] *Ibid*, para. 60.
[199] *Ibid*, para. 70.
[200] *Ibid*, para. 76.
[201] *Ibid*, para. 71.
[202] Markert & Bubrowski, *supra* note 7, at 1469.

disputes.[203] For instance, Article 10(4) of the Netherlands-China BIT stipulates that the "ad hoc tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In absence of such an agreement the tribunal shall apply the law of the Contracting Party to the dispute (including its rules on the conflict of laws), the provisions of this Agreement and such rules of international law as may be applicable."[204] Arbitrators are obliged to decide a case in accordance with the law chosen by the parties under most legal systems.[205] In a case that an arbitral tribunal manifestly disregards the applicable law designated by the parties to arbitration without legitimate reasons, the arbitral award rendered by the tribunal becomes liable to be set aside by domestic courts *loci arbitri*. However, courts in judicial review practice have not infrequently found that applications on the basis of the tribunal applying the wrong law is *de facto* an effort to "review the tribunal's decision on merits" or to "re-evaluate the evidence presented."[206] In addition, considering that an arbitral tribunal's wrong finding in factual issues and legal issues is not a common ground for setting aside an arbitral award, it seems necessary to clearly distinguish the application of wrong source of law and the wrong interpretation of the proper legal basis by an arbitral tribunal.[207]

In the previously mentioned judicial review proceeding in relation to *Myers v. Canada*, Canada also based its challenge against the arbitral decisions on the argument that the "arbitration claim that Canada breached its Articles 1102 and 1105 NAFTA obligations are disputes not contemplated or falling within the terms of the submission to arbitration because the Tribunal has **misapplied the law** with respect to those two Articles in this case (emphasis added)."[208] This holding clearly reveals Canada's intention to frame misapplication of law as excess of the Tribunal's mandate so as to set aside the arbitral decisions against it. However, even if it is true that the Tribunal in that case had misapplied the law, this mere fact would not enable the Court to set aside the arbitral decisions, because the mistakes in application of law do not constitute a reason for an independent review. With regard to this issue, the Court decided that it was not true that the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, since whether Canada had breached Articles 1102 and 1105 of NAFTA in relation to the respondent was the dispute submitted by the respondent to arbitrate.[209]

In the judicial review proceeding before the Svea Court of Appeal in Stockholm, in relation to *CME v. Czech Republic*,[210] one of the reasons that the Czech Republic relied upon to assert

[203] In the context of institutional arbitration, there are usually concrete provisions with respect to the law that should be applied by arbitral tribunals for deciding a dispute in arbitration rules. For the purpose of illustration, Article 42(1) of the ICSID Convention reads that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." Article 42(1), the ICSID Convention.
[204] Article 10(4), the Netherlands-China BIT.
[205] Rubins, *supra* note 7, at 365.
[206] UNCITRAL, *supra* note 150, at 153.
[207] Markert & Bubrowski, *supra* note 7, at 1469.
[208] See *supra* note 193, para. 76.
[209] *Ibid*, para. 45.
[210] The detailed facts of *CME* are as usual complex, but, in essence, Ronald S. Lauder, an American magnate, invested in a Czech TV license through his German and Dutch companies at different periods of time. In August 1994, CME Media Enterprise B.V. (CME Media), a Dutch company, acquired CNTS, a Czech company that ran

that the Tribunal exceeded its mandate was that the Tribunal had not applied the law that it was obliged to apply, namely Czech law and international law. Instead, the Tribunal allegedly had based the award on a general assessment of reasonableness.[211] With respect to excess of mandate in this regard, the Court stated that:

> "The arbitrators may be deemed to have exceeded their mandate only where they have applied the law of a different country in violation of an express provision that the law of a particular country shall govern the dispute; in the opinion of the Court of Appeal, an almost deliberate disregard of the designated law must be involved. There is no excess of mandate where the arbitrators have applied the designated law incorrectly. Nor can there hardly be any question of excess of mandate where the arbitrators have been required to interpret the parties' designation of applicable law and, in so doing, have interpreted the designation incorrectly."[212]

The Court found that the relevant choice of law clause in Article 8.6 of the Netherlands-Czech Republic BIT requires the Tribunal to decide on the basis of the law, taking into account in particular, though not exclusively: the law in force of the Contracting Party concerned, the provisions of this Agreement and other relevant Agreements between the Contracting Parties, the provisions of special agreements relating to the investment, and the general principles of international law.[213] The Court held that the four sources of law are not numbered nor is there any indication that the governing law of the relevant contracting state should take precedence; instead, the un-numbered list almost gives the impression that the contracting states have left to the arbitrators the determination, on a case by case basis, as to which source or sources of law should be applied.[214] The Court considered that, in assessing whether the Tribunal had exceeded its mandate, there was no need to review various sections of the arbitral award to figure out which of the sources of law listed in Article 8.6 of the treaty had been applied. And it was sufficient to present evidence that the Tribunal had

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the first independent TV station, TV Nova, in Czech Republic. In May 1997, CME Media transferred its interests in CNTS to the wholly-owned subsidiary, CME Czech Republic B.V. (CME), also a Dutch company. The operation of TV Nova proved to be very successful thanks to its innovative and sometimes controversial contents. However, after a falling out between Mr. Lauder and Dr. Zelezny, the local managing director of CNTS, the latter, via his social connections, managed to persuade the state media regulatory body, the Media Council, to deprive the company of its exclusive licensing arrangement. As a result, CME's business in Czech Republic was severely harmed by the regulatory authority's decisions. On 19 August 1999, Mr. Lauder first initiated arbitration in London against Czech Republic in his own capacity as an individual investor, claiming that the Republic violated its obligations under the BIT between the United States and Czech Republic. Six months later, CME also launched arbitration against the Republic, this time in Stockholm and pursuant to the BIT between the Netherlands and Czech Republic. In the first phase of the Stockholm proceedings, the arbitral tribunal came to the conclusion that the Republic had violated its obligations under the treaty in relation to the actions and omissions of the Media Council in 1996 and 1999. In the second phase of the Stockholm proceedings, the tribunal rendered an award in which the amount of damages owed to CME was determined. Rubins, *supra* note 7, 380. See also Thomas Walde, "Introductory Note to Svea Court of Appeals: Czech Republic v. CME Czech Republic B.V.", International Legal Materials, Vol. 42, No. 4 (2003), p. 915; "Svea Court of Appeals: Czech Republic v. CME Czech Republic B.V.", International Legal Materials, Vol. 42, No. 4 (2003), pp. 920-922.

[211] *The Czech Republic v. CME Czech Republic B.V.*, the Svea Court of Appeal, Case no. T 8735-01, Judgment of the Court of Appeal, 15 May 2003, available at https://www.italaw.com/sites/default/files/case-documents/ita0182.pdf (last visited on May 20, 2022), p. 90.

[212] *Ibid*, p. 91.

[213] *Ibid*, p. 92.

[214] *Ibid*, p. 93.

applied any one of the sources of law listed in the choice of law clause or it had not based the decision on any law at all, rather, on a general assessment of reasonableness. The contents of the arbitral award invoked by the parties to support their respective opinions in this case as to the application of law by the Tribunal led to the conclusion that the Tribunal had complied with the choice of law clause and thereby had not exceeded its mandate in this front.[215]

6.3.2.4 Irregularity in the Composition of the Tribunal and the Arbitral Procedure

Article 34(2)(a)(iv) of the Model Law states that an arbitral award may be set aside by the review court if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such an agreement, was not in accordance with the applicable arbitration law.[216] The first prong of this test relates to the adjudicative authority that would take charge of the whole process of arbitral proceedings and render decisions that may have significant impact on the parties to arbitration. Unless the parties to arbitration have agreed otherwise, an arbitral tribunal in investment arbitration usually comprises a sole arbitrator or three arbitrators, who are usually, in a direct or indirect way, appointed by parties to arbitration. Thus, those parties hold great sway over the exercise of selecting arbitrators to establish an arbitral tribunal for the purpose of deciding a specific case.[217] Considering that the rules concerning the procedure of appointing arbitrators in most cases are relatively clear and unambiguous, it is not very likely that an applicant would claim in a challenge proceeding that it has been deprived of the opportunity to effectively engage with the process of appointing arbitrators. However, a party may still have doubts as to the independence and impartiality of the constitutive members of the arbitral tribunal despite the existence of its own representation within the tribunal. In such a case, this party may move to apply for the setting-aside of the arbitral award on the ground that the arbitral tribunal was not properly constituted because there was a conflict of interest or lack of independence and impartiality with regard to arbitrators.[218] There is an argument that the improper composition of the arbitral tribunal as grounds for attacking an arbitral award is probably more relevant in investment arbitration than in commercial arbitration because of the high publicity and increased transparency of investment arbitration cases and the small community of arbitrators involved in it.[219] The 2012 Digest indicated that, in several decisions rendered out of judicial review proceedings, the failure to object to the composition of the arbitral tribunal during the arbitral proceeding precluded a party from challenging an arbitral award on the ground that the arbitral tribunal was incorrectly composed at the judicial review stage.[220] In this vein, only a party who has objected to the composition of the arbitral tribunal during the arbitration

[215] *Ibid*, p. 94.
[216] Article 34(2)(a)(iv), the Model Law.
[217] According to Articles 8 and 9 of the UNCITRAL Arbitration Rules, parties to arbitration can decide whether a sole arbitrator or three arbitrators are to be appointed to take charge of a case. In principle, the selection of a sole arbitrator should be agreed upon by all the parties. In the case that three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. Articles 8 and 9, the UNCITRAL Arbitration Rules.
[218] The 2012 Digest shows that there are judicial review cases in which the applicant challenged the arbitral award on the basis of alleged lack of independence of the members of the arbitral tribunal. UNCITRAL, *supra* note 150, at 159.
[219] Markert & Bubrowski, *supra* note 7, at 1472.
[220] UNCITRAL, *supra* note 150, at 159.

but failed, or who was reasonably unaware of the defect in this regard until after the arbitral award was rendered, is entitled to base the challenge of the award on the improper composition of the arbitral tribunal.

The second prong of the test is connected with the concept of procedural irregularity. Given the self-evident importance of procedural justice in dispensing just and unbiased dispute resolution services, an arbitral award should be, and would be in most countries,[221] set aside by domestic courts *loci arbitri* if the arbitration was carried out in a fundamentally arbitrary or unfair way. There are a variety of procedural defects that could subject an arbitral award to *vacatur* at the place of arbitration, including *ex parte* communications, manifestly unequal treatment of the parties, unauthorized consolidation of proceedings, corruption of one or more arbitrators, denial of basic due process, failure to give sufficient reasons, and non-compliance with the formal requirements for an award, etc.[222] In practice, in the light of the significant differences between court litigation and arbitration, courts tend to hold arbitrators to looser procedural formalities than those applicable to judges, ensuring considerable procedural flexibility is accorded to arbitrators to streamline arbitral proceedings at their discretion in so far as the parties have not disagreed.[223] That inclination of domestic courts *loci arbitri*, which implies a high threshold of corroboration, could operate as a stumbling block to the success of a claimant seeking *vacatur* of an arbitral award by virtue of procedural defects. On some occasions, along with the existence of a major procedural defect, the claimant also has to further prove that, but for the defect, the decision of the arbitral tribunal would have been different.[224] Furthermore, a party could also lose the right to rely on procedural defects to challenge an arbitral award in a judicial review proceeding if he failed to put the same problem onto the table during the arbitral proceeding, subject to that the problem having already become known to the party during that phase.[225]

In the context of the judicial review proceeding in relation to *CME v. Czech Republic* mentioned in the previous section, the Czech Republic also attacked the arbitral awards on the grounds that somewhat lie in between improper composition of the arbitral tribunal and procedural irregularity. The Republic argued that its appointed arbitrator, Jaroslav Handl, had been excluded by the other two arbitrators, namely Wolfgang Kuhn (the Chairman) and Stephen M. Schwebel (appointed by CME), from effective participation into the deliberations that led to the drafting of the award. In fact, on September 23, 2001, Handl gave his notice of resignation as an arbitrator, because according to him, *inter alia*, the two arbitrators, in particular Kuhn, had excluded him and deliberated without him.[226] The Svea Court of Appeal

[221] Rubins, *supra* note 7, at 368.
[222] *Ibid*. UNCITRAL, *supra* note 150, at 157-159.
[223] Rubins stated that "arbitrators enjoy broad powers to arrange hearings as they see fit, including the examination of witnesses, submission of briefs, and timing of oral hearings." According to him, this is particularly true in the context of international dispute resolution because the "fusion of civil law and common law elements have engendered flexible practices that sometimes have little resemblance to court procedures in either civil or common law countries." Rubins, *supra* note 7, at 368-369.
[224] *Ibid*, at 369. Markert & Bubrowski, *supra* note 7, at 1473-1474.
[225] Markert & Bubrowski, *supra* note 7, at 1473
[226] After Handl's resignation, Ian Brownlie took over his position as an arbitrator during the final damages phase. Although Brownlie also ended up in the minority, he signed the final award while issued a lengthy separate opinion. See *supra* note 211, at 19.

was of the view that Handl had indeed received all the essential communications between the arbitrators and there was no evidence to show that the two arbitrators had deliberated without him, and that "Handl did not have an opportunity to participate on equal terms, that they worked against him, and that the two other arbitrators ignored his opinions"; on the contrary, Kuhn appears to have treated Handl correctly for the whole time and "Handl appears to have been afforded an opportunity to submit his comments to the extent which reasonably may be dictated by considerations of courtesy between colleagues." It was considered that Handl's feelings of being excluded probably, in all essential regards, related to the fact that his opinion had not won the support of the other two arbitrators. The Court further stated that some deadlines proposed by Handl during the proceedings seemed to be unreasonably long and could not be justified by the attached reasons because they were in fact difficult to understand. In its conclusion, the Court found that "the Republic's allegation that Handl was excluded from the deliberations to be unproven and close to groundless," and thus refused to set aside the arbitral awards on those grounds.[227]

6.3.2.5 Non-arbitrability of the Subject Matter

Article 34(2)(b)(i) of the Model Law provides that an arbitral award may be set aside by a review court if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State."[228] In other words, the mere fact that the subject matter of a dispute is non-arbitrable could lead to the setting-aside of the arbitral award. Arbitrability entails "a simple question of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings."[229] While party autonomy would espouse the right of parties to put any dispute to arbitration as they desire, national laws often impose restrictions on the freedom in this regard by not allowing certain issues to be resolved by arbitration but through other methods, such as court litigation.[230] In fact, as of the time of writing, non-arbitrability as grounds for setting aside an arbitral award does not yet appear to have forged a close bond with investment arbitration, as evidenced by the fact that there is hardly any instance in which an applicant seeks *vacatur* of an investment award on the grounds of non-arbitrability.[231] This does not seem to be surprising when taking into consideration that not infrequently certain issues that are non-arbitrable in some jurisdictions relate to family, labor and consumer law, which, in turn, generally often lack relevance in investment disputes. In addition, there are also a number of states that declare issues in relation to antitrust, security transactions, intellectual property, and insolvency as non-arbitrable.[232] Those issues, however, are closely connected to the operation and expansion of foreign investments, thus bearing a relatively

[227] *Ibid*, at 89-90.
[228] Article 34(2)(b)(i), the Model Law.
[229] Loukas A. Mistelis, "Arbitrability: International & Comparative Perspectives", Kluwer Law International (2009), pp. 3-4.
[230] According to Mistells, "certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts" and "an obvious example is criminal law which is generally the domain of the national courts: it is undisputed that the sanctioning of criminal activity is in the power of the judiciary." *Ibid*, at 4.
[231] Gaëtan Verhoosel, "Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID", ICSID Review, Vol. 23, No. 1 (2008), pp. 128-129.
[232] Markert & Bubrowski, *supra* note 7, at 1474.

high possibility of gaining prominence in investment disputes. With that in mind one should not be too surprised if a challenge proceeding against an investment award mounted on the basis of non-arbitrability emerges in the future.

6.3.2.6 Violation of Public Policy

In accordance with Article 34(2)(b)(ii) of the Model Law, an arbitral award faces a risk of being set aside by domestic courts *loci arbitri* where "the award is in conflict with the public policy of this State."[233] Although public policy defenses are not infrequent in the practice of the judicial review of both commercial awards and investment awards, a generally recognized concept or scope of public policy has not yet come into being.[234] In fact, public policy is "a broad term with multiple interpretations under different legislative systems."[235] In those jurisdictions in which national public policy is distinguished from international public policy, an investment award would be subject to a narrower scope of review in terms of public policy where the court exclusively applies international public policy to awards rendered out of international arbitration.[236] The jurisprudence of the judicial review of arbitral awards has confirmed that public policy indeed embodies both substantive and procedural aspects.[237] A breach of procedural laws is considered to be a violation of public policy only when the procedural laws "set forth the basic principles upon which the procedural system is based or express fundamental procedural principles."[238] There are decisions out of setting-aside proceedings that have shown a violation of a party's right to be heard and a complete lack of reasoning can be deemed to be a violation of procedural public policy by domestic courts *loci arbitri* in some circumstances.[239] With regard to those cases in which an applicant bases its challenge against an arbitral award on substantive public policy concerns, review courts may be cajoled by the applicant into conducting a *de novo* review of the factual and legal findings of the arbitral tribunal. However, court decisions dealing with setting-aside applications based on substantive public policy considerations hitherto provide evidence that it is generally acknowledged by review courts that Article 34(2)(b)(ii) does not permit a review of the merits of an arbitrated case. Thus, an arbitral award cannot be set aside in order to correct, for example, an incorrect interpretation of contractual clauses, erroneous qualifications of legal relationships, or a wrong decision, under the guise of substantive public policy.[240]

In terms of the standard of review concerning public policy concerns, domestic courts have somehow reached a consensus that Article 34(2)(b)(ii) should not be interpreted in a broad way. It should rather be applied only in exceptional instances where extreme substantive or procedural injustice has been found, transcending the heterogeneity among different

[233] Article 34(2)(b)(ii), the Model Law.
[234] In fact, it would be extremely hard for a generally accepted definition of public policy to be reached among states, because states seem to have different, sometimes conflicting, public policy considerations, and those considerations would also change with the advancement of time and the changes of circumstances. Markert & Bubrowski, *supra* note 7, at 1475.
[235] Rajoo, *supra* note 51, at 219.
[236] UNCITRAL, *supra* note 150, at 160.
[237] *Ibid.*
[238] *Ibid*, at 161.
[239] *Ibid.*
[240] *Ibid.*

jurisdictions in the understanding of public policy *per se*.[241] In the determination of the appropriate standard of review, according to the 2012 Digest, courts have found that a public policy motion is valid only if: "(1) a fundamental principle of the law or morality or justice was violated, (2) the award fundamentally offended the most basic and explicit principles of justice and fairness or showed intolerable ignorance or corruption on part of the arbitral tribunal, or (3) the award was in conflict with a principle concerned with the very foundations of public and economic life."[242] For example, those arbitral awards rendered out of arbitral proceedings tainted with corruption, bribery, fraud and other severe procedural irregularities are likely to be set aside.[243]

The jurisprudence of the judicial review in relation to investment arbitration has shown that challenges against investment awards on the grounds of a violation of public policy are faced with a gloomy prospect in securing endorsement from domestic courts *loci arbitri*. A second look at *Saar Papier v. Poland (II)* mentioned above would reveal a U-turn in the circumstances of both parties in the sense that Saar Papier's claim of compensation was in its entirety dismissed by the Tribunal in the final award dated on 7 June 2001 despite the same Tribunal having decided in favor of the investor in the interim award. Consequently, unlike the setting-aside application regarding the interim award, it was the investor's turn to apply for the *vacatur* of the final award before the Swiss Federal Court. The investor based its challenge against the final award on four separate grounds, including, *inter alia*, a violation of public policy. The public policy argument featured the alleged breach of fundamental principles of "protection of confidence, prohibition of abuse of rights and discrimination, the protection of the weaker party, and the prohibition of expropriation without compensation."[244] The investor notably argued that the Tribunal had interpreted certain provisions of the Germany-Poland BIT in the wrong way by equalizing "the damage caused to it" to "the value of the investment" instead of "lost profits." By doing so, the Tribunal allegedly ignored the international law principle, the prohibition of expropriation, thus violating public order.[245] In its decision on the public policy argument relied upon by Saar Papier, the Court stated that an arbitral award does not violate public order unless it violates a fundamental principle of law both in its reasoning and in its result. Thus, instances such as flawed appreciation of evidence, an incorrect finding of fact, or even a clear breach of a legal norm would not engender the setting-aside of an award.[246] The Court noted that Saar Papier had never argued that it received no consideration for its investments, and that there was no principle of full compensation under international law. In addressing the investor's claim that the Tribunal had erroneously interpreted the BIT, the Court explicitly ruled that a tribunal's mere erroneous interpretation of law would not in any case qualify as a violation of public policy.[247] The Court therefore rejected the setting-aside of the final award on the basis of the public policy argument.

[241] *Ibid*, at 159-160.
[242] *Ibid*, at 160.
[243] *Ibid*, at 160 & 162-163.
[244] Scherer et al., *supra* note 181, at 270.
[245] *Ibid*.
[246] *Ibid*, at 271.
[247] *Ibid*.

In the challenge proceeding against the award rendered by the Tribunal of *CME v. Czech Republic*, the Czech Republic as well argued that the award and the way it came about violated Swedish public policy, or, were "manifestly incompatible with the principles on which the legal system of Sweden is based."[248] The Republic did not supplement extra proof to justify this public policy argument but reiterated the same defects that had already been quoted for the purpose of other grounds underlying the setting-aside application. In the view of the Republic, "each of the grounds concerning the exclusion of an arbitrator from the deliberations and the lack of jurisdiction of the Stockholm tribunal as a consequence of *lis pendens* and *res judicata*, and also the other grounds invoked by the Republic taken together, are of such a serious nature" that they also constituted a public policy breach sufficient to annul the award.[249] However, the Svea Court of Appeal was not persuaded by the Republic into agreeing with its stance when deciding on the public policy argument. Instead, the Court believed that the Republic had "not shown ample reason for why the arbitration award or the manner in which it came about should be in violation of *ordre public* and thereby invalid based on the grounds asserted".[250] Therefore, the Republic's attempt to set aside the investment award on the ground of violation of public policy also came to nothing.[251]

In the same way as Czech Republic did, when Canada launched a challenge proceeding in the wake of *S.D. Myers v. Canada* before the Canadian Federal Court, it argued that the awards should be set aside on the ground of, *inter alia*, violation of Canadian public policy but did not provide any independent basis for that claim. In effect, Canada simply stated that "the defects complained of under the rubric of 'excess of powers' also contravened Canadian public policy."[252] Before taking stock of the public policy argument made by Canada, the Court initially construed "public policy" under the Commercial Arbitration Code by stating that:

> "'Public policy' does not refer to the political position or an international position of Canada but refers to 'fundamental notions and principles of justice.' Such a principle includes that a tribunal not exceed its jurisdiction in the course of an inquiry, and that such a 'jurisdictional error' can be a decision which is 'patently unreasonable', such as a complete disregard of the law so that the decision constitutes an abuse of authority amounting to a flagrant injustice."[253] However, in consideration of the case at hand, the Court contended that the jurisdictional findings of the Tribunal were not "patently unreasonable," "clearly irrational," "totally lacking in reality" or "a flagrant denial of justice."

Accordingly, the Court declined to set aside the investment awards concerned on the ground of violation of public policy.[254]

6.4 Empirical Study: An Overview of Known Cases Concerning the Judicial Review of Investment Awards

[248] See *supra* note 211, at 105.
[249] *Ibid*.
[250] *Ibid*.
[251] *Ibid*.
[252] Rubins, *supra* note 7, at 388.
[253] See *supra* note 193, at 55.
[254] *Ibid*, at 56.

Before proceeding to the assessment of the mechanism of the judicial review of investment awards, it is necessary to present a precise understanding of the dynamics of this mechanism in reality. Any efforts to evaluate the judicial review mechanism in the investment arbitration context or to seek changes to it, should focus attention on the empirics in this regard, or risk firing a shot in the dark. While the scholarly and practical benefits of the empirical research of investment arbitration have been made known,[255] the judicial review of investment awards as a post-award remedy has not been investigated from the empirical perspective to the same extent as other aspects of investment arbitration, such as the impartiality of arbitrators, the costs and length of arbitral proceedings, and the outcomes of those proceedings.[256] Given that the practice of investment arbitration and the follow-on setting-aside proceedings have been evolving at a rapid pace, the existing empirical literature on the judicial review of investment awards could not reflect the most recent development of that mechanism. Thus, with a view to laying the groundwork for a fact-based appraisal of the judicial review mechanism, this section will conduct an empirical study of all the known setting-aside proceedings that ensued from investment arbitration cases. All the data presented here was primarily derived from the Investment Dispute Settlement Navigator (the Navigator) operated by UNCTAD and complemented by the Investment Arbitration Reporter (the IA Reporter), a specialized news and analysis service tracking investment arbitration, as of June 30, 2020.

This section aims to shed empirical light on the mechanism of the judicial review of investment awards by exploring the answers to the following questions: (1) how often do parties to non-ICSID arbitration submit investment awards to domestic courts *loci arbitri* for judicial review? (2) which legal jurisdictions have often been involved in the practice of the judicial review of investment awards in the sense that their domestic courts were the review courts and their arbitration legislation was the applicable law? (3) is there symmetry in the number of applications for the setting-aside of investment awards made by the investor party and the state party? (4) how often is more than one court instance involved in the setting-aside proceedings with respect to investment awards? (5) what are the outcomes of those challenges against investment awards entertained by domestic courts at the seat of arbitration?

[255] Chiara Giorgetti, "Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration", Santa Clara Journal of International Law, Vol. 12, No. 1 (2014), p. 275 (arguing that empirical research can provide benefits for the understanding of investment arbitration and offer guidance to its reform).

[256] Faure & Ma, *supra* note 10, at 25-49 (providing an overview of the empirical studies of a host of topics in relation to investment arbitration ranging from arbitration filing to public interest issues).

Table 5 Investment Arbitrations That Have Triggered the Judicial Review of Awards[257]

No.	Case Reference[258]	Year[259]	Jurisdiction[260]	Claimant[261]	Award/Decision[262]	Outcome[263]	Appealed[264]
1	Saar Papier v. Poland (II)	1996	Switzerland	Poland	Interim Award	Upheld	No
				Saar Papier	Final Award	Upheld	No
2	Sedelmayer v. Russia	1996	Sweden	Russia	Final Award	Upheld	Yes
3	Metalclad v. Mexico	1997	Canada	Mexico	Final Award	Partially Set Aside	No
4	Loewen v. USA	1998	The US	Raymond L. Loewen	Final Award	Upheld	No
5	Myers v. Canada	1998	Canada	Canada	Arbitration Awards	Upheld	No
6	Feldman v. Mexico	1999	Canada	Mexico	Final Award	Upheld	Yes
7	Swembalt v. Latvia	1999	Denmark	Latvia	Final Award	Upheld	No
8	CME v. Czech Republic	2000	Sweden	Czech	Partial Award	Upheld	No
9	Saluka v. Czech Republic	2001	Switzerland	Czech	Partial Award	Upheld	No
10	Canfor v. USA	2002	The US	Tembec	Procedural Order & Costs Award	Upheld	No
11	France Telecom v. Lebanon	2002	Switzerland	Lebanon	Final Award	Upheld	No

[257] This Table provides an inventory of investment arbitration cases out of which arbitral awards or decisions have been subject to the judicial review by domestic courts at the seat of arbitration as of June 30, 2020. The data shown herein is mainly derived from the Navigator. Given that this single database suffers from a number of drawbacks, such as an apparent lack of details and a rather slow process of updating, the making of this Table also benefits from the timely reports regularly updated by the Investment Arbitration Reporter.
[258] "Case Reference" is informed by the original investment arbitration proceedings instead of the following setting-aside proceedings before domestic courts at the seat of arbitration for the sake of convenience. These references conform to the abbreviations of the related investment arbitration cases as maintained by the Navigator.
[259] "Year" refers to the year of initiation of the original arbitral proceedings rather than that of the following setting-aside proceedings.
[260] "Jurisdiction" refers to a state or other area in which domestic courts deal with challenges against arbitral awards/decisions arising out of investment arbitration proceedings in accordance with applicable national laws, notably national arbitration legislation.
[261] "Claimant" refers to a party to investment arbitration which initiates a challenge proceeding against an investment arbitral award/decision before the domestic court at the seat of arbitration. In case that the setting-aside proceedings involve more one than court instance, it refers to the claimant of the first-instance proceeding.
[262] Both arbitral awards and procedural orders, partial awards and final awards, awards on jurisdiction and awards on merits could potentially be subject to judicial review by domestic courts at the seat of arbitration.
[263] "Outcome" refers to the decision made by domestic courts at the seat of arbitration with regard to whether an arbitral award/decision should be upheld, partially set aside or entirely set aside. In case of the involvement of system of appeals, "outcome" refers to the decision rendered out of the last-instance or the latest proceeding.
[264] This item intends to indicate whether the setting-aside proceedings involve more than one court instance.

12	Nagel v. Czech Republic	2002	Sweden	Nagel	Final Award	Upheld	No
13	Occidental v. Ecuador (I)	2002	England and Wales	Ecuador	Final Award	Upheld	Yes
14	Thunderbird v. Mexico	2002	The US	Thunderbird	Final Award	Upheld	No
15	AWG v. Argentina	2003	The US	Argentina	Final Award	Upheld	Yes
16	BG v. Argentina	2003	The US	Argentina	Final Award	Upheld	Yes
17	Eureko v. Poland	2003	Belgium	Poland	Partial Award	Upheld	No
18	National Grid v. Argentina	2003	The US	Argentina	Arbitration Award	Upheld	Yes
19	Petrobart v. Kyrgyz Republic	2003	Sweden	Kyrgyz Republic	Arbitration Award	Upheld	No
20	Tembec v. USA	2004	The US	Tembec	Procedural Order & Costs Award	Upheld	No
21	Terminal Forest v. USA	2004	The US	Tembec	Procedural Order & Costs Award	Upheld	No
22	Bayview v. Mexico	2005	Canada	Bayview and Others	Final Award	Upheld	No
23	Binder v. Czech Republic	2005	Czech	Czech	Award on Jurisdiction	Discontinued	Yes
24	Cargill v. Mexico	2005	Canada	Mexico	Final Award	Upheld	Yes
25	EMV v. Czech Republic	2005	England and Wales	Czech	Award on Jurisdiction	Upheld	No
26	Hulley Enterprises v. Russia	2005	The Netherlands	Russia	Arbitration Awards	Pending	Yes
27	Pren Nreka v. Czech Republic	2005	France	Czech	Final Award	Upheld	No
28	RosInvest v. Russia	2005	Sweden	Russia	Award on Jurisdiction	Entirely Set Aside	No
					Final Award	Partially Set Aside	No
29	Veteran Petroleum v. Russia	2005	The Netherlands	Russia	Arbitration Awards	Pending	Yes
30	Walter Bau v. Thailand	2005	Switzerland	Thailand	Final Award	Upheld	No
31	Yukos Universal v. Russia	2005	The Netherlands	Russia	Arbitration Awards	Pending	Yes

32	Chevron and TexPet v. Ecuador (I)	2006	The Netherlands	Ecuador	Arbitration Awards	Upheld	Yes
33	Adria Beteiligungs v. Croatia	2007	The Netherlands	Adria Beteiligungs	Final Award	Upheld	No
34	Kaliningrad v. Lithuania	2007	France	Kaliningrad	Final Award	Upheld	No
35	Mobil Investments v. Canada (I)	2007	Canada	Canada	Final Award	Upheld	No
36	Renta 4 S.V.S.A and others v. Russia	2007	Sweden	Russia	Final Award	Unclear	Unclear
37	Achmea v. Slovakia (I)	2008	Germany	Slovakia	Award on Jurisdiction, Admissibility and Suspension	Upheld	Yes
					Final Award	Entirely Set Aside	Yes
38	Clayton/Bilcon v. Canada	2008	Canada	Canada	Award on Jurisdiction and Liability	Upheld	No
				Unclear	Award on Damages	Unclear	Unclear
39	Tatneft v. Ukraine	2008	France	Ukraine	Partial Award on Jurisdiction & Final Award	Upheld	No
40	Chevron and TexPet v/ Ecuador (II)	2009	The Netherlands	Ecuador	Interim Awards & First Partial Award	Upheld	Yes
41	EDF v. Hungary	2009	Switzerland	Hungary	Final Award	Upheld	No
42	Gold Reserve v. Venezuela	2009	France	Venezuela	Final Award	Upheld	No
43	Beijing Shougang and Others v. Mongolia	2010	The US	Beijing Shougang and Others	Final Award	Pending	Yes
44	Energoalians v. Moldova	2010	France	Moldova	Final Award	Pending	Yes
45	Stati and Others v. Kazakhstan	2010	Sweden	Kazakhstan	Final Award	Upheld	No
46	Al-Kharafi v. Libya and others	2011	Egypt	Libya	Final Award	Entirely Set Aside	Yes

47	Belokon v. Kyrgyzstan	2011	France	Kyrgyzstan	Final Award	Entirely Set Aside	No
48	Crystallex v. Venezuela	2011	The US	Venezuela	Final Award	Upheld	No
49	Ghenia v. Libya	2011	France	Ghenia	Procedural Decision	Upheld	No
50	Mesa Power v. Canada	2011	The US	Mesa Power	Final Award	Upheld	No
51	Oxus Gold v. Uzbekistan	2011	France	Oxus Gold	Final Award	Upheld	No
52	Ryan and Others v. Poland	2011	France	Ryan and Others	Final Award	Upheld	No
53	Devas v. India	2012	The Netherlands	India	Award on Jurisdiction and Merits	Upheld	No
54	García Armas and García Gruber v. Venezuela	2012	France	Venezuela	Decision on Jurisdiction	Entirely Set Aside	Yes
					Final Award	Pending	Unclear
55	Progas Energy v. Pakistan	2012	England and Wales	Progas Energy	Final Award	Pending	Unclear
56	Sanum Investments v. Laos	2012	Singapore	Laos	Award on Jurisdiction	Upheld	Yes
57	Swissbourgh and Others v. Lesotho	2012	Singapore	Lesotho	Partial Award on Jurisdiction and the Merits	Entirely Set Aside	Yes
58	Beck v. Kyrgyzstan	2013	Russia	Kyrgyz Republic	Final Award	Entirely Set Aside	Yes
59	Berkowitz v. Costa Rica	2013	The US	Costa Rica	Interim Award	Upheld	No
60	De Sutter and Others v. Madagascar (I)	2013	France	Madagascar	Final Award	Entirely Set Aside	Yes
61	Deutsche Telekom v. India	2013	Switzerland	India	Interim Award	Upheld	No
62	Natland and Others v. Czech Republic	2013	Switzerland	Czech Republic	Partial Award	Pending	No
63	OKKV v. Kyrgyzstan	2013	Russia	Kyrgyz Republic	Final Award	Entirely Set Aside	Yes
64	RECOFI v. Vietnam	2013	Switzerland	RECOFI	Final Award	Upheld	No
65	Stans Energy v. Kyrgyzstan (I)	2013	Russia	Kyrgyz Republic	Final Award	Entirely Set Aside	Yes

66	Yukos Capital v. Russia	2013	Switzerland	Russia	Interim Award	Upheld	No
67	Ballantine v. Dominican Republic	2014	The US	Ballantine	Final Award	Pending	Unclear
68	Griffin v. Poland	2014	England and Wales	Griffin	Interim Award	Partially Set Aside	No
69	Horthel and Others v. Poland	2014	Switzerland	Poland	Final Award	Upheld	No
70	Luxtona v. Russia	2014	Canada	Russia	Interim Award	Pending	Unclear
71	PL Holdings v. Poland	2014	Sweden	Poland	Final Award	Pending	Yes
72	Uzan v. Turkey	2014	Sweden	Uzan	Final Award	Upheld	No
73	CEF Energia v. Italy	2015	Sweden	Italy	Final Award	Pending	Unclear
74	Dayyani v. Korea	2015	England and Wales	South Korea	Final Award	Upheld	Unclear
75	Everest and Others v. Russia	2015	The Netherlands	Russia	Final Award	Pending	Unclear
76	Foresight and Others v. Spain	2015	Sweden	Spain	Final Award	Pending	Unclear
77	Greentech and NovEngeria v. Italy	2015	Sweden	Italy	Final Award	Pending	Unclear
78	JKX Oil & Gas and Poltava v. Ukraine	2015	England and Wales	Ukraine	Final Award	Upheld	No
79	KCI v. Gabon	2015	France	KCI	Final Award	Upheld	No
80	MAESSA and SEMI v. Ecuador	2015	Unclear	Ecuador	Award on Jurisdiction	Pending	Unclear
81	NovEnergia v. Spain	2015	Sweden	Spain	Final Award	Pending	Unclear
82	Stabil and Others v. Russia	2015	Switzerland	Russia	Award on Jurisdiction Final Award	Upheld	No
83	Stans Energy and Kutisay Mining v. Kyrgyzstan (II)	2015	England and Wales	Kyrgyz Republic	Award on Jurisdictional Objection	Upheld	No
84	Ukrnafta v. Russia	2015	Switzerland	Russia	Award on Jurisdiction Final Award	Upheld	No

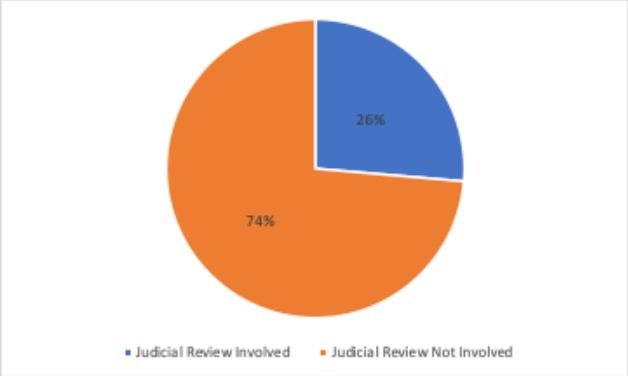
85	Cengiz v. Libya	2016	France	Libya	Final Award	Pending	Unclear
86	Nurol v. Libya	2016	France	Libya	Decision on Jurisdiction	Pending	Unclear
87	Nissan v. India	2016	Singapore	India	Decision on Jurisdiction	Pending	Unclear

6.4.1 How Often Do Arbitration Parties Challenge Investment Awards?

According to Table 5 as shown above, the judicial review of investment awards, as a post-award remedy for parties to non-ICSID arbitration, is not an insignificant practice. There are at least 87 non-ICSID arbitration cases so far, according to the Navigator and the IA Reporter, that have been followed by judicial proceedings where arbitral awards or decisions were referred to domestic courts *loci arbitri* for review by arbitration parties. That numerical value might not seem so impressive particularly when it is put against the overall amount of investment arbitration cases, which, as indicated by the Navigator, stands at 1, 023 as of June 2020.[265] However, more than half of the total investment arbitrations, to be precise, 540 of them, were conducted pursuant to the ICSID Arbitration Rules,[266] which leave no room for the judicial review of investment awards.[267] In addition, among the residual 483 non-ICSID arbitrations, 165 of them are still pending according to the Navigator.[268] While 12 of those unsettled arbitration cases have already triggered setting-aside proceedings before domestic courts *loci arbitri*, whether the remaining 153 of them will entail the judicial review of investment awards is uncertain at this stage.[269] Thus, when the frequency of the activation of the judicial review mechanism is to be measured correctly, those 153 arbitration cases should be excluded from the total sample since it is too early to say whether arbitration parties will challenge arbitral outcomes or not. Therefore, of the 330 non-ICSID arbitration cases comprising all the concluded cases and some pending cases with the involvement of challenge proceedings, arbitration parties activated the judicial review mechanism before domestic courts *loci arbitri* in at least 87 instances. In other words, as Figure 17 shows, empirically speaking, more than 26 percent of non-ICSID arbitrations have been followed by the setting-aside proceedings initiated by arbitration parties at the place of arbitration. Although the majority of non-ICSID arbitration cases have not triggered the judicial review of investment awards, we should factor in that, in some instances, such as when a settlement was achieved, arbitration parties would have no need to challenge investment awards at all. Therefore, it is safe to say that in those non-ICSID arbitration cases where arbitral tribunals made substantial decisions which set apart the winning party and the losing party, the losing party arguably not infrequently refers the unfavorable outcome to domestic courts *loci arbitri* in an attempt to take a second bite at the apple.

[265] UNCTAD, "Investment Dispute Settlement Navigator", https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited on May 20, 2022).
[266] *Ibid*.
[267] Markus Burgstaller and Charles B. Rosenberg, "Challenging International Arbitral Awards: To ICSID or not to ICSID", Arbitration International, Vol. 27, No. 1 (2011), p. 93 (arguing that the ICSID Convention has a self-contained procedure for the annulment of an investment award and that ICSID awards are not subject to challenges under local law).
[268] UNCTAD, *supra* note 265.
[269] *Ibid*.

Figure 16 The Ratio of Non-ICSID Arbitrations Followed by Judicial Review



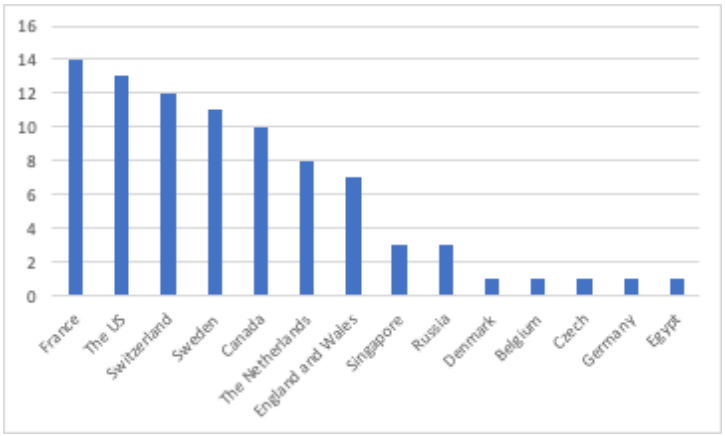
6.4.2 Forum States Involved in the Judicial Review of Investment Awards

Insofar as the information is available, there are at least 14 jurisdictions in which domestic courts have exerted judicial control over arbitral awards in relation to investment arbitration, including Belgium, Canada, Czech, Denmark, Egypt, England and Wales, France, Germany, Russia, Singapore, Sweden, Switzerland, the Netherlands, and the US. Those jurisdictions are mainly from the continents of North America and Western Europe, corresponding to the dominance of developed countries in the international arbitration industry and to their sheer popularity among disputing parties (in this context foreign investors and host states) and arbitrators as the seat of arbitration.[270] Figure 18 suggests that France, the US, Switzerland, Sweden, Canada, the Netherlands, and England and Wales are legal jurisdictions where domestic courts were most frequently involved in the practice of the judicial review of investment awards. One can also safely infer that most of those selected jurisdictions feature modern and effective arbitration laws, an independent and efficient judiciary, and a good track record of enforcing agreement to arbitrate and arbitral awards, thus satisfying the benchmarks of the Chartered Institute of Arbitrators (the CIArb) London Centenary Principles for an effective and efficient seat in international arbitration.[271] It can also be drawn from Table 5 that, in most cases, parties to non-ICSID arbitration or the arbitral tribunals established tend to avoid choosing either the host state or the home state of the foreign investor as the seat of arbitration in order to ensure the neutrality of arbitral proceedings. That to some extent ensures that the domestic courts of the host state or the home state of the foreign investors would not be entrusted with the task of reviewing an arbitral award for or against the interest of their states or nationals. There are exceptions, though. For instance, in *Myers v. Canada*, the arbitration was seated within the territory of Canada even though the respondent was indeed the government of Canada. Thus, the judiciary of Canada was tasked with reviewing the three investment awards rendered by the Tribunal in that case. In addition, most of the judicial review proceedings unfolded before the

[270] Gary G. Born, "International Arbitration: Law and Practice (Second Edition)", Kluwer Law International (2015), p. 111 (arguing that, in practice, the seat of arbitration is almost always specified by arbitration parties in their arbitration agreement or by arbitrators or arbitral institutions in the absence of an agreement between the parties for that purpose).
[271] The CIArb, "Introduction CIArb London Centenary Principles", http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4 (last visited on May 20, 2022).

domestic courts of the US and Canada were related to investment arbitration cases initiated under NAFTA which has been replaced by the USMCA Agreement.[272]

Figure 17 Jurisdictions Where Review Courts Are Located



6.4.3 Investor versus State: Which Party Made More Setting-Aside Applications?

The jurisprudence of the judicial review of investment awards shows that both the investor party and the state party to non-ICSID arbitration cases are likely to resort to domestic courts *loci arbitri* to challenge arbitral awards/decisions rendered against them. In other words, the judicial review mechanism in relation to investment arbitration can be activated by either the investor party or the state party. If two or more arbitral awards are issued by the tribunal in an investment arbitration and those awards are not homogeneous in the distribution of interests as in *Saar Papier v. Poland (II)*, the foreign investor and the host state could even respectively initiate setting-aside proceedings in relation to the specific award that consigns them to an adverse situation. Although both foreign investors and host states could make applications for the setting-aside of investment awards, empirical evidence has shown that most judicial review proceedings in relation to investment arbitration were initiated by host states. To be precise, as shown in Figure 19, the instances where the judicial review was commenced by the state party (67) are around 3 times as many as those by the investor party (21).

Assuming that the state party and the investor party are equally loath to swallow the bitterness of unfavorable arbitral outcomes, that many more applications for the setting-aside of investment awards were made by host states is a thought-provoking finding. At first sight, one possible explanation could be that states lost more often in investment arbitrations than foreign investors, otherwise they would not have had the need to challenge investment awards before domestic courts *loci arbitri*. This proposition resonates with the cliché in investment law that investment arbitration is inherently biased against host states.[273]

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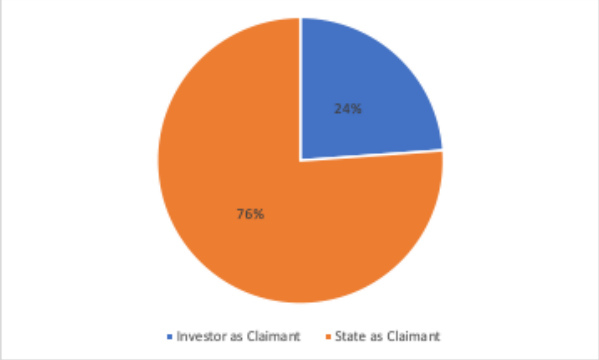
[272] Those NAFTA cases include *Metalclad v. Mexico*, *Loewen v. USA*, *Myers v. Canada*, *Feldman v. Mexico*, *Canfor v. USA*, *Thunderbird v. Mexico*, *Tembec v. USA*, *Terminal Forest v. USA*, *Bayview v. Mexico*, *Cargill v. Mexico*, *Mobil Investments v. Canada (I)*, *Clayton/Bilcon v. Canada*, and *Mesa Power v. Canada*.

[273] Charles N. Brower and Sadie Blanchard, "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States", Vol. 52, No. 3 (2014), Columbia Journal of Transnational Law, p. 709 (asserting that there is a school of thought holding that investment treaty protections and investment arbitration structurally favor foreign investors).

However, according to the Navigator, among those non-ICSID arbitrations in which the clear-cut victory of a party is discernible, a decision was made in favor of host states in 276 instances and of foreign investors in 237 instances.[274] Thus, that host states lost more often in non-ICSID arbitrations does not seem to be a reasonable explanation.

However, the effects of the setting-aside of investment awards may be held to account for the discrepancy in the proportions of challenge proceedings in relation to investment awards initiated by host states and foreign investors. Once the application for the setting-aside of an investment award is granted, the award would be deprived of all legal purposes, at least within the forum state.[275] However, the underlying dispute would remain unresolved, and there would be no *res judicata* effect with regard to the merits of an annulled award.[276] Thus, for the state party which succeeds in setting aside an unfavorable investment award, the consequential benefit is immediate and definite, such as denying the effects of a positive jurisdictional ruling or obviating the need to pay all of or part of the amount of damages accorded to the investor by the tribunal. On the contrary, even if an investor manages to set aside an unfavorable investment award, the claims of the investor via arbitration equally cannot be satisfied because domestic courts *loci arbitri* in all likelihood would not revise the award on their own.[277] The benefit that the investor can acquire is that the dispute might be remitted to the original investment tribunal or the investor would get another opportunity to launch a *de novo* arbitral proceeding against the host state,[278] yet still facing uncertain outcomes.

Figure 18 A Breakdown of Judicial Review Cases by Claimant



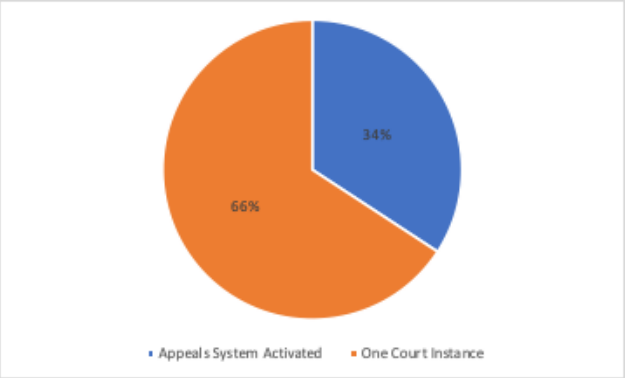
6.4.4 How Often Is More Than One Court Instance Involved?

Unlike the ICSID annulment procedure where the decision made by an *ad hoc* annulment committee is not subject to any review or appeal, a court judgement made in judicial review

[274] UNCTAD, *supra* note 265.
[275] Fernández-Armesto, *supra* note 52, at 142.
[276] *Ibid.*
[277] Barbara H. Steindl, "ICSID Annulment vs. Set Aside by State Courts – Compared to ICSID ad hoc Annulment Committees, Is It the State Courts that are Now More Hesitant to Set Aside Awards?", Yearbook on International Arbitration, Vol. 4 (2015), p. 201 (arguing that domestic courts sitting on set-aside will not "substitute their own decision for the successfully challenged award").
[278] Piero Bernardini, "ICSID versus Non-ICSID Investment Treaty Arbitration", https://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf (last visited on May 20, 2022), pp. 34-35 (revealing that, under different national arbitration legal orders, the effects of the setting-aside of investment awards could be different).

proceedings either upholding or setting aside an investment award might be appealed to a higher court in a number of jurisdictions.[279] As shown in Figure 20, insofar as the information is available, in a sizable minority of judicial review proceedings in relation to investment arbitration (34% or 26 instances), the judgment made by a lower court was later appealed to a higher court within the forum states. In a majority of those judicial review proceedings (66% or 50 instances), the appeals system common to national judiciaries was not activated by disputing parties. In fact, the reasons that the judgment of a lower court was not appealed to a higher court in some judicial review proceedings could be multi-dimensional, such as the deterrence of increased length and cost and a gloomy prospect of having the trial judgment reversed. In addition, sometimes disputing parties involved in a judicial review proceeding in relation to investment arbitration choose not to appeal the judgment of a court merely for the fact that they are not granted the right to do so in a given jurisdiction. For instance, in Switzerland, any request to set aside investment awards must be filed with the Swiss Federal Supreme Court, thus effectively precluding disputing parties from appealing the judgments made by the Court.[280] It is also worth mentioning that, according to a previous study, although judicial review proceedings before domestic courts might involve more than one instance of court proceedings, these proceedings do not necessarily take more time than annulment proceedings in the context of ICSID arbitrations.[281]

Figure 19 The Proportion of Judicial Review Proceedings where the Appeals System Was Activated



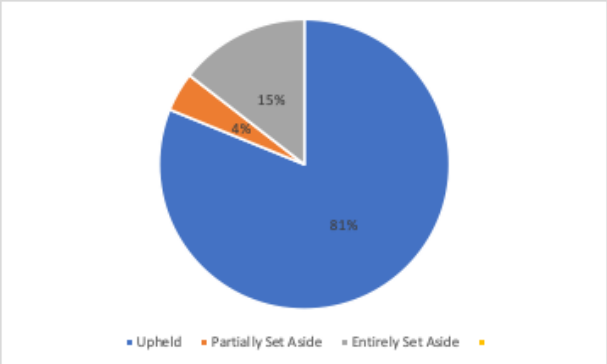
6.4.5 The Outcomes of Judicial Review Proceedings

When it comes to the outcomes of the applications for the setting-aside of investment awards, a notable pattern is that only a small portion of judicial review proceedings have seen the investment awards partially or entirely set aside by domestic courts *loci arbitri*. To be more precise, as shown in Figure 21, review courts upheld original investment awards in 81% of judicial review proceedings (56 instances); instead, 15% (10 instances) and 4% (3 instances) of those proceedings have led to the entire and partial setting-aside of investment awards respectively. It can be inferred that, in most of the time, domestic courts *loci arbitri* have refrained from taking an unduly intrusive approach and shown a high level of deference to the decision-making of investment tribunals in judicial review proceedings. Fernández-

[279] Verhoosel, *supra* note 231, at 145.
[280] Scherer, *supra* note 98, at 19-20.
[281] Verhoosel, *supra* note 231, at 145 (identifying in the year of 2008 that "the ICSID annulment review process still took on average nearly five months longer than non-ICSID setting aside proceedings").

Armesto put forward three possible explanations to account for the high level of deference: first, arbitrators in charge of investment arbitrations are usually renowned and respected experts selected by disputing parties; second, investment disputes are complicated and do not fall into the jurisdiction of review courts; third, those courts recognize that the disputing parties agreed to submit their disputes for arbitration and stood ready to accept the decisions made by arbitral tribunals.[282] Therefore, it is safe to say that parties to non-ICSID arbitration, both foreign investors and host states, are faced with formidable challenges in vacating investment awards before review courts.

Figure 20 The Outcomes of Judicial Review Proceedings



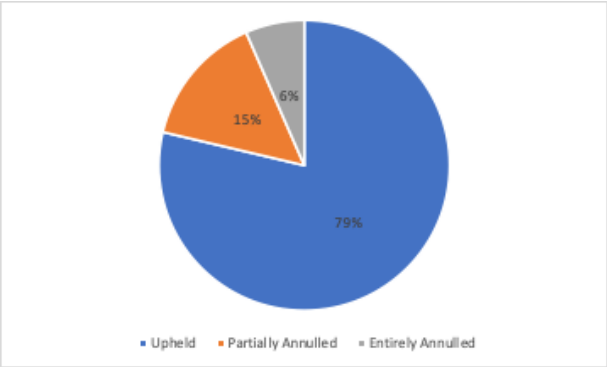
When the success rates of the investor party and the state party in applying for the *vacatur* of investment awards are viewed separately, an asymmetry is rather conspicuous in the sense that all but one setting-aside applications initiated by foreign investors were rejected by review courts.[283] All the other court decisions to entirely or partially set aside investment awards were rendered out of the judicial review proceedings initiated by the state party. The underlying reasons for the notable divergence between the success rates of the two sides are difficult to gauge. One possible explanation could be that, given that arbitral tribunals have less incentive to wrongly deny their jurisdiction over investment disputes than to wrongly claim their jurisdiction, the threshold to have negative jurisdictional rulings reversed through setting-aside applications could be rather high. In any case, it would be imprudent and insufficient to conclude that domestic courts *loci arbitri* are biased against foreign investors in reviewing the awards made by investment tribunals merely on this point.

With respect to the court decisions to entirely or partially set aside investment awards, it is noted that France and Russia have each entirely set aside three investment awards. The fact that France is one of the jurisdictions that set aside the most investment awards is somewhat surprising given that France has for long been viewed as one of the most arbitration-friendly places in the world. However, recalling that French courts have handled the most applications for the setting-aside of investment awards so far, three instances of *vacatur* decisions do not seem to be intolerably out of proportion. Russia, as a jurisdiction less known for its friendliness towards arbitration, has gone so far to set aside all the three investment awards

[282] Fernández-Armesto, *supra* note 52, at 146.
[283] The only exception took place in the judicial review proceeding in relation to *Griffin v. Poland* where the interim awards was partially set aside by an English court at the request of Griffin.

submitted to its courts for judicial review. Nevertheless, concluding thereby that Russian courts show little deference to the decisions of investment tribunals and demonstrate a burning inclination to vacate investment awards risks untenable generalization. For one thing, since only three applications for the setting-aside of investment awards were filed with Russian courts, the sample size is arguably too small to reach any conclusion. For another thing, the three underlying investment arbitrations for the setting-aside applications were closely related, effectively reducing the oddity of making three entire setting-aside decisions. In the meantime, the US and Switzerland stand out as two jurisdictions that have hitherto issued no (final) judgments to entirely or partially set aside investment awards, though both countries have received a good number of applications for the setting-aside of such awards due to their popularity as places of non-ICSID arbitration.

Figure 21 The Outcomes of ICSID Annulment Proceedings



With the help of the updated data from more recent years, this empirical work improves previous studies by rectifying an obsolete judgment. Indeed, across the existing literature on the judicial review mechanism with respect to investment arbitration, a widespread argument is that ICSID awards are more likely to be annulled by *ad hoc* annulment committees than non-ICSID awards set aside by review courts.[284] However, with the sample size of both ICSID annulment proceedings and the judicial review proceedings in relation to non-ICSID arbitration increasing over the last several years, it becomes clear that applications for the annulment of ICSID awards are not necessarily easier to succeed than those for the setting-aside of non-ICSID awards. Figure 22 shows that, in 79% of all the annulment proceedings (48 instances), the *ad hoc* committees upheld the ICSID awards concerned. In addition, in 6% (4 instances) and 15% (9 instances) of those proceedings, the ICSID awards were entirely and partially annulled respectively. Measured against the setting-aside ratio of non-ICSID awards (19%), the annulment ratio of ICSID awards (21%) does not seem to be strikingly different. Therefore, generally speaking, the odds are rather heavily against the losing party of the underlying investment arbitration proceeding in its effort to strike down either ICSID or non-ICSID awards.

[284] Verhoosel, *supra* note 231, at 122 (arguing in 2008 that the annulment ration of ICSID awards was much higher than the setting-aside ratio of non-ICSID awards). Veijo Heiskanen and Laura Halonen, "Chapter 16: Post-Award Remedies", in Chiara Giorgetti, ed., "Litigating International Investment Disputes: A Practitioner's Guide", Brill (2014), p. 511 (arguing that challenges against ICSID awards are more likely to succeed than challenges against non-ICSID awards before domestic courts *loci arbitri*).

6.5 Dedicated Analysis of Several High-Profile Judicial Review Proceedings

The analysis above (in Sections 6.3 and 6.4) has shed light on the mechanism of the judicial review of investment awards by summarizing the review grounds spelt out in arbitration legislation and outlining the practice of setting-aside proceedings via empirical evidence. However, that analysis on its own is not adequate to navigate a comprehensive and reliable assessment of the judicial review mechanism since some nuanced details have not been effectively illuminated.[285] The gap in the knowledge about the judicial review mechanism in turn invites a closer look at the subtleties of setting-aside proceedings before domestic courts *loci arbitri*. In other words, a dedicated case law study could improve our understanding of the judicial review mechanism by complementing the doctrinal study in Section 6.3 and the empirical study in Section 6.4. Although the applications for the setting-aside of investment awards have increased significantly in the last decade to around 90, this section only focuses on 4 high-profile judicial review proceedings triggered by the following non-ICSID arbitration cases: *Metalclad v. Mexico*, *BG v. Argentina*, the *Yukos* case, and *Sanum Investments v. Laos*. Those judicial review proceedings were selected not only because they have caused a sensation in the investment law scholarship but also because they revealed divergent opinions between review courts and investment tribunals and/or between courts of different instances within a given jurisdiction on certain procedural and/or substantive issues relating to investment awards. An in-depth analysis of those judicial review proceedings brings some added value by: (1) uncovering the standard of review adopted by domestic courts *loci arbitri* or, in other words, the extent to which those courts deferred to arbitral decision-making; (2) identifying the consistency/inconsistency in the application of review grounds to the specifics of underlying investment arbitrations by review courts (or courts of different instances); and (3) highlighting the grounds upon which review courts decided to vacate investment awards.

6.5.1 *Metalclad v. Mexico*[286]

6.5.1.1 The Arbitral Proceeding

The dispute between Metalclad, a US enterprise incorporated under the laws of Delaware, and Mexico arose out of the construction and operation by a corporation owned and controlled by Metalclad of a hazardous waste disposal landfill in Guadalcazar in the central Mexican state of San Luis Potosi. After securing assurances from the federal government that all the permits for the landfill were issued or would be forthcoming, the construction of the landfill was commenced in April 1994 and completed in March 1995. Between the commencement and completion of the landfill, the construction activities were requested by the Municipality to be halted. Demonstrations took place at the inauguration of the landfill, thus keeping the operation of the landfill at bay. In November 1995, Metalclad concluded an

[285] For instance, the analysis above cannot make known the grounds upon which domestic courts *loci arbitri* have (entirely or partially) set aside or attempted to do so in practice. It also cannot capture the different approaches that might be taken by courts of different instances within a given jurisdiction to applying the review grounds to the specifics of the underlying investment arbitration.

[286] For the sake of the convenience of identification, the designation of the judicial review proceeding initiated by Mexico reflects the abbreviation of the underlying investment arbitration proceeding between Metalclad and Mexico. The same below.

agreement with Mexican federal environmental agencies, setting forth the conditions under which the landfill would operate. However, the local municipality in December 1995 still issued a denial of construction permit and then moved to challenge the agreement between Metalclad and federal agencies and managed to secure an injunction preventing the operation of the landfill through May 1999. In 1997, Metalclad formally commenced arbitration against Mexico under Chapter Eleven of NAFTA pursuant to the ICSID Additional Facility Rules. While the arbitration was underway, the governor of the state issued an ecological decree for the protection of endangered cacti species, bringing even more uncertainty towards the operation of the landfill.[287] The award rendered on 30 August 2000 accorded damages to the investor, making itself the first of its kind to uphold an investment claim submitted to arbitration under Chapter Eleven of NAFTA.[288]

The Tribunal decided in favor of Metalclad basically on the basis of three key findings, respectively with respect to Mexico's breaches of obligations under Article 1105 (Minimum Standard of Treatment)[289] and Article 1110 (Expropriation and Compensation)[290] of NAFTA. First, the Tribunal contended that "the acts of the State and the Municipality – and therefore the acts of Mexico – fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party should accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment."[291] Second, the Tribunal was of the view that "these measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation."[292] Third, the Tribunal contended that there was no need

[287] Award of *Metalclad v. Mexico*, dated on Aug. 30, 2000, https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (last visited on Aug. 8, 2020), pp. 12-21. Chris Tollefson, "*Metalclad v. United Mexican States* Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process", Minnesota Journal of Global Trade, Vol. 11, No. 2 (2002), pp. 187-191.

[288] Alejandro A. Escobar, "Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1) Introductory Note", ICSID Review, Vol. 16, No. 1 (2001), p. 165.

[289] Article 1105 of NAFTA provides that: "1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)." Article 1105, the NAFTA.

[290] Article 1110 of NAFTA provides that: "1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6. 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. 3. Compensation shall be paid without delay and be fully realizable. ……" Article 1110, the NAFTA.

[291] See *supra* note 287, para. 100, p. 27.

[292] *Ibid*, para. 107, p. 29. The Tribunal also defined expropriation under NAFTA as including "not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect

for it to decide or consider "the motivation or intent of the adoption of the Ecological Decree", and that, instead, "a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110." However, "the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation."[293]

6.5.1.2 The Challenge Proceeding

Upon receipt of the unfavorable investment award, Mexico proceeded to apply for the setting-aside of the award in October 2000. Given that Vancouver, British Columbia was designated as the seat of arbitration, the application was filed with the Supreme Court of that province.[294] Mexico based its challenge against the investment award on two principal grounds, i.e. the Tribunal had exceeded its jurisdiction and it had erred in its interpretation and application of Articles 1105 and 1110.[295] Justice David Tysoe held that the review of the investment award should be governed by the International Commercial Arbitration Act (the ICAA), which was based on the Model Law, instead of the Commercial Arbitration Act, because "the primary relationship between Metalclad and Mexico was one of investing."[296] The Judge rejected the proposal by Mexico and Canada, as the intervenor in this case, that the standard of review under the ICAA should be determined by "pragmatic and functional approach."[297]

With respect to the Tribunal's finding of Mexico's breach of Article 1105, the Judge considered that the Tribunal had not simply interpreted the wording of Article 1105 but wrongly stated the applicable law to include transparency obligations, which were matters addressed under Chapter Eighteen of NAFTA, and based its decision on the concept of transparency. The Tribunal was held to "decide a matter beyond the scope of the submission to arbitration" in connection with its finding of a breach of Article 1105.[298] As for the Tribunal's finding that Mexico's actions prior to the Ecological Decree were tantamount to expropriation, the Judge also contended that the Tribunal had made a decision beyond the scope of the submission to arbitration. In the judge's words, "the Tribunal's analysis of Article 1105 infected its analysis of Article 1110" and "the Tribunal based its conclusion that there had been a measure tantamount to expropriation/indirect expropriation, at least in part, on the concept of transparency."[299] However, the Judge upheld the Tribunal's finding that the implementation of the Ecological Decree did constitute expropriation, because this finding "stood on its own and was not based on a lack of transparency or on the Tribunal's finding of

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of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

[293] *Ibid*, para. 111, p. 30.

[294] *The United Mexican States v. Metalclad Corporation*, Decision of the Supreme Court of British Columbia on the challenge by the Petitioner, The United Mexican States, of the Arbitration Award issued on 30 August 2000, 2001 BCSC 664 dated 2 May 2001, https://www.italaw.com/sites/default/files/case-documents/ita0512.pdf (last visited on May 20, 2022), p. 3.

[295] Tollefson, *supra* note 287, at 196.

[296] See *supra* note 294, at 9-11.

[297] *Ibid*, at 11-13.

[298] *Ibid*, at 13-17.

[299] *Ibid*, at 17-18.

a breach of Article 1105." The Tribunal actually "identified the issuance of the Decree as a further ground for a finding of expropriation."[300]

Mexico also attempted to set aside the award on the further grounds that there were two categories of improper acts on the part of Metalclad which rendered the award in conflict with public policy and that the Tribunal failed to address all questions but failed.[301] All in all, the Judge declined to set aside the investment award in its entirety,[302] but only vacated the Tribunal's first two findings of breaches of NAFTA, respectively in relation to Articles 1105 and 1110. Accordingly, the Judge set aside the investment award to the extent that it included interest from 5 December 1995 to 20 September 1997 (plus the compounding effects thereafter).[303] But the Judge also cautioned that in making this decision he "should not be taken as holding that there was no breach of Article 1105 and no breach of Article 1110 until the issuance of the Ecological Decree."[304] Mexico filed a notice of appeal to British Columbia Court of Appeal, but the parties ultimately reached a preliminary agreement to settle the case.[305]

6.5.2 *BG v. Argentina*

6.5.2.1 The Arbitral Proceeding

The dispute between BG Group Plc., a British investor, and Argentina is one of a raft of disputes of similar kind in the wake of the enactment of the Emergency Law in January 2002 when the Republic was enveloped by a grievous economic crisis. In the 1990s, Argentina invited foreign investors to participate in the privatization of a variety of state assets. It was against this background that BG invested in MetroGas which was entitled to offer exclusive electricity distribution within Buenos Aires for 35 years and calculate tariffs in US dollars and express them in pesos. In the midst of the economic crisis, certain regulatory measures under the Emergency Law unpegged the Argentinian peso from the US dollar allowing the peso to devalue and converted dollar-denominated tariffs to peso-denominated tariffs at a rate of one peso to one dollar. In consequence, BG's interests embodied by its investment in Argentinian electricity industry has to a large extent shrunk. After the negotiations with the Republic proved to be futile, BG commenced arbitral proceedings against the Argentinian

[300] The Judge contended that: "It is true that the Tribunal stated that it did not attach controlling importance to the Ecological Decree and that a finding of expropriation on the basis of the Decree was not strictly necessary or essential to its finding of a violation of Article 1110. However, the Tribunal made these statements because it also made a finding of expropriation on the basis of the events preceding the announcement of the Decree. It now becomes potentially important because I have held that the Tribunal decided a matter beyond the scope of the submission to arbitration in finding that the events preceding the announcement of the Decree amounted to an expropriation." *Ibid*, at 18-23.
[301] *Ibid*, at 23-29.
[302] The Judge made it clear that "in order to have this Court set aside the Award in its entirety, Mexico was required to successfully establish that all three of the Tribunal's findings of breaches of Articles 1105 and 1110 of the NAFTA involved decisions beyond the scope of the submission to arbitration or that the Award should be set aside in view of Metalclad's allegedly improper acts or the Tribunal's alleged failure to answer all questions submitted to it". 2001 BCSC 664 dated 2 May 2001, p. 29.
[303] 2001 BCSC 664 dated 2 May 2001, pp. 29-30.
[304] *Ibid*, at 29.
[305] William S. Dodge, "International Decisions: Metalclad Corp. v. Mexico and Mexico v. Metalclad Corp", American Journal of International Law, Vol. 95 (2001), p. 915.

government under the UK-Argentina BIT in April 2003, alleging among other things that Argentina had failed to discharge its obligation to provide fair and equitable treatment.[306] The arbitral proceeding was governed by the UNCITRAL Arbitration Rules, and BG and Argentina agreed to Washington, D.C. as the seat of arbitration.

During the arbitration process, Argentina argued that, in accordance with Article 8 of the underlying BIT,[307] BG's claims should be declared inadmissible because of its failure to bring the grievance to Argentine courts for 18 months.[308] BG argued among other things that the requirement of local litigation was senseless because there was no chance that a decision could ever be rendered within the eighteen-month period in a case of this nature.[309] The Tribunal agreed with Argentina that, as a matter of treaty law, investors covered by the BIT must commence litigation in the host state's courts for eighteen months before the claims could be submitted to arbitration.[310] However, as a matter of treaty interpretation, the Tribunal considered that "Article 8(2)(a)(i) cannot be interpreted as an absolute impediment to arbitration." The Tribunal was of the view that "where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention on the Law of Treaties (VCLT), allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication."[311] This decision was based on the Tribunal's factual findings that Argentina "provided for a stay of all suits brought by those whose rights were allegedly affected by the emergency measures adopted by the government" and excluded any licensee seeking judicial redress from the renegotiation process of its license.[312] The Tribunal noted that a serious problem would loom if Argentina was allowed at the same time to: "a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations; b) insist that Claimant go to domestic courts to challenge the very same measures; and c) exclude from the renegotiation

[306] *BG v. Argentina*, Final Award dated on 24 December 2007, para. 85, p. 29. For more details on the background of *BG v. Argentina*, see Laurence Shore, et al., "Cert Petition in the BG v Argentina Case: No Support from the US Solicitor General", http://hsfnotes.com/arbitration/2013/05/17/cert-petition-in-the-bg-v-argentina-case-no-support-from-the-us-solicitor-general/ (last visited on May 20, 2022); Jarrod Wong, "*BG Group v. Republic of Argentina*: A Supreme Misunderstanding of Investment Treaty Arbitration", Pepperdine Law Review, Vol. 43 (2016), pp. 550-551.

[307] Article 8(1) and (2) of the UK-Argentina BIT provide that: "(1)Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled should be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made. (2) The aforementioned disputes shall be submitted to international arbitration in the following cases: (a) if one of the Parties so requests, in any of the following circumstances: (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision; (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; (b) where the Contracting Party and the investor of the other Contracting Party have so agreed."

[308] See *supra* note 306, Final Award, para. 141, p. 48.

[309] *Ibid*, para. 142, p. 48.

[310] *Ibid*, para. 146, p. 50.

[311] *Ibid*, para. 147, p. 50.

[312] *Ibid*, paras. 149 & 154, pp. 50-52.

process any licensee that does bring its grievance to local courts."[313] The Tribunal thus rejected the claim by Argentina on this point and affirmed the admissibility of BG's claims.[314] A breach by Argentina of the obligation of the provision of fair and equitable treatment was then found by the Tribunal, and BG was accordingly accorded damages of around US$185 million.[315]

6.5.2.2 The Challenge Proceeding

(a) Columbia District Court

In the face of the failure in the arbitral proceeding, Argentina sought to vacate (or modify) the final award in accordance with the Federal Arbitration Act before the United States District Court for the District of Columbia. Argentina filed the petition on the grounds that, *inter alia*, the Tribunal exceeded its authority under the BIT (9 U.S.C. § 10(a)(4)) and the Tribunal acted "in manifest disregard of the law."[316] In support of its proposition that the Tribunal and the ICC Court exceeded their authority, Argentina proffered several arguments, including that "the arbitral panel improperly 'permit[ed] BG [Group] to arbitrate its claims' before seeking recourse in the Argentine courts."[317] The District Court at the beginning submitted that Argentina "must demonstrate that the 'arbitrator stray[ed] from interpretation and application of the agreement and effectively dispense[d] his own brand of industrial justice'" in order to seek the *vacatur* of the award under Section 10(a)(4).[318] The District Court believed that "the panel correctly turned to the text of Article 9(2)(a)(i) of the Investment Treaty and relevant international law sources in attempting to discern its jurisdiction to hear BG Group's claims, and it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable." Thus, it had no authority to "disturb the panel's conclusions" regarding the litigation condition under Section 10(a)(4) and the controlling case law.[319]

In terms of the question of whether the Tribunal acted in manifest disregard of the law, the District Court again refused to espouse Argentina's claim because the Tribunal indeed did not ignore the plain language of the investment treaty in resolving the jurisdictional matter and the argument of Argentina that "the arbitral panel 'misunderstood … and failed to correctly apply the ['state of necessity'] doctrine' is nothing more than a mere assertion of error, and

[313] *Ibid*, para. 156, p. 53.
[314] *Ibid*, para. 157, p. 53.
[315] *Ibid*, para. 444, p. 133.
[316] The other three grounds that Argentina relied upon to vacate or modify the final award included that there was "evident partiality or corruption" on the part of one of the arbitrators on the panel, and the Award was procured through "corruption, fraud, or undue means", and the Award is disproportionate, unfair, and irrational. *Argentina v. BG*, Memorandum Opinion, Civil Action No. 08-485 (RBW), United States District Court for the District of Columbia, 7 June 2010, https://www.italaw.com/sites/default/files/case-documents/ita0083.pdf (last visited on May 20, 2022), p. 14.
[317] Other arguments put forward by Argentina in this regard are as following: first, "Argentina contends that the ICC Court exceeded its authority by failing to disqualify Jan van den Berg from serving on the panel"; second, "Argentina contends that the arbitral panel acted outside the bounds of its authority by allowing BG Group to 'bring [] a derivative claim on behalf of MetroGAS'"; third, "Argentina argues that the arbitral panel wrongfully rejected 'the discounted cash flow method' in calculating the amount of the Award." *Ibid*, at 14-15.
[318] *Ibid*, at 15.
[319] *Ibid*, at 16-17.

not that the panel manifestly disregarded the law."[320] The District Court suggested that a mere error or misunderstanding with respect to the law cannot constitute manifest disregard of the law.[321] Those who seek the *vacatur* of an arbitral award under the "manifest disregard of the law" standard must demonstrate that (1) the arbitrators are aware of a governing legal principle yet refuse to apply it or ignore it altogether, and (2) the law ignored by the arbitrators is well-defined, explicit and clearly applicable to the case.[322] The District Court concluded that in this case it "does not sit like 'an appellate court does in reviewing the decisions of lower courts'", thus the application for the setting-aside and modification of the investment award by Argentina was denied.[323] After the denial of Argentina's motion to vacate the investment award, the District Court in a separate decision granted BG's motion to confirm the award pursuant to Section 203 of the FAA and the New York Convention.[324]

(b) Columbia Appeals Court

Argentina appealed the decision of the District Court to the United States Court of Appeals for the District of Columbia Circuit "on the principal ground that the arbitral panel exceeded its authority by ignoring the terms of the parties' agreement."[325] The Court of Appeals contended that the "gateway" question in this appeal is arbitrability, i.e. whether the UK and Argentina intend that a covered investor under the treaty could initiate arbitration without fulfilling the requirement of Article 8(1) of their BIT that recourse should initially be sought in a court of the contracting party where the investment was made. The Court of Appeals held that, according to the Supreme Court, the intent of the contracting parties is the key to deciding whether the answer to the question of arbitrability should be provided by a court or an arbitrator.[326] Since the treaty is silent on who decides arbitrability when the precondition to arbitration was disregarded, the Court of Appeals considered the question of arbitrability as an independent question of law for the court to decide. Thus, a conclusion was reached that the District Court "erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court."[327]

The Court of Appeals argued that "the usual 'emphatic federal policy in favor of arbitral dispute resolution'" could not be quoted in this context to override the intent of the contracting parties, namely the UK and Argentina, because the treaty provision at issue is

[320] *Ibid*, at 19.
[321] *Ibid*, at 18.
[322] *Ibid*, at 18-19.
[323] The District Court suggested that "to be sure, under a more searching, appellate-style review, the arguments presented by Argentina in its Petition could very well carry the day." *Ibid*, at 23.
[324] *Argentina v. BG*, Memorandum Opinion, Civil Action No. 08-485 (RBW), United States District Court for the District of Columbia, 21 January 2011, https://www.italaw.com/sites/default/files/case-documents/ita0084.pdf (last visited on May 20, 2022).
[325] *Argentina v. BG*, Opinion for the Court, No. 11-7021, United States Court of Appeals for the District of Columbia Circuit, 17 January 2012, https://www.italaw.com/sites/default/files/case-documents/ita0085.pdf (last visited on May 20, 2022), p. 2.
[326] *Ibid*, at 9.
[327] *Ibid*, at 13.

fairly clear and explicit.[328] Given that the contracting parties unambiguously provide that a covered investor must initially submit the dispute to the decision of a court in the contracting party where the investment was made, the Court of Appeals held the view that it "cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties."[329] It also submitted that "although the scope of judicial review of the substance of arbitral awards is exceedingly narrow, it is well settled that an arbitrator cannot ignore the intent of the contracting parties." The Court of Appeals considered that the arbitral award "ignored the terms of the treaty and shifted the risk that the Argentine courts might not resolve BG's claim within eighteen months", thus the investment award was "wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration". Accordingly, the Court of Appeals reversed the decisions by the District Court and vacated the investment award.[330]

(c) The US Supreme Court

However, the saga of the judicial review in relation to the investment award in *BG v. Argentina* did not come to an end with the decision of the Court of Appeals. BG filed a petition for certiorari, which was granted by the Supreme Court, despite a discouraging opinion from the US Solicitor General.[331] Although the majority of the Supreme Court came to an opposite decision against the Court of Appeals, the approach adopted by them to addressing the problem was actually the same as the Supreme Court summarized that the question before them was "who – court or arbitrator – bears primary responsibility for interpreting and applying Article 8's local court litigation provision."[332] In order to answer the question, the Supreme Court decided to take two steps by first treating the document (the BIT) before them "as if it were an ordinary contract between private parties" and then asking "whether the fact that the document in question is a treaty makes a critical difference."[333]

Writing for the majority,[334] Justice Breyer concluded that without an express instruction in the contract as to "the matter of who primarily is to decide 'threshold' questions about arbitration, courts determine the parties' intent with the help of presumptions."[335] The Supreme Court presumed, on the one hand, that "disputes about 'arbitrability'" (so-called substantive arbitrability questions) are intended by the parties to be decided by courts, on the other hand, that "disputes about the meaning and application of particular preconditions for the use of arbitration" (so-called procedural gateway matters) are to be decided by arbitrators instead.[336] The 7-2 majority considered the local litigation provision as of "the latter,

[328] *Ibid*, at 15-16.
[329] *Ibid*, at 16.
[330] *Ibid*, at 2.
[331] Laurence Shore, et al., "The US Supreme Court Decides BG V Argentina – Right Place, Wrong Road?", https://hsfnotes.com/arbitration/2014/03/14/the-us-supreme-court-decides-bg-v-argentina-right-place-wrong-road-2/ (last visited on May 20, 2022).
[332] *BG v. Argentina*, Opinion of the Court, No. 12-138, Supreme Court of the United States, 5 March 2014, https://www.italaw.com/sites/default/files/case-documents/italaw3115.pdf (last visited on May 20, 2022), p. 6.
[333] *Ibid*, at 6.
[334] The majority included Justices Breyer, Scalia, Thomas, Ginsburg, Alito, and Kagan.
[335] See *supra* note 332, at 7.
[336] Substantive arbitrability questions are supposed to include questions such as "whether the parties are bound by a given arbitration clause", or "whether an arbitration clause in a concededly binding contract applies to a

procedural variety", because, *inter alia*, "it determines when the contractual duty arises, not whether there is a contractual duty to arbitrate at all."[337] The majority then went on to argue that nowhere in the BIT shows that the intention of the parties is contrary to the Supreme Court's ordinary assumption.[338] Thus, the ordinary assumption applied and was not overcome, as the majority argued. Since it was up to the arbitrators to take responsibility for the interpretation and application of the local litigation provision, the majority contended that courts should accord considerable deference to their decision instead of reviewing it *de novo*.[339] After a brief discussion about the Tribunal's three key analytical elements of its determination with regard to the local litigation provision, the majority concluded that "the arbitrators' jurisdictional determinations are lawful" and reversed the judgment of the Court of Appeals.[340]

6.5.3 The Yukos Case

6.5.3.1 The Arbitral Proceeding

The Yukos case refers to the three parallel investment arbitration proceedings initiated in 2005 respectively by Hulley Enterprises, Yukos Universal, and Veteran Petroleum, all former shareholders of once the largest oil company in Russia - OAO Yukos Oil Company (Yukos), against the Russian Federation, with the arbitration seat located in The Hague, the Netherlands. Although each of the three claimants maintained their own claims in separate arbitration proceedings, the interim awards and the final awards issued by the Tribunal which dealt with the three arbitration proceedings were to a large extent identical. In a nutshell, the dispute between the claimants and Russia concerns the treatment accorded to Yukos by the Russian authorities, which allegedly breached Russia's obligations under the Energy Charter Treaty (ECT).[341]

Given that Russia signed the ECT on 17 December 1994 but failed to ratify the treaty since then, the provisional application of the ECT to Russia became a central yet controversial issue in the determination of the competence of the Tribunal.[342] Article 45 of the ECT that governs the provisional application of the treaty is a lengthy and complex provision, but the

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particular type of controversy." Procedural gateway matters are said to include, for example, "claims of 'waiver, delay, or a like defense to arbitrability'" and "the satisfaction of 'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitration'." *Ibid*, at 7-8.

[337] The other three reasons that led the majority to this conclusion are as followings: first, "neither does this language or other language in Article 8 give substantive weight to the local court's determinations on the matters at issue between the parties"; second, "the local litigation requirement is highly analogous to procedural provisions that both this Court and others have found are for arbitrators, not courts, primarily to interpret and to apply"; third, they could "find nothing in Article 8 or elsewhere in the Treaty that might overcome the ordinary assumption." *Ibid*, at 8-9.

[338] *Ibid*, at 13.

[339] *Ibid*, at 14.

[340] *Ibid*, at 17-19.

[341] Marek Jezewski, "The Arbitral Award of 18.7.2014 in the Veteran Petroleum v. Russia Case", Polish Review of International and European Law, Vol. 3, No. 1-2 (2014), p. 122.

[342] *Hulley Enterprises v. Russia*, PCA Case No. AA226, Interim Award on Jurisdiction and Admissibility (30 November 2009), https://www.italaw.com/sites/default/files/case-documents/ita0411.pdf (last visited on May 20, 2022), para. 244, p. 88.

most relevant part of the Article in the Yukos case was the first and second paragraphs.[343] Considering that Russia invoked Article 45(1) (the so-called "Limitation Clause") to challenge the competence of the Tribunal to consider the merits of the claims though the country made no declaration under Article 45(2), the Tribunal decided to center the interim awards on the issue of provisional application and to apply a strategy of three-step analysis to address the issue.[344]

First, the Tribunal argued that there is no indication in Article 45 that the limitation clause in the first paragraph is dependent on the declaration referred to in the second paragraph, leading to the conclusion that a declaration under Article 45(2) is not necessary for a signatory to claim the benefits under Article 45(1).[345] Second, the Tribunal could not "read into Article 45(1) of the ECT a notification requirement which the text does not disclose and which no recognized legal principle dictates", thus Russia was able to benefit from the limitation clause of Article 45(1) even without making any prior declaration or notification.[346] Third, the Tribunal came to the conclusion that "by signing the ECT, the Russian Federation agreed that the Treaty *as a whole* would be applied provisionally pending its entry into force unless *the principle* of provisional application itself were inconsistent 'with its constitution, laws or regulations' [emphasis in original]."[347] In other words, the Tribunal endorsed the idea that the limitation clause of Article 45(1) contains an "all-or-nothing" proposition instead of a "piecemeal" approach, meaning that either the entire treaty is applied provisionally or it is not applied provisionally at all.[348]

The Tribunal started its interpretation of Article 45(1) with the reading of the ordinary meaning of the terms used therein. In doing so, the Tribunal put most of its focus on the adjective "such" in the phrase "such provisional application" and concluded that the meaning of "such provisional application" is context-specific and should be interpreted as the provisional application of this treaty as a whole, not in part.[349] The Tribunal further asserted that it should not be presumed that the signatories intend to apply only part of the treaty provisionally unless there is an explicit expression in that provision.[350] It was also submitted that the alternative, namely Article 45(1) carries a test of compatibility of each and every provision of the treaty with Russia's internal legal regime for the purpose of provisional

[343] Article 45 (1) and (2) of the ECT provide that: "(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository. (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1). (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations."
[344] See *supra* note 342, paras. 247-248, pp. 89-90.
[345] *Ibid*, paras. 260-269, pp. 96-100.
[346] *Ibid*, paras. 282-288, pp. 104-106.
[347] *Ibid*, para. 301, pp. 110-111.
[348] *Ibid*, para. 311, p. 115.
[349] *Ibid*, paras. 304-308, pp. 112-113.
[350] *Ibid*, para. 311, p. 115.

application, would "run squarely against the object and purpose of the Treaty, and indeed against the grain of international law."[351]

The Tribunal continued to check whether the principle of provisional application *per se* is inconsistent with the Constitution, law or regulations of Russia and found that the principle is recognized in Russia with ease. Thus, the provisional application of the entirety of the treaty is valid for Russia.[352] This positive answer to the debate over the provisional application of the treaty to Russia allowed the Tribunal to assert its competence over the investment claims in the interim awards. In the awfully lengthy final awards dated on 18 July 2014, the Tribunal found that Russia had breached its obligations under Article 13(1) of the ECT and accorded the claimants unprecedentedly a considerable amount of compensation and other costs in relation to the arbitrations.[353]

6.5.3.2 The Challenge Proceeding

(a) The Hague District Court

As it is entitled to do so, Russia filed a motion to quash all the interim awards and final awards issued in relation to the Yukos case before the Hague District Court pursuant to the Dutch Code of Civil Procedure (the DCCP), making references to all the five grounds envisaged in Section 1065 subsection 1 to launch attacks against the awards. Notably, Russia alleged that, *inter alia*, "the Tribunal was not competent to take cognizance of and given [sic] an award on the defendant's claims."[354] The essence of the judgment by the District Court was focused on the analysis of the competence of the Tribunal in terms of the Limitation Clause and the compatibility of the arbitral provision of Article 26 of the ECT with Russian law. The District Court first and foremost stated that in contrast to the restrictive approach normally adopted in challenge proceedings against arbitral awards, it could not embrace the legitimacy of a restrictive assessment when a challenge is based on the grounds of lacking a valid agreement.[355]

The District Court summed up that the divergence between the claimant and the defendants boiled down to the question of whether the Limitation Clause is related to the principle of provisional application – in which case the provisional application of the ECT as a whole depends on the answer to the question whether the principle *per se* is reconcilable with national law, or it is related to specific provisions of the ECT – in which case the provisional application of the ECT is limited to those provisions not contrary to national law.[356] The District Court attached great significance to the ordinary meaning of the word "extent", with

[351] *Ibid*, para. 312, p. 115.
[352] *Ibid*, paras. 330-331, pp. 122-123.
[353] *Hulley Enterprises v. Russia*, PCA Case No. AA226, Final Award (18 July 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf (last visited on May 20, 2022), para. 1888, p. 578.
[354] *Russia v. Veteran Petroleum Limited*, *Russia v. Yukos Universal Limited*, *Russia v. Hulley Enterprises Limited*, Judgment of the Hague District Court, C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112, 20 April 2016, https://www.italaw.com/sites/default/files/case-documents/italaw7258.pdf (last visited on Aug. 10, 2020), para. 4.2, p. 32.
[355] Ibid, para. 5.4, p. 33.
[356] Ibid, para. 5.8, p. 35.

due consideration of the relevant provision of the Vienna Convention on the Law of Treaties (the VCLT), finding that the term "to the extent" in common parlance signifies a degree of application, scope or differentiation and considering that this finding is more indicative of the interpretation of the Limitation Clause put forward by Russia.[357]

The clear reference to not only the "constitution" and "laws" but also "regulations" in measuring irreconcilability also came to notice because the District Court was of the opinion that the fundamental nature of the provisional application of treaties implies the inconceivability of inserting a ban on the provisional application of treaties in delegated legislation.[358] In other words, if the signatories to the treaty had intended to link the compatibility test to the principle of provisional application, they would not have included "regulations" in the first place considering the rarity for a country to address such an issue outside the "constitution" and "laws".

The District Court also negated the Tribunal's way of interpreting the Limitation Clause by asserting that such an interpretation significantly deviated from the ordinary meaning that should be assigned to Article 45(2)(c) of the ECT, which uses the same terminology as seen in the first paragraph with the difference that it does not refer to the "constitution."[359] After looking at this contentious issue from other perspectives, including the opinions of other arbitral tribunals, state practice, and the *travaux preparatoires*, the District Court decided to uphold a "piecemeal" approach rather than the "all-or-nothing" proposition adopted by the Tribunal and came to the conclusion that "the Russian Federation was only bound by the treaty provisions reconcilable with Russian law."[360]

With that being decided, the competence of the Tribunal turned on the compatibility of the investment arbitration system enshrined in Article 26 of the ECT with Russian law. The District Court stated that, in a way that might catch many by surprise,[361] incompatibility exists not only when the investment arbitration mechanism is expressly prohibited by Russian law but also in the case that the law does not provide a legal basis for such dispute resolution method.[362] The District Court revisited the relevant laws of Russia and concluded that the discussed provisions "in any case do not provide for the option of arbitration for disputes arising from a legal relationship between the Russian Federation and (foreign) investors, in

[357] Ibid, paras. 5.9-5.12, pp. 35-36.
[358] Ibid, para. 5.13, p. 36.
[359] Ibid, paras. 5.14-5.17, pp. 37-38.
[360] First, the court refuted the opinion on the part of the tribunal that the limitation of provisional application and the invocation of internal law to invalidate international obligations in this case are contrary to the object and purpose of the ECT and the nature of international law, because all these arrangements are encased in the treaty itself. Second, the court denied the significance attached to the opinion of another tribunal, which happened to be chaired by the same person, on this issue. Third, the court disregarded state practice and the meaning of state practice, because there was no argument nor evidence to show the existence of a widely accepted application practice by all the states involved. Fourth, the court envisioned no need to refer to the *travaux preparatoires*, because the condition for the reference to this supplemental means of interpretation was not met. *Ibid*, paras. 5.19-5.23, pp. 38-40.
[361] For instance, according to Graham Coop, "The ECT is not a masterpiece of drafting clarity, it is true. However, it does seem that the Court's approach largely empties Article 45 of much of its potential utility…." Borja A. Sanz, "The *Yukos* Saga Reloaded: Further Developments in the Interplay between Domestic Legislations and Provisionally Applied Treaties", International Law and Politics, Vol. 49, No. 2 (2017), p. 599.
[362] See *supra* note 354, para. 5.33, p. 43.

which the public-law nature of the Russian Federation's actions in that relationship is predominant and in which an assessment of the exercise of public-law authorities by Russian Federation state bodies is concerned."[363] Thus, in the District Court's opinion, the previously mentioned provisions failed to provide for the necessary legal basis for the arbitration proceedings with respect to the Yukos case to go ahead.

The District Court also examined the particular provisions of the Russian Law on Foreign Investments 1991 (the RLFI), namely Articles 9 and 10,[364] that the Tribunal had invoked to assert its jurisdiction over the case so as to determine whether those articles provide a legal basis for arbitration. With regard to the first paragraph of Article 9 of the RLFI, the District Court believed that it does not provide an independent legal basis for arbitration of the Yukos case considering the fact that the Russian courts are designated to consider cases of this type and other modes of dispute resolution are available only if a treaty provides for it.[365] Furthermore, the District Court regarded Article 10 of the RLFI as a "blanket provision", which does not provide a direct legal basis for arbitration of such disputes but rather "makes the option of arbitration conditional on the existence of a provision in treaties and federal laws to that effect."[366] The conclusions made by the District Court in relation to Articles 9 and 10 of the RLFI indicate that, as observed by Sanz, the key question that mattered "was not whether such provisions *allowed* for investor-state arbitration (which, arguably, they did) but whether they *directly provided* an independent legal basis for arbitration [emphasis original]."[367] Based on the foregoing analysis it was decided that Russia was not bound by the provisional application of the investment arbitration mechanism provided by Article 26 of the ECT and the Tribunal lacked competence to take cognizance of the claims and to issue the ensuing awards.[368] The District Court therefore declared all the six investment awards rendered out of the arbitration proceedings for the Yukos case reversed on the ground of the incompetence of the Tribunal and left other grounds for reversal put forward by Russia undiscussed.[369]

(b) The Hague Court of Appeal

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[363] *Ibid*, para. 5.41, p. 45.
[364] Article 9 of the Law on Foreign Investment 1991 provides that: "(1) Investment disputes, including disputes over the amount, conditions and procedure of the payment of compensation, shall be resolved by the Supreme Court of the RSFSR or the Supreme Arbitrazh Court of the RSFSR, unless another procedure is established by an international treaty in force in the territory of the RSFSR. (2)Disputes of foreign investors and enterprises with foreign investments against RSFSR State bodies, disputes between investors and enterprises with foreign investments involving matters relating to their operations, as well as disputes between participants of an enterprise with foreign investments and the enterprise itself shall be resolved by the RSFSR courts, or, upon agreement of the parties, by an arbitral tribunal, or, in cases specified by the laws, by authorities authorized to consider economic disputes." Article 10 of that law provides that: "A dispute of a foreign investor arising in connection with its investments and business activity conducted in the territory of the Russian Federation shall be resolved in accordance with international treaties of the Russian Federation and federal laws in courts, arbitrazh courts or through international arbitration (arbitral tribunal)." Articles 9 and 10, the Russian Law on Foreign Investments 1991.
[365] See *supra* note 354, para. 5.51, pp. 48-49.
[366] *Ibid*, paras. 5.56-5.58, p. 50.
[367] Sanz, *supra* note 361, at 599-600.
[368] See *supra* note 354, paras. 5.95-5.96, p. 62.
[369] *Ibid*, paras. 5.97-5.98, p. 62.

The three former shareholders of Yukos (the appellants) were upset with the setting-aside judgment made by the District Court and appealed the judgment to the Court of Appeal of the Hague. The core contentious issue before the Appeal Court continued to be whether the Tribunal had the jurisdiction over the underlying disputes, particularly with regard to the interpretation of the Limitation Clause of Article 45(1) of the ECT. The primary position of the appellants remained unchanged, arguing that the Limitation Clause indicates that the entirety of the ECT should temporarily apply to Russia if the principle of the provisional application of treaties is not inconsistent with Russian law.[370] To supplement this position, the appellants put forward a third alternative understanding of the Limitation Clause, which was faced with emphatic opposition from Russia.[371] According to this understanding, even if the Limitation Clause is not related to the principle of provisional application, it should be concerned with "whether the *provisional application* of one or more provisions of the ECT is compatible with national law, not whether any provision of the ECT is in itself inconsistent with national law."[372] Russia, instead, insisted on its position that the issue at stake was whether a specific provision of the ECT is inconsistent with national law.[373]

The Appeal Court agreed neither the primary position of the appellants nor the way of interpretation struck by Russia, arguing that the former gave short shrift to the words "to the extent" in the Limitation Clause and the latter ignored the emphasis on "such provisional application" thereof.[374] Instead, the Appeal Court was satisfied with the alternative understanding proposed by the appellants, believing that this alternative takes into account the ordinary meaning of both the words "to the extent" and "such provisional application."[375] The alternative interpretation of the Limitation Clause in essence indicates that the provisional application of the ECT is limited in the sense that only if the provisional application of specific provisions of the treaty is not prohibited by Russian law can those treaty provisions be applied provisionally.[376] The Appeal Court also referred to the opinion of three eminent international law professors that state practice has shown that sometimes "the exclusion of provisional application relates only to certain types of treaty provisions" to strengthen its argument.[377]

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[370] *Veteran Petroleum Limited et al. v. Russia*, The Unofficial English Translation of the Judgment of the Court of Appeal of The Hague, Case No.: 200.197.079/01, https://www.italaw.com/sites/default/files/case-documents/italaw11339.pdf (last visited on May 20, 2022), para. 4.5.4, pp. 22-23.

[371] Russia protested the new argument introduced by the appellant during the appeal proceeding particularly considering that it was not raised during the arbitration proceeding. The Appeal Court, however, held that "the investors were entitled to introduce new arguments in favour of the tribunal's jurisdiction at any time, as arbitral jurisdiction must be upheld whenever it exists – regardless of the tribunal's reasoning in this respect." IA Reporter, "Analysis: A Closer Look at the Reasons Why the Hague Court of Appeal Dismissed All of Russia's Challenges to $50 Billion+ Yukos Awards", https://www-iareporter-com.eur.idm.oclc.org/articles/analysis-a-closer-look-at-the-reasons-why-the-hague-court-of-appeal-dismissed-all-of-russias-challenges-to-50bn-yukos-awards/ (last visited on May 20, 2022).

[372] See *supra* note 370, para. 4.5.4, p. 23.

[373] *Ibid*, para. 4.5.3, p. 22.

[374] *Ibid*, paras. 4.5.9-4.5.11, pp. 24-25.

[375] *Ibid*, para. 4.5.13, p. 25.

[376] *Ibid*.

[377] These three international law professors are Nico Schrijver, Jan Klabbers, and Allain Pellet. *Ibid*, para. 4.5.12, p. 25.

The Appeal Court also argued that the alternative interpretation of the Limitation Clause is in line with the object and purpose of the ECT in that potential foreign investors would not be deterred from making investments by the demanding task of identifying whether each and every provision of the treaty is consistent with national law for the purpose of ascertaining the scope of the provisional application of the ECT.[378] When it comes to the state practice with regard to the Limitation Clause, the Appeal Court observed that some examples cited by Russia were not state practice in nature.[379] In any event, the alleged state practice cited by Russia was believed to be compatible with both the position of Russia and the alternative interpretation proposed by the appellant.[380] Finally, the Appeal Court held that the *travaux preparatoires* of the ECT confirmed the correctness of the alternative interpretation of the Limitation Clause given that some countries, such as the US, previously elucidated that their constitutions did not allow for the provisional application of certain provisions of the treaty.[381] Based on the alternative interpretation, it was then found that Russian national law did not expressly prohibit the provisional application of any certain treaty provisions.[382] Notably, the Appeal Court refuted the claim by Russia that its domestic law provided that only public disputes are arbitrable, effectively preventing the Tribunal from exercising jurisdiction over the disputes at issue. For one thing, the Appeal Court endorsed the view that the disputes between the appellants and Russia were civil-legal in nature.[383] For another thing, it was of the opinion that even those disputes were of public law nature, that Russia, as a sovereign state, agreed to arbitrate with foreign investors via the investment arbitration clause of the ECT did not contradict the fact that only civil disputes were arbitrable under Russian law.[384]

At a later stage, the Appeal Court also dismissed other challenges posed by Russia against the jurisdiction of the Tribunal. Russia emphatically argued that the investments concerned were ultimately controlled by Russian nationals, indicating that the investments were indeed not covered investment under the ECT. By referring to the denial of benefit clause in Article 17 of the ECT,[385] Russia maintained that since nationals of a third country which do not engage in business activities in the state in which it is incorporated are denied treaty protections, then the investments controlled by nationals of the host country should *a fortiori* fall outside the scope of the ECT.[386] The Appeal Court disagreed with Russia and opined that Article 17(1) does not exclude sham companies and/or investors controlled by the national of the host

[378] *Ibid*, paras. 4.5.26-4.5.27, pp. 29-30.
[379] *Ibid*, paras. 4.5.31-4.5.32, pp. 31-32.
[380] For instance, one of the alleged state practice cited by Russia in this regard was that the EU and its member states in a 1994 joint statement made clear that: "(a) it [Article 45(1) ECT, Ct] does not create any commitment beyond what is compatible with the existing internal legal order of the signatories." The Appeal Court, however, argued that this statement was compatible with both the story of Russia and the alternative understanding. *Ibid*, para. 4.5.29, p. 31.
[381] *Ibid*, para. 4.5.37, p. 34.
[382] *Ibid*, para. 4.6.1, p. 38.
[383] *Ibid*, para. 4.7.35, p. 51.
[384] *Ibid*, para. 4.7.37, p. 51.
[385] Article 17(1) of the ECT provides that: "Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized." Article 17(1), the ECT.
[386] See *supra* note 370, para. 5.1.8.3, pp. 68-69.

country from treaty protections.[387] Russia's invocation of an alleged rule of customary international law that a national is prohibited from bringing an international law action against its own home state was likewise rejected by the Appeal Court. Furthermore, regarding Russia's argument that there existed a general rule of international law requiring foreign investors to contribute to the host state economy to be qualified for treaty protections, the Appeal Court affirmatively argued that the definition of "investment" provided in the ECT did not support the claim of Russia.[388] In addition, given that there is not a legality requirement in the ECT with regard to the making of investment, the Appeal Court opined that Russia could not establish that an illegality in the making of the investments should necessarily preclude the Tribunal's jurisdiction.[389] In any event, the alleged illegal conduct was far too removed from the transactions by which the appellants acquired their shares in Yukos, according to the Appeal Court.[390]

Additionally, the Appeal Court also successively dismissed other challenges against the investment awards at issue by Russia, which were based on the grounds that the Tribunal violated its own mandate, the Tribunal was improperly constituted, the awards failed to state reasons, and the arbitrations and the awards contravened public policy.[391] Consequently, the Appeal Court reversed the judgment made by the District Court and revived the Yukos awards.[392] The judgment of the Appeal Court, however, does not mark the official end of the saga of the Yukos case as Russia had lodged an appeal before the Dutch Supreme Court.[393]

(c) The Dutch Supreme Court

In a judgment delivered on November 5, 2021, the Dutch Supreme Court rejected Russia's claim that it was not bound by the ECT, thus ultimately confirming that the arbitral tribunal had due jurisdiction over the Yukos case. The Supreme Court also rejected to annul the arbitration awards based on several other grounds put forward by Russia, such as the so-called disproportionately large role played by the tribunal assistant in the making of the awards. However, the Supreme Court agreed with Russia that the lower Dutch courts should have reviewed the admissibility and substance of Russia's claims that there was sufficient evidence showing that the Yukos shareholders had committed fraud during the arbitration proceedings. Therefore, the Supreme Court overturned the judgment made by the Appeal Court which reinstated the arbitration awards, sending the case to the Amsterdam Court of Appeal for further consideration.[394] The Yukos saga was thus extended once again due to the

[387] *Ibid*, para. 5.1.8.4, p. 69.
[388] *Ibid*, para. 5.1.9.1-5.1.9.5, pp. 73-74.
[389] *Ibid*, para. 5.1.11.3, p. 77.
[390] *Ibid*, para. 5.1.11.7, p. 79.
[391] *Ibid*, pp. 86-126.
[392] *Ibid*, pp. 126-127.
[393] Reuters, "Russia Appeals $57 Billion Yukos Payout in Dutch Supreme Court", https://www.reuters.com/article/netherlands-russia-yukos/russia-appeals-57-billion-yukos-payout-in-dutch-supreme-court-idUSL8N2CX2QH (last visited on May 20, 2022).
[394] Basya Klinger and Alexander Schurink, "Yukos: Supreme Court Confirms Tribunal's Jurisdiction but Orders Fraud in Arbitration Allegations to be Investigated by Lower Court", available at https://www.lexology.com/commentary/arbitration-adr/netherlands/freshfields-bruckhaus-deringer-llp/yukos-supreme-court-confirms-tribunals-jurisdiction-but-orders-fraud-in-arbitration-allegations-to-be-investigated-by-lower-court (last visited on May 20, 2022).

ruling of the Supreme Court, and we cannot easily prognosticate when the Yukos case will be put to a full stop and what the final outcome will be.

6.5.4 *Sanum Investments v. Laos*

6.5.4.1 The Arbitral Proceeding

The dispute between Sanum, an enterprise incorporated in the Macau Special Administrative Region, the PRC, and Laos involved the investments that the claimant had made in the gambling and hospitality industry within the respondent state.[395] Sanum commenced arbitration against Laos on 14 August 2012 pursuant to the PRC-Laos BIT (31 January 1993) with Singapore designated as the seat of arbitration and the 2010 UNCITRAL Arbitration Rules as the applicable procedural rules.[396] It was alleged that the authorities of Laos had acted *vis-a-vis* Sanum in violation of relevant provisions of the BIT, resulting in "very serious consequences" for the investor and its investments in Laos.[397] The respondent state objected to the admissibility of the claims put forward by the investor, arguing that *inter alia* the BIT in question does not extend to Macanese investors and the claims did not fall into its scope of consent to arbitration.[398] The award on jurisdiction issued by the Tribunal took stock of the objection to admissibility on the part of the respondent state and concluded that it had jurisdiction to arbitrate the expropriation claims of Sanum under Article 8(3) of the BIT.[399] Despite the multiple aspects of the objection floated by the respondent state, this subsection only focuses on those aspects that were relevant at the following judicial review stage.

The Tribunal held that the question of application or non-application of the BIT to Macau is central to the establishment of jurisdiction.[400] In fact, Article 29 of the VCLT[401] and Article 15 of the Vienna Convention on Succession of States in respect of Treaties (the VCST)[402]

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[395] The investments made by Sanum mainly took the form of joint ventures with local companies. *Sanum Investments v. Laos*, Award on Jurisdiction (13 December 2013), PCA Case No. 2013-13, https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf (last visited on May 20, 2022), para. 38, pp. 9-10.

[396] *Ibid*, paras. 3 & 5, p. 3.

[397] The alleged actions include: "the cancellation of a bundle of rights, previously secured by the Investor from the Respondent, for the construction and operation of a hotel and casino complex in Paksong, Lao; the cancellation of the operating licenses for a casino gaming facility, known as the Paksan Slot Club, which was a going concern at the time of termination; and the cancellation of a gaming license (along with the retraction of key portions of a land concession for the development of a Free Trade Zone at Thakhaek, in Khammouane Province)". *Sanum Investments v. Laos*, Notice of Arbitration (14 August 2012), https://www.italaw.com/sites/default/files/case-documents/italaw3234.pdf (last visited on May 20, 2022), para. 14, p. 4. The investor alleged that Laos had breached multiple obligations under the BIT, i.e. "(a) the fair and equitable treatment obligation under Article 3(1); (b) the expropriation provision in Article 4; (c) the guarantee of transfer of payments provision in Article 5; and (d) the obligation under Article 3(2) to provide an investor no less favorable treatment than that provided to investors of third States." See *supra* note 395, para. 39, p. 10.

[398] See *supra* note 395, para. 52-79, pp. 13-23.

[399] *Ibid*, para. 370, p. 97.

[400] *Ibid*, para. 205, p. 58.

[401] Article 29 of the VCLT (Territorial Scope of Treaties) states that: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Article 29, the VCLT.

[402] Article 15 of the VCST (Succession in respect of Part of Territory) states that: "When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of

played a decisive role in the Tribunal's effort to ascertain whether the PRC-Laos BIT applies to Macau after the handover in 1999.[403] The Tribunal applied Article 15 and Article 29 to the specific context of the PRC-Laos BIT in order to test whether the general rules or the exceptions correspond to the territorial application of the treaty. In the opinion of the Tribunal, the application of the treaty to Macau would not be incompatible with the object and purpose of that treaty and likewise would not change the conditions for its operation.[404] The Tribunal also considered the respondent state's argument that the automatic extension of the BIT should not be the case because both the Joint Declaration on the Question of Macau and the Basic Law of Macau SAR have recognized the region's treaty-making power in economic matters. The Basic Law of the Macau SAR, according to the Tribunal, is in and of itself an internal law, thus not being able to modify the customary rule of international law set out in Article 15 of the VCST.[405] It was also believed that the respondent state could not invoke the Joint Declaration to set aside the international rule applicable to the PRC-Laos BIT in that there was no evidence showing that Laos had been informed that its treaty with the PRC would be extended to Macau only after a procedure of consultation.[406]

After applying Article 15 of the VCST to the specific context of the PRC-Laos BIT, the Tribunal reached a provisional conclusion that the BIT under dispute is applicable to Macau. But that provisional conclusion was subsequently put to test by the Tribunal through the application of Article 29 of the VCLT. During this phase, the Tribunal examined whether it was otherwise established that the PRC-Laos BIT is not applicable to Macau. The tribunal clearly stated that, considering that Macau is empowered to construct its own BIT program, the possible co-existence of BITs of the PRC and Macau respectively with the same third state would not create "legal chaos" for foreign investors. Instead, the co-existence would only facilitate "the fulfillment of the goals of the BITs, which are the protection of the foreign investors and the economic development of the host State."[407] All these discussions drove the tribunal to conclude that the territorial application of the PRC-Laos BIT extends to Macau.[408]

The other issue that also had relevance at the judicial review stage relates to the subject-matter jurisdiction of the Tribunal over the expropriation claims filed by the claimant under

States; and (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation." Article 15, the VCST.

[403] The Tribunal first contended that the fact that the 1999 Notification to the Secretary-General of the UN regarding the treaties that the PRC intended to apply to Macau does not include the PRC-Laos BIT was of no relevance, because that Notification was specifically for the purpose of multilateral treaties. The Tribunal also illuminated the applicability of Article 29 of the VCLT and Article 15 of VCST by stating that: 1) both Article 29 and Article 15 are rules of customary international law, let alone that the PRC and Laos are both parties to the VCLT; 2) Article 15 and Article 29 are compatible with each other as the former "explains and regulates what happens at the moment of transition from one sovereign to another" while the latter "prescribes what the general situation is outside of a transitional period, whether a territory has undergone a transition or not"; 3) the exceptions to Article 15 are more limited than those to Article 29, but are included in them. See *supra* note 395, paras. 206-211 & 220-231, pp. 58-60 & 62-65.

[404] *Ibid*, paras. 239-252, pp. 66-69.

[405] *Ibid*, para. 267, p. 70.

[406] *Ibid*, paras. 258-268, pp. 70-73.

[407] *Ibid*, paras. 294-295, pp. 78-79.

[408] *Ibid*, para. 300, p. 79.

Article 8(3) of the PRC-Laos BIT.[409] The respondent state objected to the jurisdiction of the Tribunal over the expropriation claims on the grounds that the terms of "a dispute involving the amount of compensation for expropriation" should imply a restrictive interpretation.[410] Thus, the expropriation claims in this case, which also encompassed a question of whether there had been an expropriation, were not covered by Laos' consent to arbitration. The Tribunal agreed that the terms spelt out in Article 8(3) of the treaty indicate that the jurisdiction of the Tribunal was limited, but it argued that other readings of "involving" are also possible, signalling that "involving" should be understood as "inclusive rather than exclusive".[411] The Tribunal also pointed out that the interpretation of the terms by the respondent state also detached Article 8(3) from its context, especially from the link with Article 4(1) of the treaty,[412] resulting in a consequence of rendering Article 8(3) without effect.[413] On the basis of the analysis above, the Tribunal concluded that the respondent state had consented to arbitrate expropriation claims under Article 8(3) of the PRC-Laos BIT.[414]

6.5.4.2 The Challenge Proceeding

Laos, upon the receipt of the jurisdictional ruling, applied to the High Court of the Republic of Singapore pursuant to Section 10 of the Singapore International Arbitration Act in an effort to set aside the positive jurisdictional ruling made by the Tribunal.[415] Despite the challenge from Sanum against the justiciability of this application, the High Court judge first demonstrated that it was justiciable in order to preserve the disputing parties' right under

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[409] Article 8 of the PRC-Laos BIT states that: "…2. If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment. 3. If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provision of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article."

[410] See *supra* note 395, para. 327, pp. 85-86.

[411] The Tribunal reasoned that: "The term "involving" has a wider meaning than other possible terms such as "limited to" which could have been used if the intention of the State Parties had been to limit the jurisdiction of the Tribunal exclusively to disputes on the amount of compensation. "To involve" means "to wrap", "to include", terms that are inclusive rather than exclusive." *Ibid*, para. 329, p. 86.

[412] Article 4(1) of the PRC-Laos BIT stipulates that: "Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting State in its territory, unless the following conditions are met: a. as necessitated by the public interest; b. in accordance with domestic legal procedures; c. without discrimination; d. against appropriate and effective compensation." Article 4(1), the PRC-Laos BIT.

[413] The Tribunal believed that if the consent to arbitration from the contracting states were to be limited to those disputes on the amount of compensation for expropriation, then Article 8(3) of the PRC-Laos BIT would be deprived of its effect. In accordance with the four conditions specified in Article 4(1), a competent court of the host state would need to decide whether the investor has been compensated appropriately and effectively in order to determine whether there has been an expropriation in the first place. That, in turn, would strip the investor's right to submit the dispute on the amount of compensation for expropriation to arbitration on the basis of Article 8(3). Thus, the provision of arbitration as a dispute resolution method for investors would be meaningless rather than meaningful. See *supra* note 395, paras. 330-333, pp. 86-87.

[414] *Ibid*, para. 342, p. 90.

[415] Section 10(3) of the Singapore International Arbitration Act states that: "If the arbitral tribunal rules – (a) on a plea as a preliminary question that it has jurisdiction; or (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the Hight Court to decide the matter." Section 10(3), the Singapore International Arbitration Act.

domestic law.[416] The judge then denied Sanum's argument that the standard of review in this application should be a limited one of deference to and respect for the Tribunal and held that the standard of review as to jurisdictional rulings should be generally regarded as *de novo*.[417]

It merits noting here that a fresh piece of evidence in the form of an exchange of two letters between relevant authorities of Laos and the PRC,[418] which came to existence only after the issuance of the jurisdictional ruling, became a key factor in the judge's determination of this application, propelling Hwang and Chang to refer to this case as "a tale of two letters."[419] The judge applied the *Lassiter* test to the specific circumstances of the two letters, ascertaining that the evidence adduced by Laos met the conditions set out for the admission of fresh evidence.[420] Article 29 of VCLT and Article 15 of VCST here again provided the legal framework for the decision of whether the PRC-Laos BIT applies to Macau as both rules were agreed by the disputing parties to be part of customary international law.[421] The judge was of the opinion that the two letters constituted an agreement between Laos and the PRC, under Article 31(3)(a) of the VCLT,[422] that the PRC-Laos BIT does not apply to Macau, thus the exception to the general rules of Article 29 and Article 15 was established.[423]

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[416] By making a reference to the English Court of Appeal decision of *Ecuador v. Occidental Exploration and Production Co* [2006] 2 WLR 70 ("Occidental Exploration"), the High Court stated that "The court held that it had the jurisdiction to interpret an international instrument where it was necessary to do so in order to determine a person's rights and duties under domestic law." The judge therefore held that "the present application does not raise questions of international law that are non-justiciable; it concerns the rights of parties seeking to invoke this court's jurisdiction under s 10 of the IAA to review the Tribunal's ruling on jurisdiction." It was also mentioned that "the issues raised in this application do not concern the exercise of sovereign or legislative prerogative in matters of high policy such as sovereign immunity, deployment of troops overseas, boundary disputes or recognition of foreign government". The analysis above propelled the judge to affirm the justiciability of the application submitted to the court. Laos v. Sanum, Judgment of Singapore High Court (20 January 2015), [2015] SGHC 15, https://www.italaw.com/sites/default/files/case-documents/italaw4107.pdf (last visited on May 20, 2022), paras. 21-31, pp. 7-11.

[417] It was argued by Sanum that "the qualifications and expertise of the arbitral tribunal counselled against the adoption by this court of anything other than a limited review of the Tribunal's positive jurisdictional ruling". However, the judge thought that Sanum's standing would lead to "a varying standard of review in every application under s 10 of the IAA depending on the relative expertise and qualifications of the High Court Judge hearing the application as compared to that of the arbitral tribunal members". *Ibid*, paras. 31-35, pp. 10-12.

[418] On February 19, 2014, Laos filed an application asking for the admission of two diplomatic letters: (1) a 7 January 2014 letter that was sent from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Vientiane, Laos, which stated Laos's view that the PRC-Laos BIT did not extend to Macau and sought the views of the PRC Government on the same; and (2) a January 9, 2014 letter that was the PRC Vientiane Embassy's reply to the Laos Letter, stating its view that the PRC-Laos BIT did not apply to Macau 'unless both China and Laos make separate arrangements in the future'. *Ibid*, paras. 39-40, pp. 13-14.

[419] Michael Hwang and Aloysius Chang, "Government of the Lao People's Democratic Republic v Sanum Investments Ltd: A Tale of Two Letters", ICSID Review, Vol. 30, No. 3 (2015), pp. 506-524.

[420] Under the Lassiter test, there are three conditions for new evidence to be admitted: (1) the party seeking to admit the evidence demonstrates sufficiently strong reasons why the evidence was not adduced at the arbitration hearing; (2) the evidence if admitted would probably have an important influence on the result of the case though it need not be decisive; and (3) the evidence must be apparently credible though it need not be incontrovertible. See *supra* note 416, paras. 43-56, pp. 15-20.

[421] *Ibid*, paras. 58-61, pp. 20-21.

[422] Article 31(3)(a) of the VCLT states that: "There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; …" Article 31(3)(a), the VCLT.

[423] *Ibid*, para. 70, p. 25.

The facts of this case were also compared with those of *Review Publishing* in which Sundaresh Menon JC was tasked with the question of whether a judicial assistance treaty between Singapore and the PRC applies to Hong Kong and decided that the treaty concerned does not apply to the region by relying on a letter from the Ministry of Foreign Affairs of Singapore (stating that the Hong Kong Department of Justice had confirmed that the treaty is not applicable to Hong Kong).[424] The judge also added that the way in which the PRC letter was worded showed that non-applicability of the PRC-Laos BIT to Macau was not a dramatic change of position but an affirmation of the common understanding between the two contracting states that the treaty from its inception does not apply to Macau.[425] With regard to other instruments and documents adduced by the disputing parties, the judge did not assign much significance for the purpose of reaching a conclusion.[426]

Laos therefore claimed victory in its endeavor to prove the non-applicability of the PRC-Laos BIT to Macau, and, in doing so, to set aside the positive jurisdictional ruling rendered by the tribunal. The other issue that was subjected to judicial review by the High Court related to the subject matter jurisdiction of the Tribunal. The judge, in stark contrast to the opinion of the Tribunal, repudiated the jurisdiction of the Tribunal over the expropriation claims raised by the investor on the basis of *inter alia* an alternative interpretation of Article 8(3) of the BIT and the analogy of the jurisdictional ruling to the decision of *Tza Yap Shum*. According to the judge, "a dispute involving the amount of compensation" in Article 8(3) of the PRC-Laos BIT should be given a restrictive interpretation, i.e. "disputes limited to the amount of compensation for expropriation."[427] All in all, the judgment explicitly vacated the positive jurisdictional ruling delivered by the Tribunal in *Sanum v. Laos*.

Upon the receipt of the unfavorable judgment by the High Court, Sanum seized the opportunity of the procedural remedy provided by the Singaporean judicial system by appealing the judgement in the Court of Appeal of the Republic of Singapore. The central question faced by the panel of five judges from the Court of Appeal remained whether the PRC-Laos BIT applies to Macau alongside the controversy of whether the Tribunal had

[424] *Ibid*, paras. 71-72, p. 25.
[425] *Ibid*, para. 77, p. 27.
[426] However, the judge mentioned that "Macau's ability to negotiate and enter into its own BITs tend to suggest to a limited extent that the PRC's treaties do not apply to Macau." He also argued that the Hong Kong experience implied that "the PRC was likely to have been of the view that their treaties would not automatically apply to Macau after the 1997 handover." It was also suggested that the 2001 WTO Trade Policy Report to a limited extent sustained that the PRC-Laos BIT does not apply to Hong Kong. *Ibid*, paras. 88, 106 & 109, pp. 31, 37 & 39.
[427] First, the judge argued that "the word 'involve' is also capable of being interpreted restrictively to mean imply, entail or make necessary." Compared with the broad wording of the phrase "any dispute in connection with an investment" in Article 8(1), the judge made clear that the contracting states could have used the same terms if they had truly intended for an arbitral tribunal to have a broad jurisdiction on all aspects of an expropriation dispute. Second, the judge refuted the reasoning in *Tza Yap Shum* that "an investor would never have access to arbitration if Article 8(3) was read restrictively to only refer to disputes on the amount of compensation." Instead, he argued that limiting an arbitral tribunal's jurisdiction to disputes that only concern the amount of compensation for expropriation does not cause a necessary consequence that a party has no access to arbitration. Third, the judge agreed that the shift from the PRC's first-generation BITs featuring more restrictive dispute resolution clauses to second-generation BITs with more expansive clauses of such kind suggests that the PRC-Laos BIT, which falls into the former category, should be read in a restrictive way. *Ibid*, paras. 121-126, pp. 43-46.

subject matter jurisdiction over the expropriation claims. The judges agreed to admit the 2015 note *verbales* between the authorities of Laos and the PRC, which intend to verify the authenticity of the two letters that had been heavily relied upon by the High Court, as further evidence.[428] They also upheld the decision of the High Court to conduct a *de novo* review instead of accepting a limited review standard with respect for, and deference to, the Tribunal.[429]

Like the High Court, the Appeal Court also linked the question of application/non-application of the PRC-Laos BIT to Macau to Article 15 of the VCST and Article 29 of the VCLT. The Appeal Court read from the articles mentioned that the Moving Treaty Frontier (MTF) rule governs the PRC-Laos BIT, which "presumably provides for the automatic extension of a treaty to a new territory as and when it becomes a part of that State," unless an exception to the general rule is provided.[430] Applying the three exceptions summed up from Article 15 and Article 29,[431] the Appeal Court found that the first two exceptions could not be derived from the present case.[432] With regard to the last exception that Laos could invoke to prove the non-applicability of the treaty to Macau, the judges first pointed out the lack of intention between the contracting states to exclude Macau from the territorial application appears from the treaty because of the silence on this issue.[433] Thus, the remaining hope for Laos and the linchpin of the case turned on whether the country was able to adduce other evidence to prove the intent between itself and the PRC of no extension of the treaty to Macau.

There were a handful of evidential materials dealt with by the Appeal Court. However, two of them appeared to be given more emphasis in the judges' demonstration, viz the 1987 PRC-Portugal Joint Declaration and the diplomatic letters produced in 2014. The Appeal Court endorsed the argument floated by Sanum that the "critical date" doctrine should be introduced to decide the relevance of the evidence submitted.[434] According to the "critical date" doctrine, evidence that "comes into being after the critical date and is self-serving and intended by the party putting it forward to *improve* its position in the arbitration" should be

[428] *Sanum v. Laos*, Judgment of the Court of Appeal of Singapore (29 September 2016), [2016] SGCA 57, https://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf (last visited on May 20, 2022), paras. 27-35, pp. 12-15.
[429] *Ibid*, paras. 40-44, pp. 17-19.
[430] *Ibid*, paras. 47-49, pp. 20-22.
[431] The Court of Appeal concluded that "the PRC-Laos BIT will by operation of law apply to Macau unless one or more of the following exceptions can be shown: (a) It appears from the PRC-Laos BIT, or is *otherwise established*, that the application of the PRC-Laos BIT would be *incompatible with the object and purpose* of the BIT (see Art 15(*b*) of the VCST). (b) It appears from the PRC-Laos BIT, or is *otherwise established*, that the application of the BIT to Macau would *radically change the conditions of its operation* (see Art 15(*b*) of the VCST). (c) An intention appears from the PRC-Laos BIT, or is *otherwise established*, that the BIT does not apply in respect of the entire territory of the PRC (see Art 29 of the VCLT) [emphasis original]." *Ibid*, para. 50, p. 22.
[432] According to the Court of Appeal, "such an extension of the BIT would enlarge the scope of protection to capture a larger pool of investors and further economic cooperation between both States over a larger territory". In addition, the judges of the Court of Appeal were "satisfied that the Lao Government could not establish that the extension of the application of the treaty to Macau would have the effect of radically altering the conditions for the operation of the treaty". Judgment, [2016] SGCA 57, paras. 51-52, pp. 22-23.
[433] *Ibid*, paras. 54-60, pp. 23-27.
[434] *Ibid*, paras. 64-65, and 69, pp. 29 and 31.

given "little, if any, weight."[435] The Appeal Court also agreed with Sanum that the critical date in the present case should be 4 August 2012 – date of the Notice of Arbitration, thus classifying the Joint Declaration pre-critical date evidence while the diplomatic letters as post-critical date evidence.[436]

The Joint Declaration was assigned a low probative value by the Appeal Court because, among others, "little or no evidence pertaining to the negotiation of the PRC-Laos BIT was put before us to support the contention that the Joint Declaration, and the asserted intention for PRC treaties not to apply to Macau, formed an agreed basis upon which the PRC-Laos BIT was concluded."[437] In addition, the Appeal Court declined the proposition of Laos that the diplomatic letters could be regarded as a confirmation of the common understanding between the contracting states that the treaty does not apply to Macau not least because "they are post-Critical Date evidence adduced to *contradict* the pre-Critical Date position [emphasis original]."[438] The Appeal Court thus affirmed the application of the PRC-Laos BIT to Macau and reversed the High Court's ruling in this regard.[439] The Appeal Court also argued that the Tribunal had subject matter jurisdiction over the expropriation claims, thus reversing the High Court judge's conclusion as to this controversy. It was believed that the specific context surrounding Article 8(3) dictates a broad interpretation of "a dispute involving the amount of compensation for expropriation."[440] By doing so, the Appeal Court not only overturned the judgment made by the High Court but also granted an endorsement for the underlying arbitration to proceed to the merit phase which, however, ended up with the Tribunal dismissing the investment claims.[441]

6.6 Critical Analysis of the Judicial Review Mechanism in relation to Investment Arbitration

The supervisory role of domestic courts at the seat of arbitration in reviewing arbitral awards has been regarded as the most important role of national judiciaries in respect of non-ICSID arbitration.[442] Although the judicial review of investment awards only applies to non-ICSID arbitration, it is highly relevant for the ongoing debates about the reform of the investment arbitration system. The question of how to handle the long-lasting call for the establishment of an appellate review mechanism is a burning issue on the agenda for the reform of

[435] *Ibid*, para. 104, p. 46.
[436] *Ibid*, para. 67, pp. 29-30.
[437] *Ibid*, paras. 72-82, pp. 31-37. Jean Ho, "Sanum Investments Ltd v The Government of the Lao People's Democratic Republic: Circumstantial Indicia in Treaty Interpretation", ICSID Review, Vol. 33, No. 1 (2018), p. 69.
[438] See *supra* note 428, para. 112, pp. 50-51.
[439] *Ibid*, para. 122, p. 57.
[440] *Ibid*, para. 147, p. 72.
[441] *Sanum Investments v. Laos*, Award (6 August 2019), PCA Case No. 2013-13, https://www.italaw.com/sites/default/files/case-documents/italaw10708.pdf (last visited onMay 20, 2022), para. 264, p. 89.
[442] Gabrielle Kaufmann-Kohler and Michele Potestà, "Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options", Springer Open (2020), p. 65.

investment arbitration.[443] Whether an extra layer of appeal-style review should be put in place in turn invites a careful assessment of the current mechanisms by which parties to investment arbitration may apply for the *vacatur* of investment awards. Thus, an examination of the judicial review mechanism in relation to non-ICSID arbitration would largely contribute to the debate on the future course for the reform of investment arbitration insofar as post-award remedy is concerned.

The previous sections are intended to combine the theoretical foundations and the up-to-date practice of the judicial review of investment awards by domestic courts *loci arbitri* so as to get a comprehensive and sufficient understanding of this mechanism. Only with the help of such an understanding can we produce an objective and fact-based appraisal of the judicial review mechanism. Section 6.2 reveals the genesis of the judicial review of arbitral awards and highlights that the legal arrangements in this regard which were originally orchestrated for commercial arbitration have now been grafted on to the context of investment arbitration with almost no apparent adjustments. Such an undiscriminating transposition may in and of itself trigger concerns and suspicion, particularly considering that investment arbitration demonstrates notable differences from commercial arbitration in a number of aspects.[444] Section 6.3 is a detailed analysis of the scope of the judicial review of investment awards, showing that divergences are detectable in the grounds for the setting-aside of investment awards spelt out in the arbitration legislation of different jurisdictions despite the unifying effects promoted by the Model Law. The empirical study in Section 6.4 provides for an overview of the practice of the judicial review of investment awards as at the latest practicable date, which in turn leads to a number of key findings that pave the way for a critical analysis of the mechanism. The dedicated case law analysis in Section 6.5, by looking into four high-profile judicial review proceedings, shows that challenges to the jurisdiction of investment tribunals are more often than not a focus in setting-aside proceedings and some judicial review cases could go through several court instances before a final judgment is made. It also shows that the standards of review and the application of review grounds to the specifics of the underlying arbitration could be different even between the lower court and the higher court within a given jurisdiction.

Before proceeding to a critical analysis of the judicial review mechanism in relation to investment arbitration, it is necessary to give this mechanism credit wherever it is due. Considering that the right to appellate review is in general not a component of the investment arbitration system, the judicial review mechanism in a way bridges a gap in the dispute resolution process. The mechanism first of all represents a trade-off between the rival goals of fairness and efficiency. By filing an application for the setting-aside of investment awards, arbitration users are afforded an opportunity to seek further redress if for instance gross procedural deviations arose out of arbitral proceedings. In the meantime, the judicial review mechanism is expected to fulfil an important role of safeguarding the procedural integrity of

[443] Albert Jan van den Berg, "Appeal Mechanism for ISDS Awards", ICSID Review, Vol. 0, No. 0 (2019), p. 2 (arguing that the debate on the establishment of an appeal mechanism within the investment arbitration system has going on for some 25 years).
[444] Faure & Ma, *supra* note 10, at 17 (arguing that investment arbitration has significant differences from commercial arbitration in some important areas).

the overall dispute resolution process and preventing egregious injustice from passing unnoticed and uncorrected. The supervisory role that domestic courts *loci arbitri* assume over arbitral tribunals may also benefit investment arbitration in a less apparent manner by generating positive impact on the behavior of arbitrators. The underlying assumption is that the very existence of the judicial review mechanism imposes desirable pressure on arbitrators, prompting them to avoid suspicious procedural irregularities in the arbitral process and to increase the quality of their decision-making.[445] If they fail to do so, there is a chance that the decisions made by them will be set aside by review courts at a later stage. Although an occasional annulment decision issued by a review court is not likely to materially reduce their likelihood of being re-elected as an arbitrator, a bad record of often having arbitral awards vacated by those courts in judicial review proceedings would only do damage to their reputation and prestige rather than the inverse. Additionally, the judicial review mechanism is likely to increase the public's confidence in investment arbitration since flawed investment awards and deficient procedures are subject to additional review by domestic courts *loci arbitri*. However, the benefits mentioned above cannot justify the judicial review mechanism as the optimal option for the post-award control of investment arbitration nor offset the concerns that the mechanism has caused. The rest of this section is devoted to a critical analysis of the judicial review mechanism, revealing that the negative by-products are so grave that it is time for reform to be introduced for an improved version of post-award remedy for non-ICSID arbitration.

6.6.1 Domestic Courts *loci arbitri* as an Inconvenient Review Forum

6.6.1.1 Sovereignty Concerns and Immunity Defense

One of the main differences between investment arbitration and commercial arbitration is that the former nearly always involves sovereign states on the respondent side while the latter generally deals with commercial disputes between parties on an equal footing. What ensues from that difference is that, in judicial review proceedings in relation to investment arbitration, the state party to the underlying arbitration is subject to the jurisdiction of the courts of another sovereign state. While states cannot claim sovereign immunity before international courts and tribunals as the jurisdiction is based on state consent, it remains unclear whether sovereign states also waived immunity from the jurisdiction of the court at the seat of arbitration when non-ICSID arbitration rules were also included as possible governing procedural rules.[446] Although there have been no cases so far in which a review court handled the immunity defense put forward by the state party, that is probably in part because a large majority of judicial review proceedings were indeed initiated by sovereign states with a view to nullifying adverse investment awards. It is possible that sovereign states would claim immunity from the jurisdiction of domestic courts *loci arbitri* in respect of setting-aside applications made by foreign investors. Although review courts would probably interpret the waiver of immunity in relation to investment arbitration as embodying an implied waiver of immunity before the courts, it is debatable whether sovereign states were aware of this when they offered foreign investors more options other than ICSID arbitration

[445] Coe, *supra* note 7, at 191.
[446] Heiskanen and Halonen, *supra* note 284, at 514.

in IIAs.[447] Compared to an alternative in which the review power resides with an international authority, such as an appellate review body or a dedicated investment court, subjecting sovereign states to the jurisdiction of the courts of another sovereign state is not an ideal policy choice.

6.6.1.2 Blending International Politics and Dispute Resolution

The judicial review mechanism where domestic courts *loci arbitri* are vested with the power to scrutinize investment awards could also unnecessarily bring international politics back into the domain of investor-state dispute resolution. There is a possibility that the forum state (State A) where an investment arbitration is seated is locked in a diplomatic row with the state party (State B) to the underlying arbitration. In that case, subjecting the investment award that significantly impacts the interest of State B to the jurisdiction of the courts of State A will be a politically inconvenient arrangement. If the courts of State A rendered a judgment to State B's detriment, it is likely that State B would claim that the review courts had a pre-determined bias against it driven by political calculation and the judicial review proceedings were partial. Even if the judgment at issue was made strictly according to applicable laws by the courts, the overall dispute resolution process might be cast into shadow by the allegation made by State B. After all, whether justice was actually dispensed would in all likelihood become an issue where the truth lies in the eye of the beholder.

Take the Yukos case as an example, the judicial review proceeding took place before the Dutch courts amidst the rising tensions in the relationship between the Netherlands and Russia. The harrowing and infuriating incident of the downing of Malaysia Airlines MH17 on 17 July 2014 dealt a blow to the Dutch-Russian diplomatic relations. The Hague District Court vacated the awards of more than US$ 50 billion in favor of Russia in 2016 when Russia was a primary suspect of the tragedy but the investigations were underway. However, the Hague Appeal Court overruled the judgment of the District Court and revived the obligation of Russia to pay astronomical damages in February 2020 after the Netherlands and Australia came to the conclusion that Russia should be held responsible for its part in the horrific air crash on 25 May 2018.[448] While the Netherlands is known for a good record of the rule of law and there is apparently no evidence to show the judges had a bias against Russia,[449] the judgment which is disadvantageous to Russia came at a politically inconvenient time. Meanwhile, with respect to the handling of a number of key issues on which controversies have long existed, the Appeal Court chose to adopt an interpretation that undermined Russia's positions. For instance, the Appeal Court was of the opinion that the underlying disputes between the former Yukos shareholders and Russia were of civil-legal nature, thus making irrelevant the fact that public disputes cannot be arbitrated by Russian Law. However, not everyone would agree that investment disputes are private in nature.

[447] *Ibid.*
[448] Government of the Netherlands, "MH17: The Netherlands and Australia Hold Russia Responsible", https://www.government.nl/latest/news/2018/05/25/mh17-the-netherlands-and-australia-hold-russia-responsible (last visited on May 20, 2022).
[449] In the Rule of Law Index 2020 released by the World Justice Project, the Netherlands admirably ranks 5 out of 128 jurisdictions. World Justice Project, "WJP Rule of Law Index", https://worldjusticeproject.org/rule-of-law-index/country/2020/Netherlands/ (last visited on May 20, 2022).

Considering that the case is pending before the Dutch Supreme Court, that Russia has not issued a politically charged statement so far does not mean it will not if the judgment by the Supreme Court is not in its favor.

Conceivably, in certain circumstances, subjecting a state party to investment arbitration to the jurisdiction of the courts of another sovereign state would not only cast a cloud on the procedural integrity of the dispute resolution process but also further complicate the strained relationship between the two countries. Again, it should be stressed that the review courts of the forum state might have handled the judicial review case at hand in a way that is perfectly consistent with the spirit of the rule of law, but that is not the focus in the opposition against unnecessarily blending interstate politics with investor-state dispute resolution via the judicial review mechanism. After all, the political inconvenience in this regard and the ensuing suspicion and confusion could have been avoided in the first place by rejecting the inept transposition of the judicial review mechanism tailored for commercial arbitration to the context of investment arbitration.

6.6.1.3 Impaired Neutrality

The unwanted politicization of dispute resolution accompanying the judicial review mechanism in relation to investment arbitration apparently could also raise concerns over the fairness of the proceedings before review courts. However, the presumed involvement of international politics in the judicial review of investment awards is not the only element that might chip away at the general public's confidence in the dispute resolution process. In practice, particularly in the context of NAFTA-related investment arbitrations, there are cases where the designated place of arbitration was in the territory of the respondent state. It follows that the judicial review proceedings in the wake of those investment arbitrations took place before the courts of the respondent states which were the very targets of the investment claims initiated by foreign investors.[450] Although that part of judicial review proceedings only accounts for a minority of the ensemble,[451] foreign investors may speculate that the neutrality of adjudicative authority is compromised at the judicial review stage if the review courts are located in the respondent states.[452] It is true that that speculation may be made without any merits and judicial bias should not be easily assumed or insinuated.[453] However, one of the advantages of investment arbitration in comparison to court litigation via the domestic courts of host states is that international tribunals are in general believed to be a more neutral forum. If the awards issued by investment tribunals are to be subjected to the control of the courts of host states via the judicial review mechanism, the *raison d'être* of investment arbitration would be questioned and the advantage of investment arbitration in terms of neutrality would be somewhat compromised.

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[450] The judicial review proceedings in relation to at least the following investment arbitrations are known to have been entertained by the courts of the respondent states: *Loewen v. USA*, *Myers v. Canada*, *Canfor v. USA*, Tembec v. USA, Terminal Forest v. USA, Binder v. Czech Republic, Mobil Investments v. Canada (I), and *Clayton / Bilcon v. Canada*.

[451] Heiskanen and Halonen, *supra* note 284, at 499 (arguing that parties to investment arbitration rarely agree on a place within the respondent state as the seat of arbitration).

[452] Coe, *supra* note 7, at 193-194.

[453] *Ibid*.

The neutrality of the review courts of forum states could be further impaired by the fact that, unlike investment arbitration where the procedural formats are orchestrated to accommodate participants of different legal cultures,[454] the specific court procedures at the seat of arbitration could be inherently in favor of one side of the disputing parties. For instance, if we imagine a situation where both the forum state and the state party to investment arbitration are common law jurisdictions while the foreign investor is from a home state with the civil law system. While the expertise of appointed legal counsels could narrow the gap in a way, the state party is likely to have a pre-existing edge over the foreign investor at the judicial review stage due to a higher level of familiarity with the procedural rules applicable to the setting-aside proceedings.

6.6.1.4 The Casual and Loose Link between the Forum State and the Underlying Arbitration

While the seat of an international arbitration case could be any city around the world in theory, arbitration rules provide guidance on the choice of the seat to ensure a degree of certainty of arbitration proceedings. In the practice of non-ICSID arbitration, the seat of arbitration is determined by the agreement of the disputing parties as the default rule.[455] In case the agreement between them on this issue is not forthcoming, which is often the case,[456] the way of designating the seat of arbitration largely depends on whether the arbitration concerned is administered by an arbitration institution or not. If so, the arbitration institution is often vested with the power to designate the seat of arbitration and the place where the institution is located is often preferred.[457] In the case of *ad hoc* arbitrations under the UNCITRAL Arbitration Rules, the seat of arbitration is decided by arbitral tribunals "having regard to the circumstances of the case."[458]

In practice, the seat of arbitration is often selected by taking into consideration a host of factors, such as neutrality and convenience, and the forum state often does not have a close connection with the underlying dispute.[459] Goode, for instance, challenges the importance of the seat of arbitration on several grounds, in particular: (1) the choice of seat is often a matter of convenience; (2) the choice of seat is often determined not by the parties but by the arbitral institution they have selected; (3) the choice of seat is often governed by the desire for neutrality; and (4) the role of the arbitral tribunal is transitory, and the seat has no necessary connection with the dispute.[460] Therefore, the contingent nature of the choice of the seat in international arbitration is evident, which means, for example, for an arbitration where Paris was selected as the seat, the place of arbitration could also have been Singapore.

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[454] *Ibid*.
[455] Fernández-Armesto, *supra* note 52, at 133.
[456] *Ibid*.
[457] *Ibid*. For instance, Article 18.1 of latest version of the ICC Rules of Arbitration provides that: "The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties." Article 18.1, the ICC Rules of Arbitration.
[458] Article 18.1 of the UNCITRAL Arbitration Rules provides that: "If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration." Article 18.1, the UNCITRAL Arbitration Rules.
[459] Read, *supra* note 28, at 185.
[460] Roy Goode, "The Role of the Lex Loci Arbitri in International Commercial Arbitration", Arbitration International, Vol. 17, No. 1 (2001), pp. 19-40.

Despite the casual and loose link between the forum state and the arbitration, the judicial review mechanism leads to a situation where domestic courts *loci arbitri* somehow are granted the power to decide whether an arbitral award should be set aside in accordance with national arbitration acts. Considering that local judges usually have broad discretion and national arbitration legislation not infrequently demonstrates particularities, the arbitral seat which is not irreplaceable in practice might have significant impact on the underlying arbitration and the distribution of interests between arbitration parties. However, bearing in mind that the forum state and the dispute arbitrated often have no material connections, that significant impact is actually inexplicable and unreasonable to a large extent. At the end of the day, investment arbitration is based on mutual consent to arbitration of the investor and the state rather than the tolerance of the place of arbitration.[461] Thus, the judicial review mechanism gives meaning to the casual link between the forum state and the underlying arbitration out of all proportion by putting the courts of that state on the top of the arbitral tribunal.

6.6.2 Keep It in the Family: The Monopoly of Review Power

Figure 18 reveals that it is the domestic courts of a small group of jurisdictions comprising in the main countries from Western Europe and North America (the developed North) that are vested with the power to entertain setting-aside applications in relation to investment awards. On the contrary, the judiciaries of countries from the developing South are almost excluded from the exercise of review power although those countries are also often subject to investment claims initiated by foreign investors before international tribunals. Certainly, in a way this monopoly of review power is understandable since the developed countries most often involved in the judicial review of investment awards are celebrated hubs for international arbitration. It is small wonder that in practice arbitral institutions and tribunals would prefer to designate those places known as arbitration-friendly jurisdictions as the seat of arbitration. Therefore, the concentration of review power in the hands of a number of developed countries to some extent reflects the reality of uneven development of the international arbitration market in geographical terms.

However, the fact that the monopoly of review power is most likely developed through a spontaneous process does not mean that no changes should be introduced to reform the judicial review mechanism under discussion. As a matter of fact, the investment arbitration system has been under attack for a long time by a multiplicity of stakeholders involved in FDI activities, particularly by developing host states. Some of them tend to believe that developing countries are put in a disadvantaged position in the investment arbitration system by the mere fact that developed countries have a higher success rate than their developing counterparts in the face of challenges from foreign investors as evidenced by some empirical studies.[462] Others believe so, citing that the pool of arbitrators in the system is mostly made

[461] Read, *supra* note 28, at 185.
[462] Thomas Schultz and Cedric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study", European Journal of International Law, Vol. 25, No. 4 (2015), pp. 1165-1167. Daniel Behn, et al., "Poor States or Poor Governance? Explaining Outcomes in

up of nationals of western countries, which gives rise to concerns over their neutrality and impartiality in decision-making.[463] Not least due to the concerns mentioned above, a growing number of developing countries have become alert to the alleged bias inherent in the investment arbitration system and some of them have taken actions to disengage themselves from the dispute resolution method.[464]

The monopoly of review power at the judicial review stage is likely to amplify the perceived bias and lend ammunition to the critics of investment arbitration. In response, more developing countries will probably stay away from investment arbitration as the dominance of the western world in the judicial review of investment awards might further lock in their perception that the mechanism is intrinsically biased against their interests. So far developing countries seemingly have been largely oblivious to the dominant position of western judiciaries in handling challenges to investment awards and have not unambiguously expressed concerns over that particularity of the judicial review mechanism. But that is the case probably because the scale of judicial review proceedings in relation to investment awards has only become notable enough in recent years. Thus, with the continued growth of non-ICSID arbitration and the following setting-aside applications, the dominant position of the judiciaries of developed countries in the judicial review mechanism could exacerbate the legitimacy crisis at least from the perspective of less developed countries.

6.6.3 Domestic Courts *loci arbitri* Are Not Appropriate Treaty Interpretation Authority

For a large majority of investment arbitrations, sovereign states provide for their consent to arbitrate via the dispute resolution provisions in IIAs and arbitral tribunals decide cases before them not least by referring to the substantive clauses in those instruments. Consequently, when the applications of the setting-aside of investment awards are filed with domestic courts *loci arbitri*, those courts are almost unavoidably faced with the task of applying and interpreting treaty provisions.[465] For instance, in the judicial review proceeding in relation to the jurisdictional decision of the Tribunal in *García Armas and García Gruber v. Venezuela*, the Paris Court of Appeal set aside the decision by dismissing the interpretation of the relevant provision of the underlying Spain-Venezuela BIT defining covered investments. While the Tribunal argued that only the investors' nationalities at the time of the alleged breaches and of the initiation of the arbitration were relevant, the Court replaced the Tribunal's analysis with its own interpretation of the "ordinary meaning" of the relevant provision.[466] Likewise, when dealing with the request to set aside the jurisdictional award of *Sanum v. Laos (I)*, the Singaporean High Court and Appeal Court also provided their own

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Investment Treaty Arbitration", Northwestern Journal of International Law and Business, Vol. 38, No. 3 (2018), pp. 380-381.

[463] Chiara Giorgetti, "Who Decides Who Decides in International Investment Arbitration?", University of Pennsylvania Journal of International Law, Vol. 35, No. 2 (2013), p. 460 (arguing that lack of diversity of arbitrators becomes more of a problem in the context of investment arbitration where a wide variety of viewpoints would benefit the handling of complex and public policy cases).

[464] Leon E. Trakman, "Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo", University of New South Wales Law Journal, Vol. 35, No.3 (2012), p. 979.

[465] Hobér & Eliasson, *supra* note 80, at 663.

[466] IA Reporter, "Paris Court Sets Aside Jurisdictional Award in Long-Running Garcia Armas Case", https://www-iareporter-com.eur.idm.oclc.org/articles/paris-court-sets-aside-jurisdictional-award-in-long-running-garcia-armas-case/ (last visited on May 20, 2022).

interpretations of the jurisdictional clauses in the PRC-Laos BIT despite the divergent conclusions that have been made by them. Additionally, in the judicial review proceeding related to *Swissbourgh and others v. Lesotho*, the Singaporean High Court had to apply and interpret the exhaustion of local remedies rule included in the South African Development Community Investment Protocol to address the setting-aside application. Accordingly, the Court had to answer some politically sensitive questions about the effectiveness of the judicial remedy that could be provided by the judiciaries of the respondent state.[467]

Despite the little doubt that domestic courts are a recognized enforcer of international law,[468] it is inappropriate to have domestic courts *loci arbitri* review investment awards by applying and interpreting the provisions of IIAs. The first reason is that, in most cases, review courts are located in a third state which is not a party to the underlying IIAs. Transposing the judicial review mechanism from the context of commercial arbitration to that of investment arbitration indicates that IIAs are treated the same as private contracts but at the end of the day they are international instruments which carry far broader implications. It is thus confusing why the opinions of the judges from a third state in terms of the meanings of treaty provisions should be binding on contracting states even when those opinions are not consistent with their true intention.[469] In other words, the judicial review of investment awards by the courts in a third state, which involves the application and interpretation of IIAs concluded by other states, "may raise issues of non-interference with the affairs of other states."[470] Second, given that most likely only one of the contracting states of the underlying investment treaty is a party to the judicial review proceeding, the review court would have to "rule upon transactions between two or several sovereign states without having the benefit of hearing all parties to the transaction."[471] Third, over the course of judicial review proceedings, domestic courts *loci arbitri* would be likely to have to decide issues of a politically sensitive nature along the lines of that emerged in the challenge proceeding in relation to *Swissbourgh and others v. Lesotho*. That would arguably again unnecessarily invite political considerations back to the dispute resolution process.

6.6.4 The Judge Judging the Arbitrators: Not Necessarily Qualified

One of the recurrent concerns raised about the judicial review mechanism is that the judges from the place of arbitration probably do not have the required knowledge and expertise to entertain the applications for the setting-aside of investment awards submitted to them. For instance, Hobér and Eliasson argue that domestic judges are typically neither knowledgeable nor experienced in the domain of international law, implying that they sometimes could not

[467] For example, the Court had to answer such questions as whether "the local courts were 'notoriously lacking in independence'" and whether "it is 'clearly established' that 'the supreme judicial tribunal is under the control of the executive organ whose acts are the subject matter of the complaint'." *Lesotho v. Swissbourgh and Others, Judgment*, [2017] SGHC 195, https://www.italaw.com/sites/default/files/case-documents/italaw9263.pdf (last visited on May 20, 2022), para. 313.
[468] Odile Ammann, "Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example", Brill (2020), p. 32 (arguing that the jurisdiction of domestic courts extends to issues of both domestic law and international law).
[469] For instance, in the judicial review proceeding in relation to *Sanum v. Laos (I)*, the Singaporean Appeal Court decided that the PRC-Laos BIT applied to Macau while this was clearly not agreed by the PRC and Laos.
[470] Hobér & Eliasson, *supra* note 80, at 663.
[471] *Ibid*.

effectively address international law issues arising out of judicial review proceedings.[472] Some other commentators maintain that, unlike ICSID annulment committee members who are leading experts in the arbitration of investment disputes, domestic judges usually do not deal with investment law as part of their usual practice.[473] It follows therefore, that the lack of expertise on the part of the judges from review courts would curtail the quality of their decision-making with regard to setting-aside applications.[474] For those who question the competence of domestic judges in this regard, it could be argued that the limited number of the judicial review proceedings in relation to investment arbitration in general also impedes the accumulation of experience for those judges. However, this line of generic attacks against the qualification of the judges from review courts does not necessarily hold water, particularly considering that the review courts involved in practice are nearly always located in international arbitration hubs and those judges tasked with the handling of setting-aside applications could also be assigned to this post for their expertise. In addition, in at least some judicial review proceedings, such as those related to *Sanum v. Laos (I)* and the Yukos case, the judges from review courts have conducted in-depth analysis of issues of international law by the employment of techniques that are commonly adopted by international courts and tribunals, such as by referring to Articles 31 and 32 of the VCLT.

However, the expertise of the judges from domestic courts *loci arbitri* is not indisputable especially considering that the judicial review mechanism to some extent places those judges in a higher position than arbitrators handling investment disputes. The question that matters thus becomes whether domestic judges are expert enough at investment law-related issues that they could be relied on to provide even higher-quality decision-making than arbitrators. Indeed, the expertise of domestic judges with regard to investment disputes as compared with that of arbitrators may suggest that the judicial review of investment awards is not an ingenious design in the first place. It is conventional wisdom that arbitrators in general tend to be specialized in a particular area of law while judges in many cases are expected to be versatile so that they could cope with disputes of different types registered with the courts that they serve.[475] This is especially true in the context of investment arbitration given that arbitrators are often faced with complex and high-stake disputes, the resolution of which often requires not only the interpretation of vague and open-ended provisions of IIAs but also the application of relevant rules of customary international law.

Although the expertise of investment arbitrators is also questioned by some commentators,[476] there are good reasons to believe that those arbitrators are more specialized in public international law and investment law than domestic judges, rather than the inverse. First, the

[472] *Ibid.*
[473] Heiskanen and Halonen, *supra* note 284, at 513.
[474] *Ibid.*
[475] Gellaine T. Newton, "Like Oil and Vinegar, Sitting Judges and Arbitrations Do Not Mix: Delaware's Unique Attempt at Judicial Arbitration", Arbitration Law Review, Vol. 5, No. 1 (2013), p. 149 (arguing that one of the benefits that makes arbitration especially attractive to large businesses is that arbitrators usually have specialized expertise).
[476] Colin M. Brown, "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches", ICSID Review, Vol. 32, No. 3 (2017), p. 673 (arguing that many of them have had involvement only in commercial arbitration, thus lacking necessary experience to assess the regulatory authority of states when public actions are measured against the terms of international treaties).

party-appointment system established in investment arbitration for the selection of arbitrators indicates that the disputing parties and their legal counsels would participate in a process of deciding the most appropriate arbitrators, which in turn to some extent ensures the eligibility and qualifications of those selected arbitrators. That is arguably one of the reasons that at least a notable proportion of investment arbitrators are experts with a background of public international law, especially with respect to international investment law. Second, critics have bluntly asserted that investment arbitration has been dominated by a small cohesive community of arbitrators who have been routinely engaged in the adjudication of investment disputes.[477]

For the reasons above, an inference may be made that the arbitrators involved in often massive investment arbitrations are "among the most experienced and qualified in the world."[478] In the light of the scathing criticisms against the investment arbitration system, those arbitrators also "have proven themselves as a general rule meticulous in their observance of procedural rules, proper techniques of communication with the parties, and thorough evidence collection."[479] However, domestic judges cannot be supposed to be on a par with those selected arbitrators in terms of expertise and experience with respect to public international law in general and international investment law in particular. Thus, with due respect to judges who are in general legal professionals with broad knowledge and acute judgment, it is debatable, if not unreasonable, to subject the decisions of arbitrators who are more specialized in investment law to the scrutiny of the judges from the place of arbitration who may lack comparable knowledge and techniques. The deficiency of expertise on the part of domestic judges relative to investment arbitrators can sometimes be worsened by the phenomenon that a single judge from domestic courts may be assigned to review the decisions made often by an investment tribunal that in the main comprises three experienced arbitrators.[480]

6.6.5 Augmented Costs and Procedural Delay

Despite previous studies which revealed that the average length of setting-aside proceedings before review courts is comparable to, or even shorter than, that of ICSID annulment procedures,[481] more recent jurisprudence shows that in some instances judicial review proceedings can be very lengthy and costly. Indeed, while in some countries, such as Switzerland, applications for the setting-aside of investment awards can be handled quite efficiently, judicial review proceedings elsewhere can drag on for several years with considerable costs incurred by disputing parties.[482] Considering that investment arbitration

[477] Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom", Corporate Europe Observatory and the Transnational Institute (2012), p. 36.
[478] Rubins, *supra* note 7, at 369.
[479] *Ibid*.
[480] For instance, a single judge from the High Court of Singapore was assigned to review the jurisdictional ruling rendered by the Tribunal in *Sanum v. Laos (I)* on his own.
[481] Heiskanen and Halonen, *supra* note 284, at 517.
[482] *Ibid*.

proceedings in many cases are not fast and cheap as they have been expected to be,[483] the judicial review mechanism would in all likelihood make the overall dispute resolution process even less efficient. For instance, the judicial review proceeding in relation to *Achmea v. Slovakia (I)* involved several instances of court in Germany and invited the intervention of the Court of Justice of the European Union (the CJEU). As a result, nearly 6 years had passed since the issuance of the final award by the Tribunal when the German Federal Supreme Court set aside the award in its entirety based on a preliminary ruling by the CJEU in October 2018. In a similar vein, the request to set aside the awards rendered out of the arbitration proceedings of the Yukos case have been heard by the Hague District Court and the Appeal Court respectively and 6 years have passed since the final awards were issued in July 2014. Given that the judgment of the Appeal Court was appealed by Russia to the Dutch Supreme Court, the final binding judgment will not be available until at least a few months later.

There are a host of reasons that could be held accountable for the not infrequent occurrence of lengthy and costly judicial review proceedings. First of all, in some jurisdictions, an application for the setting-aside of investment awards could be decided by two or three consecutive instances of court proceedings and the judges of the higher court are under no obligation or custom to accord deference to the decisions made by the judges of the lower court.[484] The multiple layers of court control would doubtlessly prolong the review process and augment the financial costs of disputing parties. In fact, with a view to reducing the length and costs required for judicial review proceedings, a number of jurisdictions are contemplating the reform of the judicial review process via limiting the instances court proceedings involved in setting-aside applications.[485] Second, since the judges from domestic courts *loci arbitri* in general are less specialized than arbitrators, more information arguably has to be transferred from disputing parties to the judges in judicial review proceedings than to arbitrators in arbitration proceedings. Consequently, the costs of dispute resolution would be increased and delays in procedure would be caused. Third, unlike investment arbitration in which the scarcity of legal practitioners has not yet been heard of, there may be a docket-related backlog within domestic courts *loci arbitri*, thus rendering the dispute resolution lengthy and inefficient.[486] Fourth, according to Fernández-Armesto, in the context of the judicial review of investment awards, "Domestic law normally requires that parties be represented by counsel admitted to the local bar, that the local language be used throughout the procedure, with foreign language documents duly translated, and that its own procedural rules and requirements be applied throughout."[487] It leads him to believe that the judicial review mechanism embodies "a complete break with the practices followed in the past arbitration."[488] Fifth, the submissions from *amici curiae* and the participation of new parties at the judicial review stage are also contributing factors of the occurrence of length and costly

[483] Lars Markert, "Improving Efficiency in Investment Arbitration", Contemporary Asia Arbitration Journal, Vol. 4, No. 2 (2011), p. 216.
[484] Heiskanen and Halonen, *supra* note 284, at 517.
[485] *Ibid*, at 519 (noting that, for instance, in the ongoing arbitration law reform in the Netherlands, a proposal that has been put forward is to "have setting aside proceedings heard directly before the appeals court, with the possibility of the parties agreeing to exclude further appeals to the Supreme Court").
[486] Coe, *supra* note 7, at 201.
[487] Fernández-Armesto, *supra* note 52, at 134.
[488] *Ibid*.

proceedings.[489] Last, the complicated nuances of domestic procedural rules could exacerbate the situation and one example would be that in some cases the higher court tends to remand the case to the lower court for retrial instead of correcting the errors on its own. For instance, in the context of the judicial review of the jurisdictional award of *García Armas and García Gruber v. Venezuela*, the French Supreme Court overruled the first decision by the Paris Court of Appeal but asked the latter to reopen the case rather than writing down its own opinions on contested issues.[490]

6.6.6 Who Are the Real Beneficiaries? Those Made of Money.

At first glance, the judicial review mechanism seems to be designed as a post-award remedial method at arm's length as it is available for both the investor party and the state party and for arbitration users of different financial conditions.[491] But, in reality, there are reasons to believe that this mechanism is likely to morph into an instrument that largely serves the interests of the comparably powerful disputing party. As indicated above, judicial review proceedings may suck arbitration users into another round of costly and lengthy legal battle which could put a colossal strain on the disputing parties. On top of that, if review courts ultimately decide to overrule arbitral awards rendered by investment tribunals, the court judgments are most likely to open the door to a new phase of dispute resolution. That is because review courts in most cases tend to avoid substituting their own decisions for awards which have been challenged, and instead either remand the case to the original tribunal or merely set aside the awards in part or in whole.[492] Collectively, disputing parties may be daunted by the prospect of an endless commitment of substantial resources entailed by the activation of judicial review proceedings. Even though the pressure in the form of expenditure of money and time is not necessarily concentrated on one end of the rivalry, it is the party of an economically weaker position, which could be a less developed host state or a financially precarious enterprise/individual, that is more vulnerable to a prolonged legal battle. Therefore, those with superior financial resources, be it a developed host state or a super wealthy multination company/individual, are most likely to benefit from judicial review proceedings by abusing the system to extend the dispute resolution to the utmost and/or to enhance their bargaining power versus the other party in any attempt to settle the disputes out of court. The judicial review mechanism, therefore, does not necessarily create a level playing field between disputing parties but rather inherently favors those arbitration users who are made of money.

6.6.7 Effectiveness in Question: Limited Review Grounds and A High Level of Deference

[489] Coe, *supra* note 7, at 201.
[490] IA Reporter, *supra* note 466.
[491] Note that this is not necessarily true since negative jurisdictional rulings rendered by arbitral tribunals are not reviewable in certain jurisdictions, such as Hong Kong. In the context of investment arbitration, this restriction apparently militates against foreign investors as they cannot resort to domestic courts *loci arbitri* to challenge an unfavorable jurisdictional ruling. Antony Crockett and Daniel Mills, "A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings", http://arbitrationblog.kluwerarbitration.com/2016/11/08/a-tale-of-two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/?print=print (last visited on May 20, 2022).
[492] Steindl, *supra* note 1, at 201. Fernández-Armesto, *supra* note 52, at 142.

As revealed by Section 6.3, the scope of judicial review of investment arbitration is rather limited in the sense that review grounds relate principally to the competence of arbitral tribunals and procedural irregularities across different jurisdictions, while issues of law and facts typically do not fall within the scope. That review grounds are narrowly defined, on the one hand, conforms to the routine in modern arbitration practice where judicial control of arbitration is discouraged and thus occurs only in exceptional cases. The benefits of limited review grounds include, among others, preserving the efficiency of dispute resolution by upholding the finality of arbitral awards and preventing arbitration from merely becoming a prelude to court litigation. On the other hand, excluding issues of law from the ambit of judicial review to a large extent compromises the added value of this post-award remedy. While the interpretation of the substantive provisions of investment agreements has given rise to heated discussions in reality, limited review grounds set out in national arbitration laws imply that domestic courts *loci arbitri* cannot be reliably expected to provide any material insights into those debates. In other words, review courts are normally prevented from vetting matters of substance that are integral to investment disputes. For instance, in the judicial review proceeding launched by Canada against a partial award which arose out of Clayton/Bilcon v. Canada, the Federal Court of Canada declined to set aside the partial award despite recognizing that "there may be many reasons to criticize the award."[493] Although the Court was aware of the major policy implications of the partial award, which include, among others, a potential regulatory chill effect on the country's environmental assessment process, it refrained from recalibrating the balance between environmental protection and corporate interests and concluded that the Tribunal's findings on a breach of Article 1102 and Article 1105 of NAFTA did not pertain to jurisdictional issues.[494] Such inadequacy in contributing to the investment arbitration system may invite doubts over the effectiveness of the judicial review mechanism, particularly in the light of the legitimacy crisis hanging over investment arbitration, and provoke thoughts about whether a better alternative should take its place.

In addition, we can recall that from the analysis in subsection 6.4.5, a dominant majority of review courts declined to set aside awards rendered by investment tribunals, either partially or entirely. It may be safely inferred that domestic courts *loci arbitri*, in line with the mainstream practice of modern arbitration,[495] have by and large adopted a policy of a fairly deferential review of investment awards. This deferential attitude demonstrated by review courts towards investment tribunals can be nicely summarized by the words of Judge Walton of the U.S. District Court of the District of Columbia: "[t]he Court … must remain mindful of the principle that 'judicial review of arbitral award is extremely limited', and that this Court 'do[es] not sit to hear claims of factual or legal error by an arbitrator' in the same manner that

[493] IAReporter, "Canada Fails in Bid to Set Aside Unfavourable NAFTA Award from Bilcon Quarry Dispute – Damages Ruling Looms in $443 Million Compensation Fight", https://www.iareporter.com/articles/canada-fails-in-bid-to-set-aside-unfavourable-nafta-award-from-bilcon-quarry-dispute-damages-ruling-looms-in-443-million-compensation-fight/ (last visited on May 20, 2022).
[494] *Ibid.*
[495] Tom Ginsburg, "The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration", The University of Chicago Law Review, Vol. 77 (2010), p. 1013 (arguing that the modern trend in national arbitration legal regimes is to "choose a fairly deferential level of review" when arbitral awards are challenged before domestic courts).

an appeals court would review the decision of a local court."[496] The conformity with the well-established practice in judicial review of (commercial) arbitral awards in and of itself, however, is not enough to justify the reasonableness of the consistent high-level deference accorded by review courts to investment tribunals, not least due to the evident characteristics of investment arbitration. For instance, Eliason contends that the deferential standard of review applied by U.S. courts in the judicial review proceedings relating to *AWG Group v. Argentina* is problematic. In her opinion, when the challenge is squarely directed towards the constitution of arbitral tribunals or the impartiality of an arbitrator, a *de novo* standard of review is more appropriate than a high level of deference.[497]

In fact, the rigid graft of the deferential review standard from commercial arbitration to investment arbitration is not only problematic in the case of evident partiality challenges but also in a more general sense, because it fails to make allowance for the particularities of investment disputes. Considering that investment disputes are often concerned with the right to regulate and that expenses and damages incurred by host states will be taken out of the public pocket, error costs are arguably higher in investment arbitration than those in commercial arbitration because it is public interests that are at stake. In the light of a high level of deference accorded by review courts to investment arbitral tribunals, the judicial review would largely become a mere formality and errors made by arbitrators for example in jurisdictional rulings would probably go uncorrected. In the meantime, if a deferential standard of review as a predetermined disposition becomes a consensus within the investment arbitration community, the prospect of the judicial review mechanism, as an extra layer of supervision, effectively prompting arbitrators to more duly and responsibly fulfil their duties is gloomy. The combination of limited review grounds and a high level of deference thus casts doubt on the extent to which court review of arbitral awards can genuinely contribute to the resolution of investment disputes and the development of international investment law.

6.6.8 Inheriting the Infamous Inconsistency

One of the prevailing arguments that reforms should be introduced to the current investment arbitration system is that inconsistent arbitral decisions have been made as a result of disparate or conflicting interpretations and application of the same investment treaties or virtually identical clauses across different treaties.[498] Recognizing the potentially ruinous effects of the lack of consistency in the jurisprudence of investment arbitration, such as the increased ambiguity of investment treaty law and dented public confidence in the dispute resolution method, judicial review of investment awards arguably posed more risks to the investment arbitration system by extending inconsistency to the post-award remedial period. That conceivable inconsistency results from the fact that there are multiple ways in which the

[496] Memorandum of Opinion of the U.S. District Court for the District of Columbia of Jan. 21, 2011 in Republic of Argentina v. BG Group, Civ. No. 08-485 (RBW), https://www.italaw.com/sites/default/files/case-documents/ita0084.pdf (last visited on May 20, 2022), p. 10.
[497] Antonia Eliason, "Evident Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform", Georgetown Journal of International Law, Vol. 50, No. 1 (2018), p. 35.
[498] Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?", Chinese Journal of International Law, Vol. 17, No. 1 (2018), pp. 140-141.

idiosyncrasies of the place of arbitration may feed into setting-aside proceedings against investment awards.

For one thing, statutory grounds for the setting-aside of investment awards as spelt out in national arbitration laws may vary across different jurisdictions. Although a discernible level of unification in review grounds has been engendered by the Model Law, the scope of judicial review of investment awards fundamentally hinges upon national arbitral regimes instead of a universally applicable convention in this respect.[499] Therefore, review courts from one jurisdiction may be called upon to address challenges against investment awards on more available statutory grounds than those from other jurisdictions. We can recall that from the categorized study in Section 6.3 of this Chapter, the moving party may be entitled to apply for the *vacatur* of an investment award based on substantive allegations, such as errors in the establishment of facts or the wrongful application of law, in certain jurisdictions while that is generally not an option in others.[500] For instance, certain federal circuits of the United States have recognized common law review grounds not explicitly found in the FAA, some of those indicating a merits-related inquiry in setting-aside proceedings by review courts located in relevant jurisdictions.[501] While expanded review grounds are not necessarily followed by a significant rise of frequency at which investment awards would be set aside, an award that is upheld by the review court at the place of arbitration could have been vacated by the court from another jurisdiction on asymmetric grounds. In addition, even if the national arbitral regimes of two jurisdictions are both modelled on the Model Law system as to the grounds for setting aside arbitral awards, judges from the said jurisdictions could handily have the relevant articles of law applied in a way that they prefer with little or no regard for extraterritorial judicial practices in this regard. Consequentially, like challenges against investment awards may be subject to distinct outcomes in different jurisdictions, exacerbating inconsistency and unpredictability that have long engulfed the investment arbitration system.

For another thing, judicial attitudes towards arbitral tribunals and arbitration awards, which arguably play an equally critical role in the outcomes of setting-aside proceedings, may also diverge among jurisdictions and/or judges. While arbitration awards are typically approached by courts in arbitration-friendly countries with appreciable self-restraint, those courts could still accord deference of different levels to investment awards submitted for their review. Switzerland as a particularly popular seat of arbitration,[502] for instance, appears to adopt a less interventionist approach in setting-aside proceedings against investment awards. That is plausibly confirmed by the prima facie evidence that the Swiss Federal Tribunal has all but

[499] See 6.3. The Scope of Judicial Review of Investment Awards.
[500] *Ibid*.
[501] These grounds include "manifest disregard of the law", "manifest disregard of the evidence", and "manifest disregard of the contract". Coe, *supra* note 7, at 194-195.
[502] White & Case and School of International Arbitration, Queen Mary University of London, "2018 International Arbitration Survey: The Evolution of International Arbitration", http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf (last visited on May 20, 2022), p. 11.

never upheld efforts made by disputing parties to challenge investment awards.[503] The Swiss court deferring to investment tribunals with greater resolve, however, is not only demonstrated by the outcomes of setting-aside proceedings but also the adjudicatory methods elected along the review process. When addressing challenges as to the jurisdiction of investment tribunals, the Swiss Federal Tribunal is of the view that new jurisdictional arguments cannot be raised at the setting-aside stage, while that reportedly is allowed before both French and UK courts even if those arguments were not introduced to the arbitral tribunals.[504] Indeed, given that domestic courts are usually vested with broad discretion to deal with setting-aside applications,[505] they may accord a high level of deference to investment tribunals, or, if deemed as appropriate and necessary, may take a more interventionist approach by launching a *de novo* review. It follows that, even if assuming the enactment of the same set of grounds for judicial review, same or like applications for the setting-aside of investment awards are likely to be treated with different outcomes by domestic courts across different jurisdictions.

To summarize, just the same as investment arbitration itself, judicial review of investment awards is also characterized by perceptible inconsistency. The idiosyncrasies of domestic courts at the seat of arbitration exerting a considerable influence over the review process and outcomes would be likely to render the judicial review mechanism and thus the overall investment arbitration system less predictable and less reliable.

6.6.9 Resulting Need for Forum Shopping

Recognizing that non-ICSID investment awards might be subject to the judicial review conducted by *situs* courts and that the particularities of arbitration localities might be largely at play, disputing parties, legal counsels and investment tribunals would conceivably take the probable initiation and conduct of setting-aside proceedings into consideration in their determination of the seat of arbitration. To maximize their interests in any follow-on judicial review applications, they would examine the laws of competing venues in relation to challenges against arbitration awards and their respective jurisprudence accumulated in this domain.[506] For instance, while the investor side and its prudent counsels would arguably seek a jurisdiction where the chance for a positive jurisdictional ruling to be vacated is minimal, host states seemingly have little reason to concur, assuming there are no pull factors. Needless to say, the odds that jurisdictional challenges are to be sustained might only be a constitutive element of the imaginably intricate calculating process. On the other hand, arbitrators should be incentivized to promote a venue in which review courts are most likely to embrace the least interventionist approach for the preservation of the finality of arbitration. Whatever the ultimate chosen venue is, the comparing and contrasting process is bound to impose temporal and financial burdens on the stakeholders. In other words, disputant energies

[503] See 6.4 Empirical Study: An Overview of Known Cases Concerning the Judicial Review of Investment Awards.
[504] IA Reporter, "Swiss Court Dismisses Set-Aside Application of Libya Award", https://www.iareporter.com/articles/swiss-court-dismisses-set-aside-application-of-libya-award/ (last visited on May 20, 2022).
[505] Coe, *supra* note 7, pp. 197-199.
[506] *Ibid*, at 199-200.

would be occupied by the determination of, and debates over, the place of arbitration at the beginning of the arbitral process, which could otherwise be leveraged for the development of the substantive aspects of the case.[507] In the meantime, arbitrators could also be distracted from the substance of the dispute at hand and counterproductive animosity between the disputing parties accelerated.[508] Therefore, the judicial review mechanism as founded upon national arbitral regimes is likely to raise the need for forum shopping, dragging down the overall economy of the dispute resolution process.

6.6.10 Sliding into the Stale Trap of Double Control

In the absence of voluntary compliance with non-ICSID awards, the New York Convention would most likely step in to facilitate the recognition and enforcement of those awards on a global scale. However, seeking recognition and enforcement in another jurisdiction other than the jurisdiction where the arbitration is seated invites the scenario in which a certain investment award might be subject to dual-level judicial control respectively by the review court and the enforcement court. The dual-level control in turn could create chaos and conflicts and that is because the enforcement court does not necessarily defer to the setting-aside decision made by the review court or hold off the enforcement proceeding until the conclusion of the judicial review proceeding.

Article 5(1)(e) of the New York Convention provides that recognition and enforcement of the award may be refused if "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[509] Thus, even if a non-ICSID award was set aside by the court at the place of arbitration, whether or not the recognition and enforcement of it would be refused by the enforcement court remains indeterminate. Indeed, domestic courts around the world are generally divided into two groups in their treatment of annulled arbitration awards during enforcement proceedings with each group characterized by the classic approach and the internationalist approach. While the classic approach recognizes the universal effect of setting-aside decisions made at the seat of arbitration, supporters of the internationalist approach contend that the decision-making of enforcement courts is not subject to the outcomes of judicial review proceedings before *situs* courts.[510] That implies, on the one hand, that a vacated investment award is not necessarily unenforceable in many parts of the world, and on the other hand, that many managed to secure a setting-aside decision probably only to see the initiation of a new string of enforcement proceedings that could be brought almost anywhere across the globe. No wonder the former Yukos shareholders did not stop their efforts to enforce the favorable awards rendered out of the arbitral proceedings in relation to the *Yukos* case globally notwithstanding the judgement which was handed down by the

[507] *Ibid*, at 200.
[508] *Ibid*.
[509] Article V(1)(e), the New York Convention.
[510] Manu Thadikkaran, "Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?", Journal of International Arbitration, Vol. 31, No. 5 (2014), pp. 606-608 (arguing that while "the likelihood of enforcement of annulled awards subsists in Austria, Brunei, Croatia, Denmark, Hong Kong, Ireland, Lebanon, Luxembourg, Mexico, Panama, Poland, Spain, and Turkey", "countries such as England, Germany, Hungary, India, Italy, Japan, Korea, and Switzerland are likely to recognition and enforcement of annulled awards").

Hague District Court in 2016 giving an unexpected twist to the dispute between those shareholders and Russia.[511]

In the event that investment awards annulled by domestic courts *loci arbitri* are otherwise recognized and enforced by competent authorities from other jurisdictions, the setting-aside proceeding may merely become a white elephant which sucks time, money and energies. Thus, the formalistic graft of the judicial review mechanism would precipitate investment arbitration into a trap, i.e., arbitration awards being subject to double control by the review court and the enforcement court, which has long haunted international commercial arbitration.[512] That trap not only renders the overall investor-state dispute resolution process more complicated and more time-consuming but also less predictable and less affordable.

6.7 Concluding Remarks

In the context of non-ICSID arbitration, investment awards are susceptible to scrutiny by domestic courts *loci arbitri* through the launch of judicial review proceedings as is the case with commercial arbitration. While the UNCITRAL Model Law has generated a unifying effect in terms of the legal foundations for the *vacatur* of arbitration awards, the review grounds and standards adopted by national authorities around the world demonstrate perceptible differences and their implementation is understandably in thrall to the discretionary power of review courts. With the gradual increase of the applications for the setting-aside of non-ICSID awards,[513] the judicial review mechanism should be put under careful examination as its relevance in the reform of the overall investor-state dispute resolution process also proportionally grows. Although the judicial review mechanism to some extent fills the gap left by the lack of an appellate body in the investment arbitration system, placing judicial authorities at the seat of arbitration above investment awards cannot be labelled as an appropriate post-award remedial method. On top of other concerns, the involvement of domestic courts *loci arbitri* in handling challenges against investment awards risks impairing neutrality and deepening distrust and the initiation of the setting-aside proceeding may render the overall dispute resolution process much lengthier and costlier than expected. What is also worth underlining is that the fate of the investment award is dependent upon the idiosyncrasies of the *situs* jurisdiction, paving the way for the lack of predictability and consistency in the global practice of judicial review of investment awards. Recognizing all the side effects of the judicial review mechanism, the pursuit of a better alternative to that as a post-award remedial method should be incorporated into the agenda for the overall reform of the investor-state dispute resolution system.

[511] Marike R. P. Paulsson, "Yukos: Enforcement or Adjournment of Arbitral Awards during Set Aside Proceedings", Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2020/03/11/yukos-enforcement-or-adjournment-of-arbitral-awards-during-set-aside-proceedings/ (last visited on May 20, 2022).
[512] Robert C. Bird, "Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention", North Carolina Journal of International Law and Commercial Regulation, Vol. 37, No. 4 (2012), pp. 1043-45.
[513] See 6.4 Empirical Study: An Overview of Known Cases Concerning the Judicial Review of Investment Awards.

Chapter 7 Conclusions and Recommendations

7.1 Introduction

This study is concerned with reforming investor-state dispute resolution from the perspective of domestic courts with a particular focus on the adjudicative and supervisory roles of those courts in the overall process. While Chapter 2 makes clear that investment arbitration is engulfed by a legitimacy crisis and a consensus for the need of reform has arisen, Chapter 3 sets out the roles and functions of domestic courts in investor-state dispute resolution and their respective legal foundations. Upon the elaboration that the adjudicative role of domestic courts may be expected to increase in the future as shown by the recent investment treaty-making practice in Chapter 4, Chapter 5 is centered upon a comparative institutional analysis of three approaches in regulating the allocation of power between domestic courts and investment arbitration.[1] The focus of Chapter 6 is placed upon the practices of judicial review of investment awards and the problems that may be raised by the judicial review mechanism. This chapter proceeds to conclude the research on the adjudicative and supervisory roles of domestic courts and to provide policy recommendations on how to improve the current mechanism underlying the resolution of investment disputes via the recalibration of domestic courts' adjudicative and supervisory roles in the process.

The rest of this chapter is divided as three sections: conclusions (Section 7.2), recommendations (Section 7.3), and limitations (Section 7.4). In view of the central research question of this study, i.e., how to reform investor-state dispute resolution from the perspective of domestic courts, Section 7.2 concludes with the essential findings of the previous chapters. Section 7.3 proceeds to provide specific policy recommendations on the recalibration of the adjudicative and supervisory roles of domestic courts in investor-state dispute resolution with an institutionalized "litigation plus arbitration" model and an alternative to the judicial review mechanism in mind. This chapter ends with Section 7.4 setting forth the limitations, to which this study and thus the conclusions and policy recommendations presented above, may be subject.

7.2 Conclusions

7.2.1 Much of the International Community Recognizes the Need to Reform the Investment Arbitration System

The emergence of the investment arbitration system has fundamentally changed the way in which investment disputes between foreign investors and host states are resolved by according those investors the right to arbitrate with sovereign states at an international forum. Parallel with the expanding scope of application via the conclusion of modern investment agreements and the growing number of initiated arbitral proceedings,[2] investment arbitration

[1] These three approaches are domestic courts as an exclusive forum for investor-state dispute resolution, investment arbitration as an alternative to domestic courts, and investment arbitration as a complement to domestic courts. See Chapter 5 Reflections on the Adjudicative Roles of Domestic Courts in Investor-State Dispute Resolution.

[2] Henrique Sachetim and Rafael Codeço, "The Investor-State Dispute Settlement System amidst Crisis, Collapse, and Reform", Arbitration Brief, Vol. 6, No. 1 (2019), p. 22-23 (arguing that most IIAs allow foreign

has lapsed into what many academics call a legitimacy crisis that threatens the continued operations of the dispute resolution mechanism.[3]

First of all, investment arbitration allegedly lacks consistency and predictability, which means that, in accordance with the same or similar investment treaty provisions, the same or similar facts could be determined with different outcomes.[4] Second, while foreign investors have managed to safeguard their monetary interests through the initiation of investment arbitration, national sovereignty and public interests might be sacrificed and sovereign states might be deterred from optimal regulation.[5] Third, the opaqueness of the investment arbitration system has been widely rebuked, raising concerns that the general public of the host state cannot effectively assess whether the arbitration proceedings operate in a fair and just manner and whether the outcomes were made at an unfair cost to them.[6] Fourth, the constitution of arbitrators involved in investment arbitration has also become an issue of contention as the majority of those arbitrators are believed to be "male, pale and stale" while the so-called revolving door phenomenon exacerbates the doubt cast over the capability of investment arbitrators to remain independent and impartial.[7] Fifth, despite the limited remedy provided by the annulment procedure for ICSID arbitration and the judicial review mechanism for non-ICSID arbitration, the lack of an appellate mechanism in the investment arbitration system fails to meet the expectations of many that errors may occur in decision-making from time to time and erroneous decisions should be corrected in any legal system.[8] Last, investment arbitration has been accused of being too expensive and lengthy, which conflicts with the traditional impression that international arbitration is faster, cheaper and thus better than litigation via domestic courts.[9]

Recognizing that discussions about the investment arbitration system often tend to be polarized,[10] the above-mentioned allegations against that system are not made without empirical foundations.[11] While the system has its own defenders who argue that the expressed concerns are exaggerated or overblown,[12] the broader international community has built a consensus that reforms should be introduced to redress the loopholes. The most notable joint efforts at the multilateral level are embodied by the fact that the member states of UNCITRAL mandated Working Group III to identify concerns regarding investment

investors to bypass national courts to initiate investment arbitrations and the dramatic increase of investment arbitrations leaves no doubt that the mechanism serves to protect foreign investors).

[3] Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", Fordham Law Review, Vol. 73, No. 4 (2005), p. 1523.

[4] See 2.4.1 Lack of Consistency and Predictability.

[5] See 2.4.2 A Threat to Public Interests.

[6] See 2.4.3 Lack of Transparency.

[7] See 2.4.4 Independent Arbitrators?.

[8] See 2.4.5 Lack of An Appeals Facility.

[9] See 2.4.6 Costly and Lengthy Proceedings.

[10] Malcolm Langford, et al., "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction", Journal of World Investment & Trade, Vol. 21, No. 2-3, p. 177 (2020).

[11] Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, "Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?", Journal of World Investment & Trade, Vol. 21, No. 2-3 (2020), pp. 188-250.

[12] Langford, et al., *supra* note 10, at 168-169.

arbitration, discuss the desirability of changes and develop solutions.[13] Although the reform of the substantive rules in IIAs is not explicitly excluded from the mandate of Working Group III,[14] the Draft Working Papers for comments so far are all concerned with the procedural mechanism.[15]

7.2.2 The Ongoing Efforts to Reform Investor-State Dispute Resolution Should Consider the Roles and Functions of Domestic Courts

Prior to the emergence of the investment arbitration system, litigation via domestic courts and diplomatic protection were the main channels for the resolution of foreign investment disputes.[16] Although investment arbitration may have become the dominant remedy for the enforcement of international investment obligations,[17] domestic courts retain the inherent jurisdiction to entertain those investment disputes. In other words, regardless of whether IIAs explicitly make reference to domestic courts in their dispute resolution section, domestic courts remain as an option for aggrieved foreign investors to file a complaint against host governments.[18] In fact, some investment agreements clearly mention litigation via domestic courts as a method for dispute resolution. By incorporating the exhaustion of local remedies rule, a small portion of investment agreements which were mostly signed decades ago require foreign investors to use up all the available remedies provided not least by the judiciaries of the host state before the right to investment arbitration could be activated.[19] However, as a rule derived from customary international law, its applicability is severely limited in modern international investment law.[20] This means foreign investors in most cases could directly invoke the investment arbitration clause contained in IIAs without the need to go through the often lengthy domestic court proceedings, which in turn becomes one of the most striking features of the international investment legal regime. Even in the event that the exhaustion of local remedies rule is put in place, foreign investors may be exempt from that burden by arguing that local litigation is futile.[21] There are also some investment agreements which have adopted a watered-down version of the exhaustion of local remedies rule, requiring prior recourse to domestic courts but subjecting it to a time limit. By doing so, foreign investors are assured that they may resort to investment arbitration if a specific period of time has elapsed but domestic court proceedings were not completed.[22]

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[13] *Ibid*, at 170.
[14] *Ibid*, at 172-173.
[15] These Draft Working Papers include the Draft Working Paper on Code of Conduct for Adjudicators in Investor-State Dispute Settlement, the Draft Working Paper on Selection and Appointment of ISDS Tribunal Members, the Draft Working Paper on Appellate Mechanism and Enforcement Issues, and the Draft Working Paper on the Establishment of An Advisory Centre. UNCITRAL, "Draft Working Papers", https://uncitral.un.org/en/draftworkingpapers (last visited on May 20, 2022).
[16] Sachetim and Codeço, *supra* note 2, at 21.
[17] Sergio Puig, "No Right without A Remedy: Foundations of Investor-State Arbitration", University of Pennsylvania Journal of International Law, Vol. 35, No. 3 (2014), p. 831.
[18] Gabrielle Kaufmann-Kohler and Michele Potestà, "Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options", Springer (2020), p. 36.
[19] See 3.2.4 Exhaustion of Local Remedies Prior to the Institution of Arbitration.
[20] *Ibid*.
[21] *Ibid*.
[22] See 3.2.5 Pursuit of Local Remedies Prior to the Institution of Investment Arbitration.

In some investment agreements, sovereign states employ the fork-in-the-road clause or the no U-turn provision to allocate the jurisdiction over investment disputes between domestic courts and investment tribunals. By way of the fork-in-the-road clause, foreign investors are granted the right to choose between litigation via domestic courts and investment arbitration as the method for the resolution of investment disputes. However, once foreign investors commence domestic court proceedings or investment arbitration proceedings, the choice is irreversible.[23] The waiver provision or the no U-turn provision is different from the fork-in-the-road clause in the sense that foreign investors retain the right to initiate investment arbitration after litigating the same measure before the domestic courts of host states. All they have to do is to discontinue ongoing domestic court proceedings and waive the right to launch any new such proceedings. In contrast, foreign investors cannot shift back to litigation via domestic courts if they have already opted for investment arbitration.[24] While both the fork-in-the-road clause and the no U-turn provision are intended to avoid the adverse impacts of parallel proceedings, such as "duplication of costs, risks of double recovery and of inconsistent outcomes", the former type of clause seems to provide foreign investors with a stronger incentive to opt for investment arbitration rather than litigation via domestic courts.[25]

In addition to directly entertaining investment disputes, domestic courts may also come into play at different stages of the dispute resolution process even if foreign investors have commenced investment arbitration proceedings. In the context of non-ICSID arbitration, domestic courts at the seat of arbitration may be used by the parties to arbitration to decide challenges against arbitral decisions via the exercise of supervisory power. The supervisory role of *situs* courts over investment arbitration and awards is recognized by mainstream arbitration rules applicable in non-ICSID arbitration. The UNCITRAL Arbitration Rules, for instance, defer to the supervisory power of *situs* courts as granted by national arbitration laws but permit parties to arbitration to waive their right to any form of recourse against an award so long as it is not prohibited by domestic law.[26] The less frequently used ICC Arbitration Rules and LCIA Arbitration Rules, however, take a different approach, which deems disputing parties to have waived their right to any recourse unless such a waiver cannot be validly made within the domestic legal framework.[27] Therefore, the existence of the right to challenge investment awards before *situs* courts and of the supervisory power held by those courts as to investment arbitration largely turns on national arbitration regimes. The UNCITRAL Model Law, which provides the template for the arbitration laws of many jurisdictions, explicitly permits parties to arbitration to apply for the setting-aside of arbitration awards before *situs* courts but that application should be made within a specific period of time.[28] Likewise, the arbitration laws of the US and the Netherlands, which are not

[23] See 3.2.6 Fork-in-the-road Clause. In the investment treaty-making practice, there are certain variants of the fork-in-the-road clause. Some investment agreements prescribe that only the choice of domestic courts is irreversible. Some other investment agreements provide that foreign investors' "choice between international arbitration and domestic court proceedings may be reversible until the first instance domestic court has issued its judgment, but not later." Kaufmann-Kohler and Potestà, *supra* note 18, at 39-40.
[24] See 3.2.6 Fork-in-the-road Clause.
[25] Kaufmann-Kohler and Potestà, *supra* note 18, at 41.
[26] See Authorization by Arbitration Rules.
[27] *Ibid*.
[28] See 3.3.4 Authorization by National Arbitration Acts.

based on the UNCITRAL Model Law, also allow challenges against arbitration awards via the judicial review mechanism and the supervisory power of *situs* courts.[29]

Domestic courts could also play a supportive role in their interplay with investment tribunals by facilitating the operations of investment arbitration proceedings in some different ways. In the event that voluntary compliance with investment awards is not forthcoming, the activation of the recognition and enforcement mechanism will become necessary for safeguarding the authority of international arbitration. Indeed, domestic courts play a key role in the process of recognizing and enforcing investment awards, in relation to both ICSID Arbitration and non-ICSID arbitration. While the ICSID Convention requires member states to recognize and enforce the pecuniary obligations imposed by an award as if it were a final judgement of their domestic courts, those courts are also often open to applications for the recognition and enforcement of non-ICSID awards via the New York Convention and other treaties with the same purpose.[30] At the same time, in both ICSID and non-ICSID arbitration proceedings, parties to arbitration are generally entitled to make an application to domestic courts for the issuance of judicial interim measures.[31] Although interim measures in many cases are handed down by arbitral tribunals, the assistance from domestic courts may be needed for the recognition and enforcement of those arbitral interim measures.[32]

While the literature on the topic of investment arbitration abounds, the roles and functions of domestic courts in the resolution of investment disputes have attracted far less scholarly attention. However, domestic courts are a crucial player in the investor-state dispute resolution process, which is not only reflected by their inherent jurisdiction over investment disputes but also their dynamic interplay with investment arbitration proceedings. Accordingly, the international community's efforts to improve the mechanism for the resolution of investment disputes and the accompanying academic debates should not focus solely on the controversial investment arbitration system. On the contrary, an examination of the engagement of domestic courts in the entire process and follow-on discussions of any room for improvement should go hand in hand with the reform of the investment arbitration system. That is the case also because the very idea of granting foreign investors the right to initiate international arbitration proceedings is founded upon the conception that investment arbitration has certain advantages over litigation via domestic courts.[33] Nevertheless, as investment arbitration *per se* has been caught in ferocious attacks for long, the time is ripe for all the stakeholders to take a step back and reconsider the roles and functions of domestic courts in the investor-state dispute resolution process.

7.2.3 The Increased Significance of Litigation via Domestic Courts in Some Recent Treaty-Making Practice

[29] *Ibid*.
[30] See 3.4.1 Recognition and Enforcement of Investment Awards by Domestic Courts.
[31] See 3.4.2 Interim Measures in relation to Domestic Courts in Investment Arbitration.
[32] *Ibid*.
[33] Julien Chaisse and Rahul Donde, "The State of Investor-State Arbitration: A Reality Check of the Issues, Trends, and Directions in Asia-Pacific", International Lawyer, Vol. 51, No. 1 (2018), p. 51 (noting that investment arbitration was by far the most popular mechanism for the resolution of foreign investment disputes).

Amidst the widespread concerns and fears over investment arbitration, litigation via domestic courts seemingly has gained momentum in some recent treaty-making practice of some of the biggest economies around the world. Nonetheless, the ascent of the relevance of domestic courts in this regard has been achieved via different routes. The first route is reducing the recourse to investment arbitration through the denunciation of the ICSID Convention and the concomitant exit from the symbolic arbitration centre. Suffice it to say, the ICSID regime largely represents the investment arbitration system as it is now and ICSID has been a main handler of those arbitration cases since its establishment.[34] Therefore, the denunciation of the ICSID Convention and the concomitant exit from ICSID largely demonstrate sovereign states' resolve to dispense with the predominant institutions underpinning investment arbitration. After a sovereign state finishes the necessary legal procedure to withdraw from the ICSID Convention and terminates its membership, foreign investors within its territory will be understandably bereaved of the opportunity to launch ICSID arbitration proceedings in due course.[35] Although the ICSID regime is definitely not the entirety of investment arbitration, the chance to go for non-ICSID arbitration instead comes down to the question of whether the denouncing state also offers its consent to arbitrate with foreign investors pursuant to other arbitration rules in the investment agreements signed with other states. The denunciation of the ICSID Convention thus makes room for litigation via domestic courts, especially considering that non-ICSID arbitration is inextricably linked with national legal regimes and some foreign investors may not find it equally attractive. While the high-profile instances of withdrawal from the ICSID arbitration system are related to some Latin American countries,[36] it is not improbable that more countries will follow suit in the years to come as ICSID itself has sparked much controversy.[37]

Since IIAs impose largely standardized constraints on sovereign states while protecting the private interests of foreign investors,[38] international investment law has been accused of being undesirably lopsided.[39] Consequentially, some states around the world have started a campaign to terminate investment agreements concluded with trade partners and some of them are even seemingly intent on completely disengaging from the sprawling network of IIAs.[40] By virtue of the termination of investment agreements, both substantive protections and procedural rights accorded to foreign investors in those agreements are extinguished.[41] Compared with the denunciation of the ICSID Convention, terminating investment agreements fundamentally revokes states' treaty-based consent to arbitrate with foreign

[34] Michael Faure and Wanli Ma, "Investor-State Arbitration: Economic and Empirical Perspectives", Michigan Journal of International Law, Vol. 41, No. 1 (2020), pp. 1-2 (noting that the investment arbitration system is largely based on the ICSID Convention and its arbitration rules and investment arbitration cases are usually administered by ICSID).
[35] See 4.2 Denunciation of the ICSID Convention.
[36] *Ibid*.
[37] Leon E. Trakman, "The ICSID under Siege", Cornell International Law Journal, Vol. 45, No. 3 (2012), pp. 603-665.
[38] Anne van Aaken, "Perils of Success? The Case of International Investment Protection", European Business Organization Law Review, Vol. 9, No. 1 (2008), p. 16.
[39] Olivia Chung, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration", Virginia Journal of International Law, Vol. 47, No. 4 (2007), pp. 953-976.
[40] See 4.3.1 State Practice on Terminating IIAs
[41] *Ibid*.

investors before both ICSID and non-ICSID tribunals. That effectively prevents foreign investors from initiating investment arbitration proceedings against the terminating host state pursuant to investment agreements, although it often does not occur immediately.[42] Without investment treaty protection, foreign investors would often be compelled to submit their disputes with host states to domestic courts for adjudication which would most likely be based on applicable domestic laws and regulations. However, if a host state only terminates part of its concluded investment agreements, those foreign investors covered by the remaining part will continue to benefit from an extra layer of procedural entitlement.

Unlike the rather extreme approach of staying away from the investment treaty regime, a string of states decided to keep in place investment agreements but exclude investment arbitration as a procedural right for foreign investors.[43] For instance, Brazil, which started to formally conclude and ratify IIAs only in recent years, insists on its long-standing policy stance of refusing the inclusion of investment arbitration as a method for the resolution of investment disputes.[44] The Australian government once announced its determination to remove investment arbitration from its network of investment agreements, but this policy goal was reversed later as a result of the change of government. However, the opposition to the engagement with investment arbitration has not since disappeared.[45] In the meantime, the United States appears to be promoting a unique selective approach, i.e., abandoning investment arbitration if the treaty counterparty is a close ally but retaining the method for dispute resolution when signing treaties with developing countries.[46] Through the exclusion of investment arbitration from IIAs, sovereign states remain committed to the international obligation of providing certain international standards of treatment to foreign investors. But that obligation cannot be enforced by private arbitrators sitting on the investment tribunal. Once investment arbitration is not an option on the table any longer, foreign investors will often be forced to bring their cases to the domestic courts located in host states for adjudication. The use of litigation via domestic courts as a method for investor-state dispute resolution would thus correspondingly increase. Commercial arbitration and diplomatic protection could also be available for foreign investors, but the activation of these two methods is apparently subject to strict conditions.[47]

The last procedural arrangement through which the relevance of domestic court proceedings rises is the reinstatement of the largely abandoned rule requiring the use of local remedies prior to the initiation of investment arbitration proceedings. As discussed above, the applicability of conditioning investment arbitration on the exhaustion or prior use of local

[42] See 4.3.2 Survival of Investor Rights.
[43] See 4.4 Exclusion of Investment Arbitration from Treaties.
[44] See 4.4.1 Brazil.
[45] See 4.4.2 Australia.
[46] See 4.4.3 A Selective Approach?.
[47] Unless the foreign investor and the host government authority include a commercial arbitration clause in the investor-state contract, securing the other party's consent to commercial arbitration after a dispute has arisen is not an easy task. In the same vein, in order to obtain diplomatic protection from home states, foreign investors must have the resources to persuade government official back at home and the ability to prove the significance of the interests involved in their disputes with host states.

remedies has been severely constrained in modern international investment law.[48] However, the recent investment treaty-making practice of some major economies might indicate that this limitation on investment arbitration has regained traction and would be considered by more states.[49] In Chapter 14 of the USMCA, investment arbitration is kept in place between the United States and Mexico. However, on top of other restrictions, investment arbitration proceeding could only be launched after the same measure has been challenged before the domestic courts of the host state.[50] In the same vein, in reliance on its Model BIT 2016, India is seeking to revive the rule of the exhaustion of local remedies in its investment treaty program despite the foreseeable difficulties.[51] By virtue of the imposition of the rule of the exhaustion or prior use of local remedies, foreign investors are deprived of the right to immediately kick off investment arbitration proceedings and the alleged unlawful regulatory measure would be first and foremost examined by the judiciaries of host states according to domestic legal frameworks and, less likely, investment agreements. In other words, domestic courts are granted primary jurisdiction over investment disputes while investment tribunals would accordingly exercise secondary jurisdiction.

The observations above are in no way meant to refute the conclusion reached by some academics that investment arbitration remains the preferred method for the resolution of investment disputes.[52] However, against the background that investment arbitration is placed under closer scrutiny, some major economies appear to be considering the idea of recalibrating the allocation of jurisdiction over investment disputes between domestic courts and investment tribunals. If these approaches are embraced by more states in their negotiation or renegotiation of investment agreements, the adjudicative role of domestic courts as to investment disputes will be much further enhanced.

7.2.4 Both Domestic Courts as An Exclusive Forum and Investment Arbitration as A Substitute for Domestic Courts Demonstrate Major Disadvantages

Given that investment arbitration allegedly failed the expectations of numerous states of being a fast, good, and cheap dispute resolution method, some of those states have shifted their attention to the role of domestic courts in adjudicating investment disputes not least by terminating investment agreements and/or excluding the investment arbitration clause.[53] Thus, although it may risk bringing investor-state dispute resolution back to the pre-BIT era, the exclusive reliance on litigation via domestic courts for the resolution of investment disputes has become a policy option for sovereign states. Indeed, despite the fact that the rule of law development and the quality of judiciaries across the world is still largely heterogenous, domestic courts in the developing world have made more or less progress in terms of fairness and efficiency in recent decades thanks to the conduct of judicial reforms.[54]

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[48] See 7.2.2 The Ongoing Efforts to Reform Investor-State Dispute Resolution Should Consider the Roles and Functions of Domestic Courts.
[49] See 4.5 Prior Use of Local Remedies.
[50] See 4.5.1 The USMCA.
[51] See 4.5.2 The Indian Model BIT 2016.
[52] Chaisse and Donde, *supra* note 33, at 48.
[53] See Chapter 4 The Rise of Domestic Courts in Recent Treaty-making Practice amidst Uncertainty of Investment Arbitration.
[54] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.

Therefore, the quality of domestic court proceedings as of today is not the same as the time when investment arbitration was created, which should prompt global policy-makers to reflect upon the division of labor between domestic courts and investment tribunals. There are also other factors that would militate in favor of domestic courts as an efficient means for the resolution of investment disputes, such as that domestic courts are more likely to provide a single forum for dispute resolution and that local judges are more knowledgeable in the field of domestic law.[55] However, the risks of unfairness and inefficiency associated with the judiciaries of some states are not predicated without grounds, especially considering that investment disputes basically set foreign corporate interests and national regulatory power against each other.[56] In terms of the promotion of compliance with investment treaty norms, domestic courts are in a better position to order primary or public law remedies which arguably do better in redressing non-compliance with the substantive provisions of investment agreements. But whether or not domestic courts can contribute to the compliance of states with investment treaty norms in reality comes down to the faithful implementation of international obligations via domestic legal arrangements and the quality of the judiciaries of the host state.[57] Moreover, while the reliance on litigation via domestic courts may improve the domestic rule of law, facilitate cross-border capital flows and maintain the sustainable development strategy, devising domestic courts as an exclusive forum for investor-state dispute resolution risks crippling the achievement of the goals of the investment treaty regime, such as the depoliticization of investment disputes.[58] When it comes to the enhancement of the legitimacy of the investment treaty regime, domestic courts may be expected to have a generally good performance. The reliance on domestic court proceedings may instill good governance principles contained in investment agreements into the domestic sphere, reduce sovereignty and financial costs incurred by national states, contribute to a level playing field between domestic investors and foreign investors and so on. Nevertheless, the optimism in this regard should be cautious as unfair and biased domestic court proceedings would sacrifice the legitimate interests of foreign investors and thus undermine the overall legitimacy of the investment treaty regime.[59]

On the other hand, molding investment arbitration as a substitute for litigation via domestic courts also has its own disadvantages that are not aligned with the goals of investor-state dispute resolution. While international arbitral tribunals are widely expected to deliver high-quality dispute resolution services at a relatively low cost, the impartiality of arbitrators involved in this practice faces relentless challenges and the efficiency of the arbitration proceedings is also cast in doubt for a number of reasons.[60] At the same time, despite the potential of investment arbitration as a neutral dispute resolution method in the promotion of state compliance with investment treaty norms, its ability to do so may be constrained not least by inconsistent arbitral jurisprudence and the practical difficulties of investment

[55] *Ibid*.
[56] See 5.3.1.2 Risks of Unfairness and Inefficiency Still Exist.
[57] See 5.3.2 Norm Compliance: Neglected Advantages and Undeniable Risks.
[58] See 5.3.3 The Attainment of Objectives: Chances and Challenges.
[59] See 5.3.4 Legitimizing the Investment Treaty Regime? Cautious Optimism.
[60] See 5.4.1 Fair and Efficient Dispute Resolution: Perceptions versus Reality.

tribunals in ordering primary remedies.[61] Moreover, theoretically speaking, investment arbitration may induce good state behavior as the supporters of investment arbitration argue that the potential of exposure to international arbitration proceedings provides host states with an incentive to adopt the established good governance standards. The improvement of the domestic rule of law would in turn help to make the host state a more attractive destination for cross-border capitals. Probably a more certain benefit of investment arbitration is the depoliticization of investment disputes, which reduces the involvement of the home state in the dispute resolution process and the likelihood of rising political rivalry. However, the direct access to investment arbitration may also have an adverse impact on the rule of law development within the host state by marginalizing domestic judicial institutions and lowering the state's incentive to improve institutional quality. It may also negatively influence the maintenance of FDI stocks inside the host state and the achievement of sustainable development goals.[62] In addition, substituting domestic court proceedings with investment arbitration would be likely to damage the overall legitimacy of investor-state dispute resolution. On top of all the alleged flaws of investment arbitration, the overwhelming reliance on international arbitration proceedings would impose heavy sovereignty and finance costs on national states. Providing access to foreign investors but not domestic investors would also fuel the concerns of reverse discrimination and competitive inequality. Last but not least, when the victims of human rights violations generally are not granted a direct and immediate access to international tribunals, it is hard to explain why multinational companies and corporate interests warrant such a privilege.[63]

Based on the analysis above, it is safe to say that neither domestic courts as an exclusive forum or investment arbitration as an alternative to domestic courts stands as a sufficiently suitable method for the resolution of investment disputes. These two institutional arrangements fall short of satisfying effectiveness in the sense that both of them demonstrate major disadvantages that may run counter to the realization of the goals of investor-state dispute resolution. Thus, suffice it to say at this stage that global policy-makers should not individually eye domestic courts or investment arbitration in the ongoing pursuit for a better answer to the ideal institutional design for the resolution of investment disputes.

7.2.5 Investment Arbitration as a Complement to Domestic Courts May Keep the Best of Both Worlds

Instead of outright abandoning or overwhelmingly relying on investment arbitration, there is another institutional arrangement where investment arbitration acts as a complement to domestic courts in resolving investment disputes. According to the complement model, domestic courts exercise primary jurisdiction over investment disputes and investment tribunals exercise secondary jurisdiction. In other words, while prior and mandatory domestic litigation would be put in place as a first line of resort, foreign investors retain the right to bring the investment dispute to international tribunals. Before proceeding to present the advantages of the complement model, it should be clarified that the complement model is not

[61] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[62] See 5.4.3 Facilitating Investment Treaty Objectives? A Mixed Picture..
[63] See 5.4.4 Investment Arbitration as A Dubious Legitimacy Booster.

an elixir that will magically eliminate all the concerns surrounding investor-state dispute resolution. The complement model itself, for instance, cannot remedy the defects of investment arbitration or the local court system in any given jurisdiction. Even if the complement model is adopted in a smart manner, the subsequent practice may reveal that more work should be done before the concerns surrounding investor-state dispute resolution can be largely cleared.

The complement model is a better institutional choice than full reliance on domestic courts and investment arbitration working as an alternative to domestic courts, because it carries more potential to fulfill the pre-determined goals of investor-state dispute resolution. In other words, it is a more effective institutional design than the other two models. This conclusion is supported by a comparative institutional analysis, which breaks down into four dimensions of fair and efficient dispute resolution, promoting state compliance with investment treaty norms, facilitating the achievement of the objectives of IIAs, and enhancing the legitimacy of the investment treaty regime. For an illustrative purpose, the following examples can be raised to demonstrate that the complement model should be the preferred design. First, in terms of fair and efficient dispute resolution, the complement model keeps both court litigation and investment arbitration, which avoids the risk that foreign investors may have no access to an independent and impartial forum in case that the local court system is corrupted and retain the opportunity for domestic judges to opine on national laws to benefit the entire dispute resolution process. Second, as of promoting state compliance with investment treaty norms, the complement model, by keeping domestic courts in the game, can more freely employ both primary remedies and secondary remedies to redress non-compliance with investment treaty norms. Note that, however, investment tribunals are not well-positioned to apply primary remedies. Third, with regard to achieving the objectives of IIAs, compared to investment arbitration working as an alternative to domestic courts, the complement model avoids the scenario where domestic courts are marginalized in resolving at least some high-profile investment disputes and national authorities would have less incentivize to reform the legal regime and local court system. Fourth, with respect to the maintenance of the legitimacy of the investment treaty regime, the complement model would more or less alleviate the concern that investment arbitration accords foreign investors an unfair privilege and reduce the sovereignty costs and financial burden imposed on national states. On top of these specific examples, the following paragraphs are intended to provide a more comprehensive analysis to demonstrate that the complement model is a more effective institutional design for resolving investment disputes.

The complement model first of all makes allowance for the high-quality judicial institutions in some states that have a good record of the rule of law and the progress that has been made in others as a result of judicial reforms. It also recognizes the need to provide foreign investors with access to an international forum since domestic courts may be subject to undue political interference and domestic legal framework is not necessarily aligned with investment agreements. Thus, the fairness of dispute resolution would not be compromised under the complement model.[64] In terms of the efficiency of dispute resolution, the

[64] See 5.5.1 The Complement Model Can Facilitate Fair and Efficient Dispute Resolution.

complement model is not necessarily less efficient than direct access to investment arbitration. If the investment dispute could be resolved already at the domestic level, the overall length and costs of the dispute resolution process would be likely to decrease. Meanwhile, domestic courts are more likely to provide a single forum for dispute resolution, which could reduce the potential need for multiple proceedings and cut down the total costs. Even if domestic courts fail to deliver a judgement to the satisfaction of foreign investors, those domestic proceedings are not futile in the sense that the discoveries and reasoning by domestic judges could give investment tribunals valuable insights into the dispute, particularly in relation to those domestic law issues. If investment tribunals indeed can find valuable information from the prior domestic court proceeding, that would likely be conducive to the improvement of the efficiency of the investment arbitration proceeding.[65] With that said, it is true that the overall dispute resolution process will be significantly delayed if the domestic court proceeding unreasonably drags on or wealthy foreign investors are intent on continuing frivolous legal battles with host states. But these loopholes are not insolvable; instead, they could be more or less addressed by the introduction of a few qualifications to the complement model in the actual design.[66]

The complement model is also more likely to fare better in promoting state compliance with investment treaty norms as it gives full play to domestic courts' flexibility to employ both primary and secondary remedies to restore state compliance and deter future recurrence. Meanwhile, even if domestic legal and judicial institutions fail to hold the host state accountable for its unlawful behavior towards foreign investors, domestic politicians would better understand that an international mechanism stands ready to cover the shortage. Therefore, the complement model arguably holds more potential in giving effect to investment treaty norms by joining the advantages of domestic courts and investment arbitration in this regard.

As far as the fulfillment of the objectives of the investment treaty regime is concerned, it also seems that the complement model can largely combine the benefits of litigation via domestic courts and investment arbitration while offsetting their respective underperformance. The complement model avoids the marginalization of the role of domestic courts in adjudicating investment disputes, which provides domestic courts, especially those located in the developing South, with an opportunity to gain valuable experience and expertise by increasing their contact with rather complicated disputes where regulatory right conflicts with commercial interests and where national laws meet with international obligations. Requiring foreign investors, particularly those powerful multinational companies, to resort to domestic courts at first would also be likely to provide the host state with more incentives to improve the quality of domestic legal and judicial institutions. On the other hand, if the potential exposure to investment arbitration proceedings would in any way exert a positive influence on state behavior, that benefit will not be compromised under the complement model.[67] Compared with direct access to investment arbitration, the complement model also provides foreign investors and specific government authorities with an opportunity to settle their

[65] *Ibid*.
[66] See 7.3.1 Towards a Smart Mix of Litigation via Domestic Courts and Investment Arbitration.
[67] See 5.5.3 A Utility Player in Facilitating the Objectives of the Investment Treaty Regime.

disputes via domestic court proceedings instead of poisoning the investor-state relationship at the rather early stage by escalating the dispute to the level at which foreign investors directly confront host states. That would be likely to increase the odds that the mutually beneficial investment relationship could be preserved despite the dispute resolution process and reduce the chance that capital flight follows. If the right to initiate investment arbitration would increase foreign investors' confidence in sinking capital within a specific state, the complement model actually provides those investors with comparable, if not the same, assurance.[68] Fortunately, within the complement model, foreign investors would still be able to avail themselves of the right to investment arbitration, obviating the need for diplomatic protection to a great extent. Since the interference from those investors' home states would be rendered unnecessary, interstate relationships would benefit from the extra layer of procedural protection in addition to domestic court proceedings.[69] The complement model is also more likely to facilitate the quest for sustainable development goals than granting foreign investors direct access to investment arbitration considering that domestic courts are regarded as more inclined to put emphasis on public interest issues than investment tribunals. On the assumption that dialogues between domestic courts and investment tribunals would be boosted under the complement model, concerns that investment tribunals place private interests before sustainable development goals would be alleviated.[70]

Last but not least, the complement model would also contribute more to the preservation of the legitimacy of the investment treaty regime. To start with, compared with retreating back to full reliance on domestic courts, the complement model avoids frustrating foreign investors by providing them with an avenue to seek remedies before international tribunals.[71] At the same time, as a result of the insertion of domestic court proceedings as a mandatory procedure, the sovereignty and finance costs inflicted by direct access to investment arbitration are likely to be reduced.[72] The complement model would also arguably facilitate the participation of local communities in the dispute resolution process and the unfair competitive disadvantage allegedly imposed on domestic investors would be to some extent eased as foreign investors also have to experience domestic court proceedings.[73] Considering that granting private parties direct and immediate access to international proceedings is not a standard practice in the international legal sphere, the complement model consolidates the legitimacy of international investment law by aligning its dispute resolution design with that of other branches of international law.[74]

The introduction of the complement model is surely not a panacea for investor-state dispute resolution. For instance, it cannot directly solve many of the obstinate accusations against the investment arbitration system, such as inconsistent arbitral jurisprudence and the lack of diversity among investment arbitrators. Nevertheless, compared with the other two options, namely domestic courts as an exclusive forum for dispute resolution and investment

[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid*.
[71] See 5.5.4 A Major Step towards A More Legitimate Investment Treaty Regime.
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.

arbitration as a substitute for domestic courts, the complement model is arguably more compatible with the realization of the goals of investor-state dispute resolution. At a time when international investment law in general, and investment arbitration in particular, are looked at with suspicion and hostility, the complement model holds potential in mitigating some of the conflicts and controversies that have held back the long-term development of international investment regime for long time.

7.2.6 An Alternative to the Current Mechanism of Judicial Review of Investment Awards Should Be Sought

Unlike ICSID arbitration where investment awards are exclusively subject to the self-contained annulment procedure, non-ICSID arbitration is put under the supervision of *situs* courts as provided by national arbitral regimes. That judicial review mechanism was originally developed for commercial arbitration and was transposed to investment arbitration with few, if any, modifications.[75] While the UNCITRAL Model Law contributes much to the harmonization and unification of the legal regimes governing the judicial review practices across the globe, sovereign countries retain the power to set down the grounds for the setting-aside of investment awards and to interpret and apply those grounds in their preferred ways.[76] The empirical study contained in Chapter 6 shows in practice that, among others, almost all the applications for the setting-aside of investment awards were filed before the judiciaries of the developed North and domestic courts *loci arbitri* upheld the decisions of investment tribunals in most cases.[77] Considering that investment arbitrations more often than not are conducted pursuant to the ICSID Convention and the associated Arbitration Rules, non-ICSID arbitrations which set off judicial review proceedings actually only account for a small portion of investment arbitrations. However, as both ICSID arbitration and non-ICSID arbitration cases continue to grow at a relatively rapid rate, the judicial review mechanism as a post-award remedy for disputing parties should be incorporated in the overall reform of the investor-state dispute resolution system.

Upon a closer look at the judicial review mechanism, it is safe to say that the mechanism demonstrates some unsettling disadvantages and thus reforms should be introduced to improve the post-award remedy available for parties to non-ICSID arbitration. First of all, domestic courts *loci arbitri* are not an appropriate forum for scrutinizing investment awards for a number of reasons: (1) that sovereign immunity concerns would be set off; (2) that *situs* courts reviewing investment awards risks blending international politics with dispute resolution; (3) that the neutrality of *situs* courts is subject to great uncertainty; and (4) that there is only a casual and loose link between the dispute and the seat of arbitration.[78] The very fact that review courts have been overwhelmingly located within the developed North could raise concern that the judicial review mechanism is inherently biased against developing countries which have already shown a somewhat negative sentiment towards

[75] See 6.2.4 Transposing Judicial Review from Commercial Arbitration to Investment Arbitration.
[76] See 6.3 The Scope of Judicial Review of Investment Awards.
[77] See 6.4 Empirical Study: An Overview of Known Cases Concerning the Judicial Review of Investment Awards.
[78] See 6.6.1 Domestic Courts *loci arbitri* as an Inconvenient Review Forum.

investment arbitration.[79] Since a dominant majority of investment arbitrations are conducted pursuant to treaties, the judicial review mechanism places review courts in an awkward position by asking them to interpret and apply investment agreements to which their own jurisdiction is often not a party.[80] Meanwhile, subjecting the decision-making of investment arbitrators who presumably specialize in the resolution of investment disputes to the scrutiny of domestic judges who may or may not be as knowledgeable or experienced may turn out to be an institutional arrangement that is open to question.[81] Given that judicial review proceedings could easily go through more than one instance of court proceedings in many jurisdictions, the dispute resolution process may consume more time and generate higher costs.[82] From this point of view, the judicial review mechanism favors the richer party in investment arbitration and could become a weapon of dilatory tactics available for such a party.[83] Considering the higher error costs relating to investment arbitration than that relating to commercial arbitration, limited review grounds and a copious amount of deference to arbitral tribunals may not prove to be as effective in the scrutiny of investment awards.[84] Moreover, the idiosyncrasies as to review grounds and standards across jurisdictions indicate that inconsistency would also probably permeate the judicial review practices, which would then encourage forum shopping that leads to increased costs and decreased efficiency.[85] In addition, as both review courts and enforcement courts may exercise control over investment awards, the setting-aside decision may be merely disregarded at the enforcement stage and the overall efficiency of investor-state dispute resolution may be reduced.[86]

In the light of the all-around attacks against the investment arbitration system, the judicial review mechanism may to some extent fill the gap left by the absence of an appellate mechanism. However, based on the foregoing analysis, such a mechanism, which is ineptly borrowed from the commercial arbitration regime, also demonstrates a number of crippling drawbacks. Thus, the comprehensive reform of investor-state dispute resolution should also recognize the inappropriateness of the judicial review of investment awards and seek a better post-award remedy method as an alternative, such as a delocalized appellate mechanism with a set of consistent standards for the review of investment awards.

7.3 Recommendations

7.3.1 Introducing a Smart Mix of Litigation via Domestic Courts and Investment Arbitration

The comparative institutional analysis in Chapter 5 suggests that the complement model is a better way to structure the allocation of jurisdiction over investment disputes between domestic courts and investment tribunals than exclusive reliance on domestic litigation or substituting investment arbitration for domestic courts.[87] That is because the complement

[79] See 6.6.2 Keep It in the Family: The Monopoly of Review Power.
[80] See 6.6.3 Domestic Courts *loci arbitri* Are Not Appropriate Treaty Interpretation Authority.
[81] See 6.6.4 The Judge Judging the Arbitrators: Not Necessarily Qualified.
[82] See 6.6.5 Augmented Costs and Procedural Delay.
[83] See 6.6.6 Who Are the Real Beneficiaries? Those Made of Money.
[84] See 6.6.7 Effectiveness in Question: Limited Review Grounds and A High Level of Deference.
[85] See 6.6.8 Inheriting the Infamous Inconsistency" & "6.9 Resulting Need for Forum Shopping.
[86] See 6.6.10 Sliding into the Stale Trap of Double Control.
[87] See Chapter 5 The Adjudicative Role of Domestic Courts in Investor-State Dispute Resolution.

model arguably serves the goals of investor-state dispute resolution better than the other two institutional designs. However, granting domestic courts primary jurisdiction and investment tribunals secondary jurisdiction only points towards a general direction and more specific proposals should be brought forward to achieve a smart mix of litigation via domestic courts and subsequent investment arbitration. Only in this way can the interests of foreign investors and host states be better balanced and the overall efficiency of investor-state dispute resolution can be improved.

Since the complement model requires foreign investors to resort to domestic court proceedings as the first step, the initial question that should be addressed is whether the exhaustion of local remedies rule should be revived. The answer to this question fundamentally determines the extent to which the domestic litigation requirement imposes a burden on those aggrieved foreign investors. We can recall that from the analysis in Chapter 5, the development of the rule of law and the quality of domestic judiciaries is uneven across jurisdictions.[88] If the traditional exhaustion of local remedies rule is reinstated, it is imaginable that foreign investors may be condemned to a rather disadvantageous position in some jurisdictions as the host state may take advantage of its underdeveloped judicial branch to impede the initiation of investment arbitration proceedings. Therefore, the domestic litigation requirement should be subject to a certain period of time, which means that foreign investors would not be trapped in endless domestic court proceedings. In other words, if domestic courts fail to render a judgement within the required period of time, foreign investors automatically become qualified to file an investment arbitration. The domestic litigation requirement short of exhaustion provides an incentive for national judiciaries to conduct the necessary reforms to improve judicial efficiency, at least in relation to the adjudication of investment disputes, and strikes a better balance between protecting foreign investors and respecting the judicial sovereignty of host states.

Recognizing that the revival of the exhaustion of the local remedies rule is not an appropriate solution, the time limit for domestic court proceedings thus becomes critical to the design of the complement model. Before a reasonable period of time for domestic courts to adjudicate investment disputes is determined, it should be noted that a minority of investment agreements have already adopted the domestic litigation requirement short of exhaustion and that has caused controversy.[89] Critics have argued that such a requirement often offers a relatively short period of time which makes it practically difficult for domestic courts to make a judgement before the required time elapses. They thus believe the prior domestic court proceedings increase the costs and duration of the dispute settlement with little contribution.[90] Although the criticism mentioned should not overshadow the benefits of the domestic litigation requirement,[91] the concern expressed over the reasonableness of the time limit warrants careful consideration in the process of institutional design. Considering that it takes

[88] See 5.3.1.1 Not as Biased, Inefficient, and Incapable as Before.
[89] Kaufmann-Kohler and Potestà, *supra* note 18, at 50-51 (arguing that the time limits provided in those investment agreements usually range between 3 months and several years).
[90] *Ibid*, at 52.
[91] Andrea K. Bjorklund, "Chapter 11 Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence", in Todd Weiler, ed., "NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects", Brill Nijhoff (2004), p. 286.

time to process the adjudication of investment disputes, the time allowed for domestic court proceedings should not be unreasonably short. The specified period of time, on the other hand, could not be too long. Otherwise, foreign investors would probably be stuck in long domestic court proceedings and the exhaustion of local remedies rule would be revived in disguised form. When it comes to the tricky question of how much time should elapse before foreign investors can initiate investment arbitration proceedings, apparently there is not a "one size fits all" solution that applies to all situations. That is because judiciaries across the world are not equally capable and judicial resources are more limited in some countries than in others. It follows that countries should proceed from reality and maintain reasonable flexibility in the negotiation process when determining the length of time allowed for domestic courts to adjudicate investment disputes. While they surely should push their counterparty to agree to a shorter period of time with the expectation that judicial efficiency could be improved through intentional reforms, that should be done with the knowledge that unreasonably short domestic court proceedings could be counterproductive.

The analysis above shows that maintaining efficient judiciaries is critical to the success of the complement model as low judicial efficiency would either lead to lengthy domestic court proceedings or a formalistic try before the domestic courts of host states. While there are certainly a lot of things that countries can do to improve judicial efficiency, such as modernizing justice systems and investing more in legal education and training,[92] most of these efforts take a relatively long period of time to bear fruit. One of the main advantages of arbitration relative to litigation, however, provides a valuable lesson for the improvement of the efficiency of domestic court proceedings. In addition to other purported benefits associated with arbitration, disputing parties choose arbitration often because arbitrators are usually more specialized in a specific industry or a certain area of law while judges are perceived to be often deluged with different sorts of disputes.[93] The higher level of specialization would then be likely to lead to more expeditious and accurate decision-making.[94] To ensure the initial domestic court proceedings under the complement model produce expected outcomes, national states should be encouraged to establish dedicated courts/divisions to handle investment disputes. In these circumstances, judges with expertise in investment law are assigned to deal with the disputes between foreign investors and host states, which is likely to increase the accuracy of decision-making and shorten the time required to deliver a judgment. At the same time, as those specialized judges can be expected to provide more compelling reasoning, foreign investors may have reduced incentives to initiate subsequent investment arbitration proceedings and investment tribunals may derive more inspirations from the judgments in previous domestic court proceedings.

Despite the assorted benefits that would be introduced in the complement model, it should be recognized that in some exceptional circumstances it is either inappropriate or futile to

[92] European Commission, "Theme 7: Quality Justice Systems", in "Quality of Public Administration: A Toolbox for Practitioners", https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8055&type=2&furtherPubs=no (last visited on May 20, 2022), pp. 2-80.
[93] Faure and Ma, supra note 34, at 4-5.
[94] *Ibid*.

condition investment arbitration upon domestic court proceedings. Therefore, when implementing the complement model, at least two exceptions should be made for foreign investors to bypass the requirement of initial domestic court proceedings. For one thing, apart from the executive branch of government, foreign investors may also enter into disputes with the domestic courts of host states as a result of a denial of justice or judicial misconduct. When investment disputes involve the judicial branch as one side of the disputing parties, there is typically little, if any, chance for foreign investors to seek further judicial remedy within host states.[95] By contrast, since national states usually offer a general consent to arbitrate with foreign investors, investment tribunals are generally able to claim jurisdiction over investment disputes involving different government branches.[96] Consequentially, mandating the requirement of domestic court proceedings would make no sense and granting foreign investors a direct access to investment arbitration is the sensible thing to do. For another thing, as recognized by the Tribunal in *Ambiente Ufficio v. Argentina*, the futility exception to the exhaustion of local remedies rule should also apply to the requirement to pursue local remedies.[97] In the case that the legal regime and/or judicial system of host states fail to provide foreign investors with any reasonable expectation for effective relief, the requirement to pursue local remedies would merely a waste of time instead of contributing to the overall dispute resolution process. For example, if the legal system of a specific host state systematically manifests a bias in favor of public authorities and foreign investors have no legal basis to claim compensation, and, as a result, domestic court proceedings would only be futile as those investors cannot expect to obtain any meaningful redress. However, as the complement model would only work if a mix of litigation via domestic courts and investment arbitration is the default, the threshold of the futility exception should not be set at a low level. In other words, foreign investors should be able to prove obvious futility and a low likelihood of success is not enough to waive the requirement to pursue local remedies.

To achieve a smart mix of litigation via domestic courts and investment arbitration, a mechanism of cost shift between disputing parties is indispensable. Although the complement model prioritizes domestic court proceedings, powerful foreign investors may have an incentive to abuse their procedural rights by filing frivolous claims. Despite the low likelihood of success in invoking the futility exception to the requirement of prior domestic court proceedings, foreign investors may try their luck before investment tribunals in an attempt to directly initiate investment arbitration. Likewise, in the case that the domestic courts of host states deliver a judgment against foreign investors with rigorous and compelling reasoning, those investors may still choose to bring the dispute further to the international level and they indeed retain the right to do so under the complement model. However, in both of the cases mentioned above, powerful foreign investors are not proceeding in good faith and may even be driven by a malicious intention of abusing their procedural rights. The current practice of investment arbitration does not seem to provide a

[95] Christopher Coble, "Can I Sue the Court?", https://blogs.findlaw.com/law_and_life/2018/01/can-i-sue-the-court.html (last visited on May 20, 2022).
[96] See 5.4.2 Norm Compliance: A Seeded Player Whose Hands Are Tied.
[97] Martin Dietrich Brauch, "Exhaustion of Local Remedies in International Investment Law", IISD Best Practices Series, January 2017, available at https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf (last visited on May 20, 2022), p. 19.

satisfactory solution to this problem as most tribunals have been found to adopt the "pay your own way" model.[98] Moreover, when investment tribunals choose to shift costs between disputing parties, they allegedly tend to do so more often for winning investors than for winning states.[99] That reluctance to embrace a cost shift mechanism would somewhat encourage foreign investors, especially those powerful ones, to abuse their procedural rights. To safeguard the primary jurisdiction of the domestic courts of host states and reduce frivolous arbitration claims, a cost shift mechanism should be introduced to facilitate the implementation of the complement model. In other words, foreign investors should bear the costs not only of their own but also those of the counterparty, at least part thereof, if they lose and vice versa.

Under the complement model, one of the key issues facing investment tribunals would be the determination of whether foreign investors have fulfilled the requirement to pursue local remedies. Therefore, the strictness of the approach embraced by investment tribunals in this regard would directly impact the enforcement of the right of foreign investors to investment arbitration. As indicated by the interpretation and application of the fork-in-the-road clause in practice, at least some investment tribunals tend to adopt the narrow "triple identity" test to evaluate the relevance of domestic court proceedings.[100] According to the "triple identity" test, investment tribunals would only regard a claim with the same object, parties and cause of action as relevant in determining whether foreign investors have already resorted to domestic courts.[101] If such a test is transposed to the context of the complement model, the cases submitted by foreign investors to investment tribunals may often be thrown out by those tribunals for failing to satisfy the requirement of prior local remedies. However, such a strict approach neglects the fact that cases before national and international adjudicating bodies are not necessarily brought by the same party but may be taken forward by those closely related parties, including but not limited to shareholders, subsidiaries, parent companies and so on.[102] Given that a formalistic approach would likely make the road towards investment arbitration unreasonably bruising for foreign investors, investment tribunals should be more flexible in assessing whether the requirement to pursue local remedies have been fulfilled. For instance, in a case where the local investment vehicle has already gone through domestic court proceedings with the responsible government authority, an investment arbitration claim made by the foreign parent company should not be rejected as far as the local remedies requirement is concerned. In other words, if only the underlying facts or measures of the domestic court proceeding and the investment arbitration claim are the same, investment tribunals should feel comfortable in exercising their jurisdiction over the dispute.

[98] Susan D. Franck, "Arbitration Costs: Myths and Realities in Investment Treaty Arbitration", Oxford University Press (2019), p. 217.
[99] *Ibid*, at 218.
[100] Kaufmann-Kohler and Potestà, *supra* note 18, at 42.
[101] Markus A. Petsche, "The Fork in the Road Revisited: An Attempt to Overcome the Clash between Formalistic and Pragmatic Approaches", Washington University Global Studies Law Review, Vol. 18, No. 2 (2019), p. 409.
[102] Kaufmann-Kohler and Potestà, *supra* note 18, at 34.

Since the complement model seeks a smart mix of domestic litigation and investment arbitration, a system of coordination between domestic courts and investment tribunals is needed to facilitate the dispute resolution process. According to the complement model, at the moment when investment arbitration proceedings are initiated, the underlying investment disputes usually have already been adjudicated by domestic courts with judgments rendered. It thus leads to the question of whether investment tribunals should start to deal with the dispute from scratch or they could rely on at least part of the work previously done by domestic courts. While the combination of domestic litigation and investment arbitration is fundamentally different from the WTO dispute settlement mechanism, the scope of work of the WTO Appellate Body may provide inspirations for that of investment tribunals. As the second and final stage of the WTO dispute settlement system, the Appellate Body is tasked with reviewing the legal aspects of the reports issued by panels.[103] In other words, the Appellate Body would focus on points of law, such as legal interpretation, instead of the re-examination of existing evidence or examination of new issues.[104] In the light of the pursuit of efficiency in investor-state dispute resolution, the default rule could be set so that the terms of reference of investment tribunals are limited to points of law and those tribunals defer to domestic courts in terms of the establishment of facts. However, in the case where either side of the disputing parties reject certain aspects of the facts of the case or the foreign investor has managed to bypass the requirement to pursue local remedies, investment tribunals should then endeavor to have a second look at (some of) the basic facts underlying the dispute.

To leverage the synergy effects of domestic courts and investment tribunals in the complement model, a form of dialogue between the national and international adjudicating bodies should be advocated. Subject to domestic constitutional limitations, domestic courts may be encouraged to directly apply international investment law and invoke arbitral decisions made by investment tribunals. By doing so, domestic judges may be able to bolster their reasoning in the decision-making process and foreign investors may find court judgements more justifiable and compelling. Consequentially, the likelihood may increase that investment disputes can be settled at a rather early stage and disputing parties are saved from enduring relatively costly investment arbitration proceedings. On the other hand, in tapping into the value of domestic court proceedings, investment tribunals could also base part of their analysis on the reasoning made by domestic judges, especially when domestic law-related issues are concerned. That is because investment disputes arise out of domestic business and/or regulatory environment and court judges are more specialized in the interpretation and application of domestic law. However, investment tribunals should not defer to domestic courts on those issues when domestic laws and regulations or the judicial interpretation of them are manifestly against the host state's international obligations, especially those contained in investment agreements. In the meantime, investment tribunals may be encouraged to interact more with domestic courts by directly addressing the points

[103] The World Trade Organization, "WTO Bodies Involved in the Dispute Settlement Process", https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm (last visited on May 20, 2022).
[104] The World Trade Organization, "Understanding the WTO: Settling Disputes", https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited on Apr. 15, 2021).

raised in court judgements to organize their own reasoning of points of law. Only in this way can disputing parties better understand why (parts of) previous court judgements are upheld or rejected by investment tribunals.

Although the complement model holds more potential in rendering investor-state dispute resolution more effective, achieving a smooth transition from the current set-up to such a model remains a daunting task, especially considering the fragmented nature of the investment treaty regime. If a piecemeal approach is adopted for the widespread introduction of the complement model, sovereign countries may be reluctant to be plunged into a complicated and exhausting process in which they have to renegotiate the dispute resolution clauses contained in investment agreements one by one. However, as indicated by the latest practices in the international law sphere, amendments to bilateral treaties may be validly made through a multilateral treaty.[105] For instance, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which aspires to expand the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to enhance transparency throughout the process, is meant to apply to investment arbitration based on pre-existing investment agreements.[106] In the same vein, the international community could also produce a multilateral treaty by which national states may choose to replace the dispute resolution clauses in their investment agreements with the complement model. This opt-in approach would not only help avoid the awkward situation where the reform is stranded because of the objection from a few countries but also spare national states from onerous renegotiations on a per treaty basis. Meanwhile, it may also provide valuable flexibility for national states in the sense that, for example, they may decide to apply the complement model to only a part of their investment treaty program but not the other part.

Last but not least, the complement model should be applied equally to both the North and South countries and the dual approach embraced by the United States and its allies may cause more harm than good. As can be seen from the investor-state dispute resolution arrangements contained in the USMCA, the United States may in the future continue the trend of abandoning investment arbitration with its traditional allies/other developed countries while keeping the mechanism in place with developing countries.[107] The supporters of this dual approach may argue that the underlying rationale is that developed countries in general have better-established judicial institutions and a more reliable rule of law tradition. However, the adoption of the dual approach may be as much political as it is legal. In the short run, it stands a good chance that developing countries would not raise a strong objection to this approach as the dispute resolution clauses are binding on both sides of the treaty. Nevertheless, if the dual approach becomes a common choice of developed countries, all the unfavorable outcomes resulting from the approach may ultimately rise to the surface.

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[105] Colin M. Brown, "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches", ICSID Review, Vol. 32, No. 3 (2017), p. 685.

[106] Article 1(1) of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration provides that: "This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 ('investor-State arbitration')." Article 1(1), the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

[107] See 4.4.3 A Selective Approach?.

Considering that cross-border capital movement is still largely dominated by the pattern of moving from developed countries to less developed countries, the large-scale adoption of the dual approach will likely lead to investment arbitrations being overwhelmingly raised against less developed countries rather than the inverse. That highly probable situation would reinforce the impression that investment arbitration serves the interests of developed countries at the cost of the other countries. Consequentially, the legitimacy of investment arbitration would be damaged and less developed countries may demand that amendments be made to the dual approach or withdraw from the investment arbitration system or even the investment treaty regime. On the other hand, if developed countries are genuinely confident about their own and each other's legal and judicial institutions, there is even less reason to partially cancel the application of investment arbitration as they should believe that their domestic courts would be able to deliver satisfactory judgments and investment arbitrations will not often arise against them. For the reasons above, the dual approach is not an ideal choice but the uniform application of the complement model should be guaranteed.

7.3.2 Replacing the Judicial Review Mechanism with a Delocalized Appellate Mechanism

In view of all the loopholes associated with the judicial review mechanism as mentioned above,[108] reforms should be introduced to the post-award remedy within the investment arbitration system. There are two obvious options in front of policy-makers — one is abolishing the judicial review mechanism and the other one is replacing such a mechanism with a delocalized appellate mechanism. Therefore, it is of necessity to consider whether an additional layer of review on top of the decision-making of investment tribunals is warranted, especially considering that, under the complement model, investment arbitration is preceded by domestic court litigation as the default rule. The core argument against the introduction of an extra layer of review is that such procedural addition would increase the overall costs and duration of dispute resolution. At the early stage upon the introduction of an appellate mechanism to the investment arbitration system, that concern might prove to be true since the losing party has much incentive to refer the dispute to the appellate body. Nevertheless, that is not necessarily true as precedents generated by an appellate mechanism in the long run may accelerate the dispute resolution process and reduce the overall costs.

Moreover, attention should also be given to the fact that investment disputes are different from ordinary commercial disputes in the sense that the stakes involved are often higher in the former type of disputes. Investment disputes are arguably more high-profile than commercial disputes, often simultaneously entailing corporate interests, host states' regulatory power, and public welfare. On that account, when it comes to investor-state dispute resolution, finality may understandably give way to accuracy. That relates to the long-standing call for the establishment of an appellate mechanism on top of investment arbitration, which holds potential for enhancing the consistency of decision-making and correcting errors made by investment arbitrators. Consistency and correctness are requisite characteristics of a genuine rule of law, without which the reputation of a certain dispute resolution method may be severely damaged. For that reason, the replacement of the judicial review mechanism with an appellate mechanism seems to be a more advisable option.

[108] See Chapter 6 Judicial Review of Investment Awards by Domestic Courts Loci Arbitri.

Unlike the judicial review of investment awards, an appellate mechanism is not affiliated with any specific jurisdiction and thus is not subject to the idiosyncrasies of the judiciary at the seat of arbitration. Such an appellate mechanism may also, by engaging professional adjudicators who are more specialized in investment law, be able to deliver better decision-making than domestic courts *loci arbitri*. In addition, while an appellate mechanism may render investor-state dispute resolution more costly and lengthy compared to the situation where investment awards are not subject to appellate review, it may still be more cost-effective and time-saving than the judicial review mechanism. That is because appellate review does not have to comprise several instances of trial and the appellate body may be empowered to correct investment awards without remand.

On top of the advantages mentioned above, there are additional benefits that replacing judicial review of investment awards with delocalized appellate review may generate. First of all, delocalized applleate review would avoid the sovereignty concern under the judicial review system where a sovereign country is subject to the ruling by private judges from another sovereign country. Second, unlike review courts in the context of investment arbitration that are almost invariably located in the developed North, appellate body can be expected to comprise decision-makers with diversified background, reflecting broad representation of both developed countries and developing countries. Third, an appellate body established with a clear mandate from national states would obviate the awkward situation under the judicial review system where the judiciary of a third country applies and interprets, without explicit mandate, the treaties entered into by two other countries. Fourth, upon careful selection by national states or an authorized organization, decision-makers at the appellate body can be more knowledgeable than judges from review courts in terms of international investment law and the interpretation of international treaties, which is likely to lead to an increase in the efficiency of dispute resolution and the quality of decision-making. Fifth, unlike the rigid deferential review commonly embraced by court judges in reviewing investment awards, an appellate body would be entitled to more discretion in determining the preferred standard of review in the face of a specific investment dispute, which might turn out to be more appropriate in the context of investment arbitration. Sixth, by making the idiosyncracies of the seat of arbitration largely irrelevant in the phase of post-award remedy, appellate review would to some extent reduce the need of forum shopping to the benefit of disputing parties.

The establishment of an appellate mechanism is a rather complicated issue which may require systemic reforms in relation to the comprehensive rules underlying the current investment arbitration system. For instance, as it involves not only non-ICSID arbitration but also ICSID arbitration, the amendment of the ICSID Convention is needed to replace the ICSID annulment procedure. In addition, there is also a question of whether an appellate mechanism should be integrated into the present ICSID regime, or built as an independent adjudicatory body or part of a potential international investment court as advocated by the EU. In the light of the research scope delimited above in the Introduction, this research does not intend to provide a thoroughly-considered and well-designed roadmap towards the creation of an appellate mechanism within the investment arbitration system. Instead, only some

preliminary sketches are made here to suggest how an appellate mechanism might look. First of all, the appellate review should be done by permanently staffed adjudicators of the appellate body who are engaged and remunerated by the body instead of disputing parties, so that they would not be incentivized to develop a pro-investor or pro-state stance to increase their chance of appointment. Second, the appellate mechanism should demonstrate a reasonable level of diversity and inclusiveness by ensuring balanced geographic representation and drafting members from both North and South countries. Third, to ensure the integrity and quality of appellate review, those adjudicators should be highly specialized in international law in general and investment law in particular and be characterized by strict adherence to moral principles. Fourth, appellate review should be limited to the interpretation and application of law in principle, which means factual findings are not subject to further review unless the moving party can prove that there is a manifest error in the appreciation of the facts. Fifth, the appellate body should be authorized to directly amend the awards rendered by investment tribunals without the need for remand to reduce the time incurred. Sixth, there should be a strict period of time allowed for appellate review to avoid indefinite deferment of dispute resolution, but that of course should be compatible with the capacity of the proposed appellate body. Last, as appellate review should not become a weapon for the powerful party to abuse its procedural right, mechanisms should be introduced to discourage unfounded applications for appellate review, such as the requirement of security for costs and the system of leave for appeal.[109]

7.4 Limitations

Subject to the limitations of this study as listed below, the conclusions and recommendations spelt out in it may hold conditionally.

First of all, although it is summarized that the current investor-state dispute resolution mechanism is investment arbitration serving as an alternative to litigation via domestic courts, the allocation of jurisdiction over investment disputes between domestic courts and investment tribunals can be more complicated in reality. Despite the small portion out of the entire investment treaty regime, some investment agreements either clearly require foreign investors to exhaust local remedies or litigate before domestic courts prior to the exercise of the right to investment arbitration. Moreover, foreign investors may voluntarily choose to refer investment disputes to domestic courts as a first step though it is not required by investment agreements, or they may choose domestic court litigation over investment arbitration because of a lack of awareness of the latter or fear for high arbitration costs. Due to the scarcity of reliable data, it remains unclear how many investment disputes were settled with the exclusive or prior involvement of the domestic courts of the host states and how to make sense of the proportion of investment disputes that were directly submitted to investment tribunals for adjudication. Such a lack of insights may cast doubt on the extent to which some of the conclusions made in this study hold true. For example, if only a very small portion of high-profile investment disputes were settled without the prior involvement of domestic courts, perhaps investment arbitration as an alternative to domestic courts would not adversely impact the incentive of local authorities to improve the quality of judicial

[109] Brown, *supra* note 105, at 684.

institutions to attract foreign investment in a material manner. However, for the sake of convenience in making an argument, the current mechanism is conceptualized as investment arbitration serving as an alternative to domestic court litigation. After all, the fundamental character of the current mechanism is that foreign investors are empowered to bypass domestic courts to initiate investment arbitration.

Second, this study stops short of conducting investigations into the domestic legal and judicial institutions of national states in terms of foreign investment protection, which restricts the ability to make more customized recommendations, which take into account the specific circumstances of national states, according to the complement model. For example, if country A is found to have a more protective legal system in place to the benefit of foreign investors as well as a more well-established judicial system than country B, there is a reason to encourage investment tribunals to defer more to the factual findings and legal reasoning made by the domestic courts in country A than that by the domestic courts in country B. Likewise, if the domestic courts in country A do not suffer from such a severe backlog as the domestic courts in country B or the former is in a better position than the latter in terms of judicial capacity, the domestic courts in country B perhaps should be left with a longer period of time to handle investment disputes under the complement model to render the prior litigation requirement meaningful. Therefore, more research could be done in the future to study the legal and judicial institutions of specific countries in relation to foreign investment protection, thereby offering clearer insights for policy-makers to help them make informed decisions in the specific work surrounding the implementation of the complement model.

Third, despite the support of a comparative institutional analysis employing a goal-based approach or a critical appraisal, the theoretical analysis cannot guarantee that the complement model or an appellate mechanism as a substitute for the judicial review mechanism will work well in reality. Unlike the availability of rather abundant empirical evidence, regardless of its validity and credibility, in measuring the characteristics of domestic court litigation and investment arbitration, the genuine performance of the complement model cannot be substantiated by enough data as it has not yet been widely implemented. In theory, the local litigation requirement can act as a filter to reduce the caseload that would otherwise be handled by investment tribunals, but how strong the filtering effect could be remains to be seen in practice. Moreover, whether the complement model can bring about a higher level of state compliance with investment treaty norms by flexibly using primary and secondary remedies is subject to uncertainty, depending heavily on the quality of domestic court litigation. In addition, while the establishment of an appellate mechanism holds much potential in promoting the consistency of investment jurisprudence, the theoretical benefits in this regard have to be corroborated by more solid empirical data in the future.

Last but not least, investor-state dispute resolution is a complicated architecture, the reform of which requires the adoption of a holistic approach. While the synergies between domestic courts and investment tribunals and the replacement of the judicial review mechanism are critical, more has to be done by the international community to make the overall architecture better. For instance, investment arbitration *per se* has attracted tremendous criticisms, such as the lack of transparency, the lack of independence and impartiality of arbitrators, and costly

and lengthy proceedings; however, the recommendations contained in this study are not targeted to provide solutions to the problems listed above. Therefore, this study does not purport to offer an all-round package of reform proposals to fix the investor-state dispute resolution mechanism but only aims to provide insights into how to reform such a mechanism from the perspective of domestic courts with a focus on adjudication and judicial review.

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Summary

While a universally applicable multilateral agreement on investment is not yet available, a broad network of BITs and investment chapters in FTAs has been put in place to protect foreign investors and their investments. Meanwhile, investment arbitration has become a defining feature of modern international investment law over the recent decades, enabling foreign investors to launch an investment arbitration against host states, often without the need to go through local remedies before that. With the caseload of investment arbitration increasing at a rather rapid speed, such a dispute resolution method has also attracted fierce criticism. Many commentators have alleged, among other, that the decision-making of investment arbitrators has been inconsistent and unpredictable, that investment arbitration has become a threat to public interest, that investment arbitration proceedings are not transparent enough, that the arbitrators involved are not independent nor diverse enough, that the lack of an applellate mechanism compromises the quality of decision-making, and that investment arbitration has become far too costly and time-consuming.

Against such a backdrop, the global community has made joint efforts to reform the investment arbitration system, not least through various initiatives developed at ICSID and UNCITRAL. Almost at the same time, national states also seem to have started to reconsider the costs and benefits of including investment arbitration in their investment agreements as a method for the resolution of disputes with foreign investors. Although the caseload of investment arbitration continues to grow and national states keep concluding IIAs containing investment arbitration clauses, at least some countries in their more recent investment treaty-making practice have demonstrated a policy trend to rein in investment arbitration and ramp up the role of domestic courts in resolving investment disputes. They often do so by exiting the ICSID system, terminating their investment agreements with economic partners, excluding investment arbitration from their investment agreements, and conditioning investment arbitration upon the prior use of litigation via domestic courts. While the state practice mentioned above surely does not suggest the global society has any intention to abandon investment arbitration any time soon, it prompts us to take a step back and reconsider the role that domestic courts may play in resolving investment disputes, instead of solely focusing on the piecemeal reform of investment arbitration.

When it comes to investor-state dispute resolution, domestic courts can indeed play different roles along the process. Like investment tribunals, domestic courts can also adjudicate investment disputes between foreign investors and local authorities. Such a judicial role sometimes is also confirmed in investment agreements through, for example, the exhaustion of local remedies rule, the clause demanding pursuit of local remedies prior to investment arbitration and the fork-in-the-road provision. In the context of non-ICSID arbitration, disputing parties are often entitled to applying for the review by domestic courts *loci arbitri* of the rulings and awards rendered by investment tribunals. Domestic courts *loci arbitri* would thus assume a supervisory role with regard to arbitration proceedings and arbitral outcomes, as they may set aside arbitration awards in question according to the review grounds enumerated in local arbitration laws. Moreover, domestic courts in a broader sense may be called upon to support the conduct and / or authority of investment arbitration, by

recognizing and enforcing the investment awards rendered by arbitral tribunals and issuing interim measures of a judicial nature to facilitate the arbitration process.

Since litigation through domestic courts and investment arbitration are two primary remedies that foreign investors often rely on for the resolution of investment disputes, this study constructs three models of institutional design with regard to the allocation of jurisdiction over investment disputes between domestic courts and investment tribunals. While the reality may turn out to be more complicated, such three models roughly represent the institutional choices facing national states. These three models are: (i) utter reliance on domestic courts as the exclusive forum for investor-state dispute resolution, (ii) investment arbitration operating as a substitute for litigation via domestic courts, and (iii) investment arbitration working as a complement to litigation via domestic courts. In order to conduct a comparative institutional analysis of the three models to reveal their respective tradeoffs, this study employs a goal-based approach which is increasingly used to analyze the effectiveness of international adjudicatory mechanisms. As a result of the employment of the goal-based approach, the goals of investor-state dispute resolution are recognized as achieving fair and efficient dispute resolution, promoting state compliance with investment treaty norms, facilitating the objectives of the investment law regime, and legitimizing the underlying investment treaty regime.

While the quality of the national judiciaries of many developing countries is not the same as it was decades ago largely due to the judicial reforms launched around the world, fairness and efficiency in dispute resolution still cannot be fully guaranteed in the domestic courts of those countries without a robust legal system and a good record of the rule of law. However, there are certain institutional characteristics of court litigation that may facilitate the efficiency in the resolution of investment disputes, such as the unique advantage of domestic courts that they can work as a single forum for dispute resolution and the better knowledge of court judges of the domestic legal framework at issue. Domestic courts also hold great potential in promoting the compliance by national states with investment treaty norms not least because they have more flexibility in awarding both primary and secondary remedies, but that of course depends on whether domestic courts can adjudicate investment disputes in a fair and impartial manner. Moreover, while utter reliance on litigation via domestic courts may strengthen the domestic rule of law and improve the investment climate in the long term by pressing host states to improve their legal systems and judicial institutions, it may also invite the politicization of investment disputes and the diplomatic intervention from home states in investor-state dispute resolution. Furthermore, despite the risks created for foreign investors, reliance on domestic courts as the exclusive forum may enhance the legitimacy of the investment treaty regime by reducing the sovereignty costs incurred by national states and putting domestic investors and foreign investors on the same footing.

Investment arbitration operating as a substitute for domestic courts, on the other hand, demonstrates certain advantages, which are typically affiliated with international arbitration, in achieving the fair and efficient resolution of investment disputes. Unlike domestic courts, which are an integral part of the state apparatus, investment arbitrators are often immune from the influence of domestic politics and are thus believed to be independent and impartial.

Meanwhile, the specialization of arbitrators in a particular area of knowledge and the procedural flexibility of arbitration proceedings, among others, are expected to improve efficiency in the resolution of investment disputes. However, empirical evidence presented in the literature sometimes suggests that, in reality, investment arbitrators may not be that unbiased and investment arbitration proceedings often drag on with a bill of a massive amount. Besides, although investment tribunals have a broad scope of jurisdiction over the behavior of different government branches, the practical difficulties they face in awarding primary remedies may damage their ability in promoting state compliance with investment treaty norms. In addition, the introduction of investment arbitration grants to foreign investors a standing in international arbitration proceedings, to a large extent reducing the need for diplomatic protection and home state intervention. However, the positive impact of investment arbitration in facilitating the development of the domestic rule of law and the maintenance and increase of foreign capital is less certain. As for the preservation of the legitimacy of the underlying investment treaty regime, investment arbitration as an alternative to domestic courts cannot be relied on to produce much positive impact. For instance, the increasing sovereignty costs and financial burden imposed on national states would probably prompt more of them to turn against the investment treaty regime.

The complement model, in which domestic courts assumes primary jurisdiction and investment tribunals secondary jurisdiction over investment disputes, stands a good chance in keeping the advantages of both court litigation and investment arbitration while avoiding their disadvantages. In the complement model, domestic courts will act as the first line of defense in adjudicating investment disputes, and the institutional advantages of court litigation will be enabled to release their potential. At the same time, even if foreign investors are not satisfied with the judicial outcome or regard the court proceedings as corrupt or unfair, they may escalate the specific disputes to investment tribunals for further consideration. Since court judges are more knowledgeable and experienced in the interpretation and application of domestic law, the legal analysis of court judges will also benefit the decision-making of investment arbitrators in the subsequent arbitration proceeding. Allowing domestic courts to have a first try at investment disputes will also increase the likelihood that primary remedies could be accorded, thus the unique advantages of primary remedies in promoting state compliance with investment treaty norms are not discarded in the complement model. Moreover, the complement model is also more promising in facilitating the achievement of the objectives of the investment treaty regime, and that is because domestic courts are not marginalized in the complement model, the antagonism between foreign investors and host states may be expected to decrease, and the depolicization of investment disputes will not be lost since investment arbitration is kept as an option. Furthermore, the complement model strikes a better balance among the interests of foreign investors, host states and other stakeholders, thus it is more likely to preserve and even enhance the legitimacy of the underlying investment treaty regime than the other two institutional choices. Although the complement model serves the goals of investor-state dispute resolution the best in theory, not any casual combination of court litigation and investment arbitration will do the job; instead, only a smart mix of the two dispute resolution methods can give full play to the advantages of the complement model.

Now, we switch to the supervisory role of domestic courts in investor-state dispute resolution. While a systemic appellate mechanism has not been created for investment arbitration, disputing parties may rely on setting-aside proceedings in non-ICSID arbitration to challenge arbitration awards. In other words, domestic courts *loci arbitri* may conduct a judicial review of the rulings and awards made by investment tribunals. However, a theoretical analysis of the judicial review mechanism supported by empirical evidence has shown that the mechanism has several flaws, which include but are not limited to the points that follow immediately. Since there is only a casual link between the seat of arbitration and the investment dispute, it is inappropriate to subject the decision-making of arbitrators to the judges from the place where the arbitration proceedings took place. The very fact that review courts have been overwhelmingly located within the developed North could raise concern that the judicial review mechanism is inherently biased against developing countries which have already shown a somewhat negative sentiment towards investment arbitration. Given that judicial review proceedings could easily go through more than one instance of court proceedings in many jurisdictions, the dispute resolution process may consume more time and generate higher costs. From this point of view, the judicial review mechanism favors the richer party in investment arbitration and could become a weapon of dilatory tactics available for such a party. Considering the higher error costs relating to investment arbitration than that relating to commercial arbitration, limited review grounds and a copious amount of deference to arbitral tribunals may not prove to be as effective in the scrutiny of investment awards. Moreover, the idiosyncrasies as to review grounds and standards across jurisdictions indicate that inconsistency would also probably permeate the judicial review practices, which would then encourage forum shopping that leads to increased costs and decreased efficiency. In addition, as both review courts and enforcement courts may exercise control over investment awards, the setting-aside decision may be merely disregarded at the enforcement stage and the overall efficiency of investor-state dispute resolution may be reduced. In order to overcome many of the flaws mentioned above, a delocalized form of review should be introduced to take place of the current judicial review mechanism.

Samenvatting

Hoewel er nog geen universeel toepasbaar multilateraal verdrag over investeringen beschikbaar is, is er een breed netwerk van BITs en investeringshoofdstukken in vrijhandelsovereenkomsten opgezet om buitenlandse investeerders en hun investeringen te beschermen. Ondertussen is investeringsarbitrage de afgelopen decennia een bepalend kenmerk geworden van het moderne internationale investeringsrecht, waardoor buitenlandse investeerders een investeringsarbitrage tegen gastlanden kunnen starten, vaak zonder dat daarvoor eerst lokale rechtsmiddelen dienen te worden ingezet. Nu de caseload van investeringsarbitrage in een vrij snel tempo toeneemt, heeft een dergelijke geschillenbeslechtingsmethode ook felle kritiek gekregen. Veel commentatoren hebben onder meer beweerd dat de besluitvorming van de investeringsarbiters inconsequent en onvoorspelbaar was, dat investeringsarbitrage een bedreiging voor het algemeen belang is geworden, dat investeringsarbitrageprocedures niet transparant genoeg zijn, dat de betrokken arbiters niet onafhankelijk en divers genoeg zijn, dat het ontbreken van een beroepsmechanisme de kwaliteit van de besluitvorming in gevaar brengt en dat investeringsarbitrage veel te kostbaar en tijdrovend is geworden.

Tegen een dergelijke achtergrond heeft de internationale gemeenschap gezamenlijke inspanningen geleverd om het arbitragesysteem voor investeringen te hervormen, niet in de laatste plaats via verschillende initiatieven die zijn ontwikkeld bij ICSID en UNCITRAL. Vrijwel tegelijkertijd lijken ook nationale staten de kosten en baten van het opnemen van investeringsarbitrage in hun investeringsovereenkomsten te heroverwegen als methode voor de beslechting van geschillen met buitenlandse investeerders. Hoewel de werklast van investeringsarbitrage blijft toenemen en nationale staten IIA's blijven sluiten die investeringsarbitrageclausules bevatten, hebben ten minste enkele landen in hun recentere praktijk van het sluiten van investeringsverdragen een beleidstrend laten zien om investeringsarbitrage te beteugelen en de rol van binnenlandse rechtbanken bij het oplossen van investeringsgeschillen te vergroten. Ze doen dit vaak door het ICSID-systeem te verlaten, hun investeringsovereenkomsten met economische partners te beëindigen, investeringsarbitrage uit te sluiten in hun investeringsovereenkomsten en investeringsarbitrage afhankelijk te stellen van het voorafgaand gebruik van geschillenbeslechting via nationale rechtbanken. Hoewel de hierboven genoemde praktijk zeker niet suggereert dat de mondiale samenleving van plan is om investeringsarbitrage op korte termijn op te geven, zet het ons ertoe aan een stap terug te doen en de rol te heroverwegen die nationale rechtbanken kunnen spelen bij het oplossen van investeringsgeschillen, in plaats van ons uitsluitend te concentreren op over de fragmentarische hervorming van investeringsarbitrage.

Als het gaat om de beslechting van geschillen tussen investeerders en staten, kunnen nationale rechtbanken inderdaad verschillende rollen spelen tijdens het proces. Net als investeringstribunalen kunnen ook nationale rechtbanken uitspraak doen in investeringsgeschillen tussen buitenlandse investeerders en lokale autoriteiten. Een dergelijke juridische rol wordt soms ook bevestigd in investeringsovereenkomsten door bijvoorbeeld de uitputting van de lokale rechtsmiddelenregel, de clausule waarin wordt geëist dat lokale

rechtsmiddelen worden uitgeput voorafgaand aan investeringsarbitrage en de fork-in-the-road-bepaling. In de context van niet-ICSID-arbitrage hebben partijen bij het geschil vaak het recht om herziening door nationale rechtbanken loci arbitri te vragen van de uitspraken van investeringstribunalen. Binnenlandse rechtbanken loci arbitri zouden dus een toezichthoudende rol op zich nemen met betrekking tot arbitrageprocedures en arbitrage-uitspraken, aangezien zij arbitrage-uitspraken in kwestie kunnen vernietigen volgens de beoordelingsgronden die zijn opgesomd in lokale arbitragewetten. Bovendien kan een beroep worden gedaan op nationale rechtbanken in ruimere zin om het gedrag en/of gezag van investeringsarbitrage te ondersteunen, door de investeringsarbitrages van arbitragetribunalen te erkennen en af te dwingen en voorlopige juridische maatregelen uit te vaardigen om het arbitrageproces te vergemakkelijken.

Aangezien procesvoering via nationale rechtbanken en investeringsarbitrage twee primaire rechtsmiddelen zijn waarop buitenlandse investeerders vaak een beroep doen voor de beslechting van investeringsgeschillen, construeert deze studie drie institutionele modellen met betrekking tot de toewijzing van jurisdictie over investeringsgeschillen tussen nationale rechtbanken en investeringstribunalen. Hoewel de werkelijkheid misschien ingewikkelder blijkt te zijn, geven de drie modellen ruwweg de institutionele keuzes weer waarmee nationale staten te maken hebben. Deze drie modellen zijn: (i) volledig vertrouwen op nationale rechtbanken als het exclusieve forum voor de beslechting van geschillen tussen investeerders en staten, (ii) investeringsarbitrage als vervanging voor procesvoering via nationale rechtbanken, en (iii) investeringsarbitrage als aanvulling op procesvoering via de nationale rechtbanken. Om een vergelijkende institutionele analyse van de drie modellen uit te voeren om hun respectievelijke afwegingen te onthullen, maakt deze studie gebruik van een doelgerichte benadering die in toenemende mate wordt gebruikt om de effectiviteit van internationale rechterlijke mechanismen te analyseren. Als gevolg van de toepassing van de doelgerichte benadering worden de doelstellingen van geschillenbeslechting tussen investeerders en staten erkend als het bereiken van eerlijke en efficiënte geschillenbeslechting, het bevorderen van de naleving door de staat van de normen van investeringsverdragen, het faciliteren van de doelstellingen van het investeringsrecht en het legitimeren van het onderliggende investeringsverdragsregime.

Hoewel de kwaliteit van de nationale rechterlijke macht van veel ontwikkelingslanden niet hetzelfde is als tientallen jaren geleden, grotendeels als gevolg van de gerechtelijke hervormingen die over de hele wereld zijn doorgevoerd, kunnen eerlijkheid en efficiëntie bij geschillenbeslechting nog steeds niet volledig worden gegarandeerd in de nationale rechtbanken van die betreffende landen zonder een robuust rechtssysteem en een goede staat van dienst op rechtsstatelijk gebied. Er zijn echter bepaalde institutionele kenmerken van gerechtelijke procedures die de efficiëntie bij de beslechting van investeringsgeschillen kunnen vergemakkelijken, zoals het unieke voordeel van nationale rechtbanken dat ze kunnen werken als één enkele instantie voor geschillenbeslechting en de betere kennis van rechters van het betreffende binnenlandse rechtssysteem. Nationale rechtbanken hebben ook een groot potentieel om de naleving door nationale staten van de normen van investeringsverdragen te bevorderen, niet in de laatste plaats omdat ze meer flexibiliteit hebben bij het toekennen van zowel primaire als secundaire rechtsmiddelen, maar dat hangt natuurlijk af van de vraag of

nationale rechtbanken investeringsgeschillen op een eerlijke en onpartijdige manier kunnen beslechten. Bovendien, hoewel het volledig vertrouwen op procesvoering via nationale rechtbanken de nationale rechtsstaat kan versterken en het investeringsklimaat op lange termijn kan verbeteren door de gaststaten ertoe aan te zetten hun rechtsstelsels en juridische instituties te verbeteren, kan het ook leiden tot politisering van investeringsgeschillen en de diplomatieke tussenkomst van de thuislanden bij de beslechting van geschillen tussen investeerders en staten. Daarnaast kan, ondanks de risico's die voor buitenlandse investeerders worden gecreëerd, een beroep op binnenlandse rechtbanken als het exclusieve forum de legitimiteit van het investeringsverdragsregime vergroten door de soevereiniteitskosten van nationale staten te verminderen en binnenlandse investeerders en buitenlandse investeerders op dezelfde voet te plaatsen.

Investeringsarbitrage die als vervanging voor nationale rechtbanken fungeert, vertoont daarentegen bepaalde voordelen, die typisch zijn verbonden aan internationale arbitrage, als het gaat om het bereiken van een eerlijke en efficiënte oplossing van investeringsgeschillen. In tegenstelling tot nationale rechtbanken, die een integraal onderdeel vormen van het staatsapparaat, zijn investeringsarbiters vaak immuun voor de invloed van de binnenlandse politiek en worden ze daarom als onafhankelijk en onpartijdig beschouwd. Ondertussen wordt verwacht dat de specialisatie van arbiters op een bepaald kennisgebied en de procedurele flexibiliteit van onder meer arbitrageprocedures de efficiëntie bij de beslechting van investeringsgeschillen zullen verbeteren. Echter, empirisch bewijs in de literatuur suggereert soms dat investeringsarbiters in werkelijkheid niet zo onbevooroordeeld zijn en investeringsarbitrageprocedures slepen vaak voort met enorme kosten als gevolg. Bovendien, hoewel investeringstribunalen een brede bevoegdheid hebben als het gaat om het gedrag van verschillende overheidstakken, kunnen de praktische moeilijkheden waarmee zij worden geconfronteerd bij het toekennen van primaire rechtsmiddelen hun vermogen schaden om de naleving door de staat van de normen van investeringsverdragen te bevorderen. Bovendien geeft de introductie van investeringsarbitrage aan buitenlandse investeerders een positie in internationale arbitrageprocedures, waardoor de behoefte aan diplomatieke bescherming en tussenkomst van de thuisstaat grotendeels wordt verminderd. Het positieve effect van investeringsarbitrage bij het vergemakkelijken van de ontwikkeling van de nationale rechtsstaat en het in stand houden en vergroten van buitenlands kapitaal is echter minder zeker. Wat betreft het behoud van de legitimiteit van het onderliggende investeringsverdragsregime, kan er niet op worden vertrouwd dat investeringsarbitrage als alternatief voor nationale rechtbanken veel positieve effecten heeft. Zo zouden de toenemende soevereiniteitskosten en financiële lasten voor nationale staten waarschijnlijk meer van hen ertoe aanzetten zich tegen het investeringsverdragsregime te keren.

Het complementaire model, waarin nationale rechtbanken primaire jurisdictie en investeringstribunalen secundaire jurisdictie over investeringsgeschillen aannemen, maakt een goede kans om de voordelen van zowel gerechtelijke procedures als investeringsarbitrage te behouden, terwijl de nadelen ervan worden vermeden. In het complementmodel zullen nationale rechtbanken optreden als de eerste verdedigingslinie bij het beslechten van investeringsgeschillen, en zullen de institutionele voordelen van gerechtelijke procedures hun potentieel kunnen benutten. Tegelijkertijd kunnen buitenlandse investeerders, zelfs als ze niet

tevreden zijn met de gerechtelijke uitkomst of de gerechtelijke procedure als corrupt of oneerlijk beschouwen, de specifieke geschillen doorzetten bij investeringsrechtbanken voor verdere overweging. Aangezien rechters van rechtbanken meer kennis en ervaring hebben met de interpretatie en toepassing van het nationale recht, zal de juridische analyse van rechtbankrechters ook de besluitvorming van investeringsarbiters in de daaropvolgende arbitrageprocedure ten goede komen. Door nationale rechtbanken toe te staan een eerste poging te doen bij investeringsgeschillen, wordt ook de kans groter dat primaire rechtsmiddelen kunnen worden toegekend, zodat de unieke voordelen van primaire rechtsmiddelen bij het bevorderen van de naleving door de staat van de normen van investeringsverdragen niet worden weggegooid in het complementaire model. Bovendien is het complementaire model ook veelbelovender in het vergemakkelijken van de verwezenlijking van de doelstellingen van het investeringsverdragsregime. Dat komt doordat nationale rechtbanken niet worden gemarginaliseerd in het complementaire model, waardoor de tegenstelling tussen buitenlandse investeerders en gastlanden naar verwachting zal afnemen, en de depolitisering van investeringsgeschillen niet verloren zal gaan, aangezien investeringsarbitrage als optie wordt behouden. Bovendien zorgt het complementaire model voor een beter evenwicht tussen de belangen van buitenlandse investeerders, gastlanden en andere belanghebbenden, waardoor het waarschijnlijker is dat het de legitimiteit van het onderliggende investeringsverdragsregime behoudt en zelfs versterkt, meer dan de andere twee institutionele keuzes. Hoewel het complementaire model in theorie de doelstellingen van geschillenbeslechting tussen investeerders en staten het beste dient, zal niet zomaar iedere toevallige combinatie van gerechtelijke procedures en investeringsarbitrage het werk doen; in plaats daarvan kan alleen een slimme mix van de twee methoden voor geschillenbeslechting de voordelen van het complementaire model ten volle benutten.

Nu schakelen we over naar de toezichthoudende rol van nationale rechtbanken bij de beslechting van geschillen tussen investeerders en staten. Hoewel er geen systemisch beroepsmechanisme is gecreëerd voor investeringsarbitrage, kunnen partijen bij het geschil een beroep doen op vernietigingsprocedures in niet-ICSID-arbitrage om arbitrale uitspraken aan te vechten. Met andere woorden, nationale rechtbanken loci arbitri kunnen een rechterlijke toetsing uitvoeren van de uitspraken en uitspraken van investeringstribunalen. Een theoretische analyse van het mechanisme voor rechterlijke toetsing, ondersteund door empirisch bewijs, heeft echter aangetoond dat het mechanisme verschillende gebreken vertoont, waaronder maar niet beperkt tot de punten die hierna volgen. Aangezien er slechts een incidenteel verband bestaat tussen de plaats van arbitrage en het investeringsgeschil, is het ongepast om de besluitvorming van arbiters te onderwerpen aan de rechters van de plaats waar de arbitrageprocedure heeft plaatsgevonden. Alleen al het feit dat de herzieningshoven overwegend in het ontwikkelde noorden zijn gevestigd, zou aanleiding kunnen geven tot bezorgdheid dat het mechanisme voor rechterlijke toetsing inherent bevooroordeeld is ten opzichte van ontwikkelingslanden die al een enigszins negatief sentiment ten aanzien van investeringsarbitrage hebben getoond. Aangezien bij rechterlijke toetsingsprocedures in veel rechtsgebieden gemakkelijk meer dan één gerechtelijke procedure kan worden doorlopen, kan het proces voor geschillenbeslechting meer tijd kosten en hogere kosten met zich meebrengen. Vanuit dit oogpunt bevoordeelt het mechanisme van rechterlijke toetsing de

rijkere partij bij investeringsarbitrage en zou het een wapen van vertragende tactieken kunnen worden voor een dergelijke partij. Gezien de hogere foutenkosten met betrekking tot investeringsarbitrage dan die met betrekking tot commerciële arbitrage, kunnen beperkte beoordelingsgronden en een grote mate van eerbied voor arbitragetribunalen niet zo effectief blijken te zijn bij de toetsing van investeringsuitspraken. Bovendien wijzen de eigenaardigheden met betrekking tot de beoordelingsgronden en normen in alle rechtsgebieden erop dat inconsistentie waarschijnlijk ook de rechterlijke toetsingspraktijken zou doordringen, wat dan forumshopping zou aanmoedigen, hetgeen leidt tot hogere kosten en verminderde efficiëntie. Aangezien zowel de herzieningsrechter als de tenuitvoerleggingsrechtbank controle kunnen uitoefenen over investeringsbesluiten, kan het vernietigingsbesluit in de tenuitvoerleggingsfase worden genegeerd en kan de algehele efficiëntie van de beslechting van geschillen tussen investeerders en staten worden verminderd. Om veel van de hierboven genoemde tekortkomingen te verhelpen, moet een niet-gelokaliseerde vorm van toetsing worden ingevoerd voor het huidige rechterlijke toetsingsmechanisme.

Curriculum Vitae

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Short bio
My name is Wanli Ma and I am a PhD candidate at Erasmus School of Law, Erasmus University Rotterdam. My current research interests primarily include international investment law, investor-state dispute settlement and international trade law. Since September 2020, I have been working at the Beijing Representative Office of Kirkland & Ellis International LLP, with a practice focus on capital markets transactions in the United States and Hong Kong. I received a bachelor degree in law from Minzu University of China (Beijing, the PRC) in 2014 and a master degree in international economic law from China University of Political Science and Law (Beijing, the PRC) in 2016.

Education	
PhD Candidate, Erasmus University Rotterdam (Rotterdam, the Netherlands)	2016-2022
Master of International Economic Law, China University of Political Science and Law (Beijing, the PRC)	2014-2016
Bachelor of Law, Minzu University of China (Beijing, the PRC)	2010-2014

Work Experience	
Foreign Legal Consultant, Kirkland & Ellis International LLP (Beijing, the PRC)	2021-2022
Summer Intern, Kirkland & Ellis International LLP (Beijing, the PRC)	2020-2021
Legal Intern, DeHeng Law Offices (Beijing, the PRC)	2015
Legal Intern, Joyvio Group (Legend Holdings) (Beijing, the PRC)	2013-2014

Awards	
Top Prize in the Second Yi & Partners Cup Arbitration Thesis Competition in China	2021
Third Prize in the First Thesis Competition for Young Scholars held by China International Investment Arbitration Forum	2021

Third Prize in the Eighth Thesis Competition in International Commercial Arbitration held by the Beijing Arbitration Commission	2020
Publications	
Wanli Ma and Michael Faure, "Is Investment Arbitration an Effective Alternative to Court Litigation? Towards a Smart Mix of Litigation and Arbitration in Resolving Investment Disputes", Brooklyn Journal of International Law (expected to be published in early 2023).	2023
Wei Li and Wanli Ma, "Regional Trade Agreements" (in Chinese), in Chuanli Wang (ed.), "International Trade Law" (Textbook), CUPL Press, pp. 388-466.	2021
Michael Faure and Wanli Ma, "Investor-State Arbitration: Economic and Empirical Perspectives", Michigan Journal of International Law, Vol. 41, No. 1 (2020), pp. 1-61.	2020
Michael Faure and Wanli Ma, "Investor-State Arbitration: An Economic and Empirical Perspective", in Yuwen Li et al. (eds), "China, the EU and International Investment Law", Routledge (2019), pp. 124-138.	2019

PhD Portfolio
Name PhD student: Wanli Ma PhD-period: September 2016 - December 2022 Promoters: Prof.dr. M.G. Faure LLM and Prof.dr. Y. Li

PhD Training	
EGSL Courses	*Year*
Reflection on Social Science Research	2017
Writing Clinic	2017
Review Day	2017
Introduction to Legal Methods	2017
Collaborating with Your Supervisor	2017
Research Lab	2017
Academic Writing in English	2017
Seminars and Workshops	*Year*
Brexit and Challenges in Legal Education given by Prof. Thom Brooks	2019
BACT Seminar Series	2017-2019
The Hague Arbitration Lecture 2017 by Prof. Jan Paulsson	2017
EDLE Seminar Series	2016-2020
ECLC Seminar Series	2016-2019
ECLC Brown Bag Lunches	2016-2018
NCLA - Workshop on Investment Law	2016
EU-China Workshop (EU-China Study Day)	2016
Presentations	*Year*
EDLE Seminar, "Is Investment Arbitration an Effective Substitute for Domestic Courts in Resolving Investment Disputes?"	2021
ECLC Seminar, "The Adjudicative Competence of Domestic Courts in Resolving Investment Disputes"	2019
The Third Annual Conference of the French Association of Law and Economics, "Investor-State Arbitration: An Economic and Empirical Perspective"	2018
ECLC Seminar, "The Statutory Authority of Domestic Courts in International Investment Dispute Settlement"	2017
ECLC Seminar, "Judicial Review by Domestic Courts of Investment Awards"	2017
Attendance (International) Conferences	*Year*
The Third Annual Conference of the French Association of Law and Economics (Nancy, France)	2018
EU-China Bilateral Investment Treaty Negotiations: A Focus on Investor-State Dispute Settlements (Rotterdam, the Netherlands)	2018
Reforming the Investor-State Dispute Settlement System: EU and Chinese Perspectives (Wuhan, China)	2017

The EU-China Bilateral Comprehensive Agreement on Investment (CAI) (Brussels, Belgium)	2017
Participation in Research Projects	*Year*
Reforming the Investor-State Dispute Settlement System	2017-2019