Exposé

Dissertation Title:	Domestic Courts in Investment Treaty Arbitration
Doctoral Candidate:	Mag. Forian Haugeneder LL.M.
Supervisor:	Univ.-Prof. Dr. Christoph Schreuer
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1. Framework of the Enquiry

A foreign investor can traditionally seek redress for injuries inflicted by the host state in the domestic courts of that state. For instance, an investor whose investment contract is terminated may challenge the termination in the domestic courts by arguing that the termination was unlawful. Domestic courts are, however, often viewed as unattractive by foreign investors: The domestic judiciary often lacks, or is perceived as lacking, the sufficient independence to adjudicate claims against the state of which it is itself an organ.[1] Sovereign immunity or related doctrines may reduce the available remedies of a foreign investor against the state.[2] Many domestic law systems do not allow the domestic courts to apply international law directly.[3]

Investment protection treaties have added a further layer of protection, granting the investor additional substantive and procedural rights against the host state. On a procedural level, investment protection treaties typically provide for access of the investor to arbitration against the host state even in the absence of a contract and an individual arbitration agreement between the investor and the state.[4] The substantive protections of most investment treaties

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[1] Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Tribunals Is Not Working*, 59 Hastings Law Journal 241, at 254 (2007-2008); Mark Friedman, *Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration*, in ICCA CONGRESS SERIES 2006 MONTREAL VOLUME 13 (Kluwer 2007) 545; at 567; STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (Cambridge University Press 2009) 152; compare the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention), paragraph 10, available at http://icsid.worldbank.org.

[2] Christoph Schreuer, STATE IMMUNITY: SOME RECENT DEVELOPMENTS (1988); Georges L. Delaume, *Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration*, 2 ICSID Review Foreign Investment Law Journal 403 (1987); Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 Recueil des Cours 113 (1980); Jean-Flavien Lalive, *L'immunité de Juridiction des Etats et des Organisations Internationales*, 84 Recueil des Cours 209 (1953).

[3] See, e.g., Rosalyn Higgins, *The Relationship between International and Regional Human Rights Norms and Domestic Law*, 18 Commonwealth Law Bulletin, 1268 (1992).

[4] Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection* 269 Recueil des Cours 251 (1997); Jan Paulsson, *Arbitration without Privity*, 10 ICSID Review Foreign Investment Law Journal 232 (1995); Aaron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes* in

include autonomous standards, such as the obligations of the host state to provide fair and equitable treatment, full protection and security and compensation for lawful expropriations. The investor who lost the investment contract may therefore also have the option to claim compensation before an international arbitral tribunal, arguing, for example, that the termination of the investment contract amounted to a violation of fair and equitable treatment.[5]

As the example of the investment contract shows, the protection under investment treaties is not without interrelations with the domestic law protections of the host state. An investment generally consists of a bundle of domestic law rights, such as property, shares, contract rights, concessions. The protection of investments under investment treaties is based on the existence of such rights and obligations under the domestic law of the host state. Investment protection treaties do not themselves create autonomous property or other rights which are entitled to protection, but presuppose the existence of these rights in the domestic legal system. These "hybrid" foundations of investment treaty arbitration also have consequences for the legal protection of investments: In addition to the protection under an investment treaty, investments are generally also subject to the protection in the competent domestic forums, and most prominently in the domestic courts.[6] It is therefore not surprising that many, if not the majority, of the investment disputes based on bilateral or multilateral treaties also involve the domestic courts.

The hybrid bases of investment treaty arbitration have been extensively described in legal writings.[7] International Tribunals and legal scholars are, however, still grappling with their consequences on the system of investment protection.

Investment treaty arbitration has indeed certain structural features which complicate the relationship between the domestic courts and investment tribunals. Contrary to the system of human rights protection under the European Convention for Human Rights, investment arbitration was originally not designed to supplement the domestic law protections, but to replace them.[8] The focus at the beginnings of investment arbitration was on so-called "state contracts" between foreign investors and states.[9] Investment arbitration was meant to be a universal and exclusive forum, replacing domestic courts by an international forum and not adding an international forum to the available domestic remedial system. Investment tribunals were competent to adjudicate claims under public international law, but their jurisdiction was in no way limited to disputes under public international law.[10]

THE ART OF ARBITRATION: LIBER AMICORUM PIETER SANDERS (J. Schultsz and A. van den Berg eds, Kluwer Deventer 1982).

[5] For an example of an investor using both domestic and international remedies see, e.g., Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8 (Award, 11 September 2007), available on http://ita.law.uvic.ca.

[6] On the hybrid foundations of investment treaty arbitration see Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 British Yearbook of International Law 151 (2003).

[7] Id.

[8] For a comparsion between human rights and investment protection, see Ursula Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?* in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (P.M. Dupuy et al. eds., Oxford University Press 2009) 219.

[9] Francis A. Mann, *State Contracts and State Responsibility*, 54 American Journal of International Law 572 (1960); Steven Schwebel, *International Protection of Contractual Arrangements,* 53 American Society of International Law Procedures 266 (1959); Prosper Weil, *Problèmes Relatifs aux Contracts Passés entre un Etat et un Particuli*er, 128 Recueil des Cours 95 (1969).

[10] Compare Article 42 (1) of the ICSID Convention, which provides that, in the absence of an agreement of the parties on the applicable rules of law, a tribunal under the Convention "shall apply the law of the Contracting State party to the dispute […] and such rules of international law as may be applicable".

The jurisdictional basis for investment arbitration as the exclusive, universal forum for investment disputes was individual consent to arbitration between the investor and the State, typically in an investment contract. This technique is well-known from commercial arbitration, where the arbitration agreement inserted into a contract creates a single forum for all disputes relating to a defined legal relationship. Article 26 of the ICSID Convention reflects the envisaged universality of the jurisdiction of investment tribunals by providing that consent to arbitration under the Convention should, unless otherwise stated, "be deemed consent to such arbitration to the exclusion of any other remedy".[11]

The model of a single, individually agreed international forum for all disputes between a foreign investor and the host state was abandoned with the widespread conclusion of investment protection treaties. Bilateral or multilateral investment protection treaties usually contain an offer by the state to all eligible investors to resolve investment disputes through arbitration. This method upholds the fiction of consensual arbitration: The investment treaty contains the offer to arbitrate, which the investor must accept to create an agreement to arbitrate.[12] However, structurally, the jurisdiction under investment treaties is compulsory in the sense that once a state has given its general consent to arbitration, it can no longer choose the investor with whom it wishes to enter into an arbitration agreement.[13] Arbitration on the basis of investment protetion treaties is in effect "arbitration without privity".[14] The investor simply needs to accept the general offer to arbitrate, without an individual contractual relationship with the state. Prior to the initiation of a dispute settlement procedure, the state does not know and cannot control the likely nature or scope of the dispute.[15] Given the dense network of existing investment protection treaties, a large number of investors have general access to an international forum, in a way comparable to the access of individuals to human rights courts.

"Arbitration without privity" has introduced a valuable second layer of protection for foreign investors. It did, however, profoundly disturb the balance of the system of investment protection. Investment arbitration under investment treaties is often a second, superposed forum in addition to the domestic courts or other agreed dispute resolution forums. Given the hybrid nature of investment disputes, a single dispute may, and frequently will, consist of aspects for which the domestic courts are competent, while other aspects fall into the domain of an international tribunal. As a consequence of the fragmentation of dispute resolution, an investor may need to go to different forums to get full relief.[16] The traditional coordination mechanism of consensual arbitration – exclusivity of the forum for a defined legal relationship – does not work when consent to arbitration only covers some aspects of a dispute, or when, as it frequently happens, several forums purport to be exclusive.

Some investment protection treaties contain mechanisms to coordinate the interrelationship between the domestic courts and investment treaty tribunals. For example, "fork-in-the-road" or "waiver" provisions oblige the investor, with varying scopes and consequences, to choose between the pursuit of domestic and international remedies.[17] Most of these provisions have,

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[11] On the effects of article 26 of the ICSID Convention, see CHRISTOPH SCHREUER et al., THE ICSID CONVENTION: A COMMENTARY (2nd ed. Cambridge University Press 2009) 348.

[12] Christoph Schreuer, *Consent to Arbitration,* in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (P. Muchlinski et al. eds., Oxford Universtity Press 2008) 830.

[13] Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm: Elements for a Theory of Consent*, 39 New York University Journal of International Law and Politics 791 (2006-2007).

[14] Jan Paulsson, above n. 4.

[15] Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 Universtity of Chicago Journal of International Law 183 (2001).

[16] Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Tribunals Is Not Working*, 59 Hastings Law Journal 241, at 242 et seq (2007-2008).

[17] Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 Journal of World Investment & Trade 231; Gerhard Wegen/Lars Markert, *Investment Arbitration – Food for*

however, not been successful in regulating in a satisfactory manner all aspects of the relationship between the domestic courts and international tribunals.[18] In contrast to the system of relief for individuals under human rights treaties, there is usually no clear order of priority between the domestic courts and investment tribunals: While human rights treaties require the exhaustion of local remedies before an application to a human rights court may be made, many investment protection treaties allow investors to start an investment arbitration while domestic court proceedings are still pending. In view of the interrelationship between domestic and international law questions, this inevitably entails the risk of conflicting decisions and a lack of coordination between domestic courts and international tribunals.

It is therefore not surprising that the coordination between international tribunals and domestic court proceedings is one of the most contentious areas of the law of investment protection. Ultimately, the relationship between the domestic cours and investment treaty arbitration concerns the wider, fundamental policy question about the extent to which states relinquish sovereignty and accept an international forum for its legal relations with foreign investors. This question is old and tends to resurface in the area of state responsibility from time to time in different forms.[19] Legal writing ultimately cannot provide solutions to this question, but it can, through analytical clarity, contribute to provide a basis for rational policy decisions.

2. Purpose and structure of the research

The scholarly debate about the relationship between domestic courts and investment treaty tribunals mostly centers on jurisdictional competition, and in particular on the proper forums for contract claims and treaty claims.[20] The discussion has been, to a large extent, dominated by the focus on the alleged division into domestic and international spheres of jurisdiction. The limitation of the debate to jurisdiction has prevented an adequate investigation of other areas of interaction, which are equally significant for a consistent and conceptualized definition of the role of domestic courts in investment treaty arbitration. A proper perception of the full range of interaction is necessary before jurisdictional and other competition can be regulated in a meaningful way. Discussion based on mere postulates about national and international domains is not conducive to the development of the analysis. It is the ambition of this dissertation to contribute to a clearer perception of the role of domestic courts in investment treaty arbitration by examining the full scope of interactions and the interrelations between the two forums.

In addition to jurisdictional conflicts, three areas merit particular attention. First, the question of when and how decisions of the domestic courts are relevant as preliminary questions for

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Thought on Fork-in-the-Road – A Clause Awakens from its Hibernation, in AUSTRIAN ARBITRATION YEARBOOK 2010 (C. Klausegger et al. eds. 2010) 269; Andrea K. Bjorklund, *Waiver and Exhaustion of Local Remedies Rule in NAFTA Jurisprudence, in NAFTA Jurisprudence*, in NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler ed., 2004) 253.

[18] Id, at 306; YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (Oxford University Press, 2007) 39 et seq.

[19] see, e.g., Elihu Root, *The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts*, 3 Amercian Journal of International Law 529 (1909); F.V. Garciá-Amador, *Calvo Doctrine, Calvo Clause*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Bernhardt, ed. 1997) 521.

[20] Stanimir Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?* in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS (Katia Yannaca-Small ed., Oxford University Press 2010); James Crawford, *Treaty and Contract in Investment Arbitration*, 22nd Freshfields Lecture on International Arbitration (2007); Mark Friedman, *Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration*, in ICCA CONGRESS SERIES 2006 MONTREAL VOLUME 13 (Kluwer 2007) 545; Douglas D. Reichert, *Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration*, 8 International Arbitration 237 (1992); August Reinisch, *The Use and the Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 Law & Practice of International Courts and Tribunals 37 (2004).

investment tribunals has not been researched extensively. Even if the jurisdicion between the domestic courts and investment tribunals could be strictly separated, the question about the balance between the two forums is at issue when matters before the domestic courts form preliminary issues for an investment tribunal. These preliminary questions necessarily arise as a consequence of the hybrid foundations of investment treaty arbitration: The question of whether an investor was the beneficiary of a concession agreement, or the owner of shares, or whether an investment was in accordance with the law of the host state, will in many cases be decisive for a tribunal's determination of a treaty violation. The present enquiry therefore examines the weight of domestic court decisions in investment treaty proceedings, their possible binding effect, and the coordination between related domestic and international proceedings.

Second, the regulation of the interrelationship between the domestic courts and an investment treaty tribunal has to take into account the remedies available in the two forums. "Claim splitting", i.e. the institution of parallel proceedings to obtain the full range of remedies, is generally regarded as undesireable. However, the access of the investor to one forum cannot be legitimately restricted if this amounts to a denial of remedies.[21] It is therefore necessary to compare the remedies available to investors in the domestic courts and before international tribunals. An important part of my analysis relates to the types of provisional measures an investor may obtain from international tribunals and the domestic courts and their possible coordination.

Third, the relationship between the domestic courts and investment treaty arbitration is also determined by the substantive treaty protections. A state is internationally responsible for the acts of its judiciary.[22] The domestic courts are central in denial of justice claims, but also have a role in relation to other protection standards, such as expropriation and full protection and security. The standard of review of domestic court decisions by international tribunals therefore directly affects the role of the domestic courts in investment treaty arbitration.

In addition, the role of the domestic courts is determined by the question of whether the substantive treaty standards require an investor to first seek redress through the domestic remedial system before substantive treaty standards are breached: Investment treaty tribunals have increasingly ruled that treaty standards are not breached if the investor does not make a reasonable attempt to obtain redress before the domestic courts.[23] While this requirement is distinguished from the local remedies rule by the proposition that it is part of the substantive treaty standard, its effects are similar. I will therefore examine the question to what extent an investor has to involve the domestic courts before he can seek redress under an investment protection treaty.

Chapter I of this dissertation will lay out the respective scopes of jurisdiction of the domestic courts and investment treaty tribunals, with a view to potential overlaps, interactions and conflicts. Chapter II will examine the various instruments of coordination and regulation of jurisdictional competition. In this regard, I will try to define criteria for the distinction of disputes before the domestic courts and international tribunals in order to set a basis for a

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[21] Christoph Schreuer, *Concurrent Jurisdiction of National and International Tribunals*, 13 Houston Law Review 508, at 518 (1975-1976).

[22] INTERNATIONAL LAW COMMISSION, ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS WITH COMMENTARIES (UN Doc A/56/10 2001), paragraph 6 of the commentaries on Article 4; see also Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Virginia Journal of International Law 809 (2005).

[23] Ursula Kriebaum, *Local Remedies and the Standards for the Protection of Foreign Investment* in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Oxford Universtity Press 2009) 417; Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 Law & Practice of International Courts & Tribunals 1 (2005).

rational regulation of jurisdictional relations and their limitations. Chapter III will examine the interplay between domestic courts and investment treaty arbitration in relation to matters which constitute preliminary issues for investment tribunals. Chapter IV will compare the provisional and substantive remedies available in the domestic courts and in investment treaty arbitration, and will examine the consequences of the available remedies regarding the relationship between the two forums. Chapter V will analyse the substative standards of investment treaties and their impact on the interrelationship between the domestic courts and investment treaty tribunals.

3. Scope of the investigation

The interrelationship between domestic courts and investment treaty arbitration is shaped both by domestic and international decisions. The relationship therefore involves regulation both from the points of view of international law and of the domestic judiciary. The national regulations have to take account of the specific national legal environments and will therefore likely be different in specific national contexts.

This dissertation will look at the relationship between domestic courts and investment treaty arbitration from the point of view of international law. The emphasis of the research is therefore on international legal authorities, in particular the decisions of investment treaty tribunals. The implementation of the rules of international law and of international decisions by domestic courts, and the various domestic coordination mechanisms in relation to investment treaty arbitration, are a formidable field of research on its own.[24] It cannot be fully examined here. Decisions of domestic courts will be examined selectively when they are relevant in the context of decisions of international tribunals.

In addition, the scope of this dissertation is limited to a survey of the interactions between domestic courts and investment treaty arbitration during the arbitral process. The review of decisions of international tribunals by domestic courts and the enforcement of arbitral awards are not covered. The review and enforcement proceedings often involve the courts of other states than the host state. Other legal frameworks and policies often come into play. They merit a separate examination. In addition, there are significant differences in the review and enforcement mechanisms under the ICSID Convention and in non-ICSID arbitration. A differentiated discussion of ICSID and non-ICSID arbitration with regard to the review and enforcement of awards of investment treaty tribunals is therefore useful. Time and efficiency considerations dictate an examination of these topics outside of this research project.

4. Methodology

The purpose of this dissertation is to analyse the full spectrum of the interaction between domestic courts and investment treaty arbitration. The investigation subscribes to a contextual and policy-aware approach. A contextual approach takes into account a wide range of factors influencing decisions and law-making. They include the participants in the decision-making, their perspectives and policies as well as the analysis of the arenas of interaction between decision-takers. A policy-aware approach is based on the understanding that legal rules are the product of policies of decision-makers. The analysis of the law without the analysis of the underlying policies would be incomplete and sterile. While it is not the task of legal research to make decisions on policies, a meaningful contribution to the development of the law includes the discussion of policy choices and policy preferences.

[24] Compare CHRISTOPH SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS (Oceana Publications 1981); AUGUST REINISCH, INTERNATIONAL ORGANISATIONS BEFORE NATIONAL COURTS (Cambridge University Press 2000).

The dissertation aims at fulfilling the following tasks:

- Clarification and analysis of the bases of interactions between domestic courts and investment treaty arbitration: This includes the clarification of the relevant international law sources and their interplay with the domestic judiciary. A major part of this task will be the analysis of jurisdiction-conferring, jurisdiction-regulating and substantive provisions of investment protection treaties.
- Analysis of past decisions and conditioning factors: The analysis of past decisions shows that the complexity of the interrelations between domestic courts and investment treaty arbitration goes far beyond the regulation of jurisdictional competition. A first step of the analysis is a thorough examination and classification of the problems raised by past decisions. The analysis of conditioning factors includes the examination of the reasons and policies given by international tribunals. But tribunals often do not divulge their true motives. It is therefore necessary to take into account other ascertainable circumstances influencing the decisions of international tribunals. A significant part of the analysis is therefore devoted to the analysis of the facts underlying decisions of international tribunals.
- Projection of possible future developments: Predictability of future decisions is an important goal of legal research. Given the current rapid development of the international law of investment protection, a significant part of the dissertation will be the projection of possible future decisions. Future developments may be derived from the systematic examination of the past practice of international tribunals and courts. But the examination is not limited to the projection from past decisions. Trends in the law-making, the comparison of investment treaty arbitration with other areas of international law, and the evaluation of rules and principles found in domestic legal systems, also form part of the analysis of future developments.
- Development of policy alternatives: An investigation limited to a descriptive presentation of the current state of the law would overlook the fact that the law is not static but in continuous change and development. This dissertation attempts to develop, on the basis of the broad analysis of the interactions between domestic courts and investment treaty arbitration, policy choices and preferences.

5. Time plan and funding

The dissertation in part builds on earlier work during a LL.M. with a specialization in international arbitration and practical work experience in investment treaty arbitration. My estimate is that the finalization of the research and drafting will take approximately 20 months.

The time plan is as follows:

- January 2011: Submission of the Exposé
- January 2011 – December 2011: Completion of research and preparation of first drafts of chapters. Attendance of 2 Seminars, one of which is on the topic of the dissertation. Attendance of the required lectures in the field of the dissertation.
- December 2011 – June 2012: Drafting
- October 2012: Public Defence

The dissertation will be financed with my own funds. I do, however, plan to apply for research grants to support the project.

Draft Outline

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