Chapter 3
The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework

3.1 Introduction

The interrelation between investment arbitration and domestic courts is complex and versatile, varying from harmonious co-existence to reinforcing complementation, reciprocal supervision and, occasionally, competition and tension. This chapter provides an overview of the different ways in which the inter-relationship between domestic courts and investor-State arbitration occurs in the current IIA framework. It first looks at the allocation of jurisdiction over investment disputes between courts and arbitral tribunals and reviews the ways in which the current IIA framework seeks to regulate the jurisdictional interaction between domestic and international tribunals (*infra* at Sect. 3.2). Section 3.3 then reviews the role of national courts in support and control of investment tribunals. Finally, Sect. 3.4 provides an overview of the reciprocal scrutiny of investor-State tribunals over the conduct of domestic courts. 56

As already noted in the introductory remarks (*supra* in Chap. 1), the main points of intersection between domestic courts and international investment tribunals examined in this study touch on issues of jurisdiction, admissibility, merits, and procedure. The questions reviewed thus extend over almost all aspects of the law of investment protection, both substantive and procedural. Many of these questions are controversial and have often given rise to splits in the jurisprudence. Given the breadth of the issues, the study's approach is to focus primarily on State practice as reflected in the conclusion of IIAs and the policies underlying the choices reflected in the treaties. By contrast, the study does not systematically deal with the tools available to arbitral tribunals in seeking to coordinate multiple proceedings, e.g. *lis pendens*, *res judicata*, or abuse of process. 57

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3.2 Allocation of Jurisdiction Between Investor-State Tribunals and Domestic Courts

3.2.1 Jurisdictional Overlaps Between National and International Courts

58 Multiple judicial institutions, national and international, may be authorized to adjudicate—i.e. have jurisdiction over—what in substance is one and the same dispute, namely a disagreement about a State measure that has caused certain harm. These jurisdictional overlaps between domestic courts and international tribunals are not confined to investment law; they also occur in other areas of international law.[1] In the field of investment law, they have, however, given rise to particular difficulties and complexities.

59 A few examples may illustrate the extent of the jurisdictional interactions between national courts and international tribunals in investment law. A first point of jurisdictional contact and potential tension occurs in the adjudication of contract and treaty claims. A foreign investor may enter into an investment contract with the host State or a State-owned entity to regulate the terms of its cross-border investment in the host State. That contract may be governed by a certain substantive law (often the host State's law) and, of special relevance here, contain a dispute resolution clause providing for the jurisdiction of the host State's domestic courts or for commercial arbitration with a seat in the host State.

60 In *SGS v. Philippines*, for instance, the contract between the Swiss investor and the Philippines contained a choice in favor of the courts of the Philippines. When the Philippines failed to make certain payments under the contract, the investor filed an ICSID arbitration against the State, relying on the dispute resolution clause contained in the Swiss-Philippines BIT and alleging that the Philippines' conduct breached the BIT standards. Faced with the respondent's jurisdictional objection that the dispute was purely contractual and thus subject to the Philippines' courts in accordance with the contract, the ICSID tribunal determined that "justice would be best served if the Tribunal were to stay the [proceedings before it] pending determination of the amount payable [under the contract], either by agreement between the parties or by the Philippine courts in accordance with [the contract]".[2] The *SGS v. Pakistan* dispute presented a similar situation. Here, the contract provided for domestic arbitration in Pakistan. After Pakistan had commenced contractual arbitration in Islamabad, SGS filed an ICSID arbitration under the Swiss-Pakistan BIT. Pakistan argued that SGS's claim was essentially a claim for breach of contract, which should be submitted to the exclusive jurisdiction of the arbitrator in Pakistan. The ICSID tribunal found that the forum selection clause in the contract did not

[1] See generally Shany (2007).

[2] See *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004, para. 175.

affect its jurisdiction to adjudicate treaty breaches based on the BIT.[3] These examples show the concurrent jurisdiction of domestic courts or commercial arbitral tribunals under the contract, on the one side, and investment treaty tribunals under the treaty on the other, when both categories of adjudicatory bodies are seized of claims that arise out of substantively the same State conduct.

61 In a second type of overlapping situation, a foreign investor may seek to vindicate its rights for the same allegedly wrongful conduct by the State under both an IIA and domestic administrative or constitutional law. In the dispute between the Swedish State-owned company Vattenfall and the Federal Republic of Germany arising out of the State's decision to phase out nuclear energy after Fukushima, for instance, Vattenfall brought an ICSID arbitration against Germany under the ECT, which is still pending at the time of writing.[4] At the same time, Vattenfall's German subsidiary brought a constitutional complaint (*Verfassungsbeschwerde*) before the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) alleging that the closure of nuclear plants was tantamount to expropriation and that the lack of compensation for the nuclear phase-out required by the German Atomic Energy Act was inconsistent with German constitutional law. In 2016, the German Constitutional Court held that the German legislative measures were "for the most part compatible with the Basic Law" (the German constitution or *Grundgesetz*) and did not amount to an expropriation, while certain restrictions contained in the law were contrary to the constitutional right to property as they did not provide for compensation.[5]

62 In Spain, the changes to the regulatory framework in the solar (photovoltaic) energy sector effected through a series of regulatory and legislative measures enacted between 2010 and 2013 triggered a wave of investor-State arbitrations brought by foreign investors against the Kingdom of Spain under the ECT and have resulted, in certain instances, in findings of liability against the Government.[6] At the same time, investors and other actors complained that the same measures were contrary to Spanish administrative and constitutional law and seized both the Spanish Supreme Court (*Tribunal Supremo*) and Constitutional Court (*Tribunal Constitucional*).[7] Both the investment treaty tribunals and the Spanish courts have thus passed judgment on claims for alleged violations of similar principles of legal certainty and legitimate expectations. These principles were anchored, however, in

[3] See *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003. The tribunal found, however, that it did not have jurisdiction over purely contractual claims which did not also amount to breaches of the relevant BIT.

[4] See *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (pending).

[5] See German Federal Constitutional Court, Judgment of the First Senate of 6 December 2016, 1 BvR 2821/11 (German version available at http://www.bverfg.de/e/rs20161206_1bvr282111.html and English version available at http://www.bverfg.de/e/rs20161206_1bvr282111en.html).

[6] See, e.g., *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 7 May 2017.

[7] See generally García-Castrillón (2016).

different legal regimes, namely international law, specifically an IIA, for the investment claims and domestic law, specifically administrative and constitutional law, for the domestic claims.[8] In an analogous fashion, Italy's and the Czech Republic's repeal of incentives granted to renewable energy operators gave rise to both domestic and investment treaty arbitrations. It appears that in the Italian domestic proceedings, petitioners asserted violations not only of Italian administrative and constitutional law, but also of international law, including the ECT and the ECHR.[9]

63 These few examples show that a State measure or conduct may potentially violate several sources of laws, each with its own system of remedies, and thus potentially open up multiple avenues for redress to aggrieved investors. As a result, international arbitral tribunals routinely examine domestic measures adopted by national governments under investment law standards, while national courts may review those same measures from the perspective of domestic constitutional, administrative, tax or civil law (and, less frequently, also from the perspective of international law if the latter can be directly invoked by private parties before domestic courts).[10] Cases before the national and international courts are not always brought by the same party, but may be pursued by closely related parties (such as shareholders, subsidiaries, parent companies, etc.), either consecutively or simultaneously.

64 Despite the fact that the disputes brought before these different fora are distinct and formally independent, because the parties are often non-identical, the "cause of action" or legal basis for the claims is different (domestic law v. IIA), and the remedies sought may be distinct (annulment of a regulation, declaration of constitutionality, monetary compensation), the essence of the dispute is often the same in that it bears on the same set of facts or measures and involves the same economic harm. In practice, the multiplicity of remedies poses potential problems of duplication of proceedings, which implies a waste of resources, risks of conflicting factual and legal determinations, and risks of double or multiple recovery, where compensation is an available remedy in the different sets of proceedings.

65 It should also not be overlooked that when State measures negatively affect an investment, in addition to investment arbitration based on an IIA, private parties may be entitled to bring a claim before a human rights court (e.g., the ECtHR) alleging the violation of human rights, in particular—as far as relevant here—the right to

[8] In certain of the Spanish domestic cases, the ECT was also invoked. See García-Castrillón (2016), pp. 6–7 (discussing the judgment of the Spanish Constitutional Court no. 270/2015, in which the petitioners also invoked provisions of the ECT).

[9] See *Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018, para. 197 (where Italy argued that "several Italian administrative court actions were brought by parties [...] regarding the measures at issue in this arbitration" and that "claimants in those actions asserted violations of the Italian Constitution, the ECHR, the ECT, and certain EU directives"). With regard to the Czech measures in the renewable energy sector which gave rise to both domestic and investment treaty arbitrations, see, e.g., *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, sections II.G, V.D(1)(h) and (2)(h).

[10] See the Spanish and Italian cases mentioned *supra* at the preceding footnotes and the discussion *infra* at Sect. 3.2.2.1.

property under Protocol 1 of the ECHR. In *Yukos v. Russia*, for instance, the claimants in the ECT investment arbitrations and/or certain related parties brought domestic actions before the Russian courts as well as proceedings in the ECtHR.[11]

Against this background of multiple litigation opportunities, how does the IIA framework deal with the competing jurisdiction of national and international courts over the same dispute (understood in substantive terms) concerning an investment? As will be seen from the following sub-sections, IIAs seek to regulate the allocation of jurisdiction between domestic courts and investment treaty arbitration in two broad ways. The treaty may offer a choice between domestic courts and international arbitration ("alternative" approach) (*infra* at Sect. 3.2.2) or it may require that domestic remedies be pursued or even exhausted prior to commencing arbitration proceedings ("sequential" approach) (*infra* at Sect. 3.2.3). Within those broad categories, States have devised several constellations to cater for different policy concerns. Despite a growing awareness of the jurisdictional overlaps between national and international courts, the rules contained in IIAs do not always appear satisfactory. Indeed, they do not always provide for a clear "division of labor" between domestic courts and international tribunals; often they do not cater for the fact that the legal basis and the parties in the two settings may not be the same; and do not clarify whether one forum may (or even must) consider its counterpart's decision, ultimately leaving these matters to the best judgment of courts and tribunals. 66

3.2.2 *Domestic Courts and International Arbitration as Alternative Fora*

IIAs often offer investors an alternative between domestic courts and international investment arbitration. Among other issues, this option raises the question of whether IIAs can be directly invoked by investors before domestic courts (*infra* at Sect. 3.2.2.1). Furthermore, where the investor has the choice of submitting its investment dispute before the domestic courts or in international arbitration, some 67

[11] See *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 587–600. The same measures may also be concurrently reviewed in domestic courts, investment treaty arbitration, and in the inter-State WTO setting. See, for instance, the tobacco restriction measures implemented in Australia, which gave rise to both domestic court proceedings (*JT International SA v. Commonwealth of Australia British American Tobacco Australasia Limited v. The Commonwealth* [2012] High Court of Australia 43), investment treaty arbitration (*Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration, 22 June 2011), and WTO disputes (Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434,WT/DS435,WT/DS441 (complaints initiated by the Dominican Republic, Honduras, and Ukraine on 18 July 2012, 4 April 2012, and 13 March 2012, respectively). On jurisdictional overlaps between investment treaty and WTO disputes, see Allen and Soave (2014), pp. 1–58.

IIAs seek to minimize the risk of duplication of proceedings through fork-in-the-road or waiver clauses (*infra* at Sect. 3.2.2.2).

3.2.2.1 Domestic Courts as a Possible Forum for Disputes Under the IIA?

68 Regardless of whether an IIA mentions the host State's domestic courts as a forum for the adjudication of investment disputes between investors and States, those courts would normally be the default forum. Indeed, under usual choice of court rules, the proper forum would be that of the defendant, i.e. the host State, which also happens to be the place where the investment was made.[12] In fact, although there are no precise figures in this respect,[13] many disputes relating to an investment are resolved before domestic courts by reference to domestic law standards. Where the investor has the option of taking up an arbitration offer contained in an investment treaty, absent other direct arrangements with the State (e.g., an arbitration clause in a contract) the investor remains free to seize the domestic courts of its investment dispute, until it has taken up that offer. When it accepts the offer and consent to arbitration is perfected, limitations to bring the dispute before domestic courts may come into play depending on the applicable legal framework, for instance as a result of Article 26 of the ICSID Convention (which provides that "[c]onsent 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*"), or of provisions contained in an IIA, such as a fork-in-the road or waiver clause (on which see *infra* at Sect. 3.2.2.2).

69 It is not uncommon for IIAs to mention expressly that domestic courts are a possible forum alternative to the international arbitration options provided under the treaty. The Switzerland-Tajikistan BIT (2009), for instance, provides that in respect of a "dispute with respect to investments between a Contracting Party and an investor of the other Contracting Party", "the investor may submit the dispute either to the national jurisdiction of the Contracting Party in whose territory the investment was made or to international arbitration".[14] Other IIAs provide that disputes "concerning an obligation under the treaty" (or similar formulations) can be brought before domestic courts or international arbitration. As an example, the Switzerland-Trinidad and Tobago BIT (2010) sets out that "the investor may submit the dispute [concerning an obligation under this Agreement] either to the courts or the administrative tribunals of the Contracting Party in whose territory the investment has been made or to international arbitration".[15]

[12] See Dolzer and Schreuer (2012), p. 235.

[13] See the discussion in Bonnitcha et al. (2017), p. 82.

[14] See Switzerland-Tajikistan BIT (2009), Article 11, paras. 1–2.

[15] Switzerland-Trinidad and Tobago BIT (2010), Article 8, para. 2.

In respect of these IIA formulations presenting domestic courts and investment treaty tribunals as adjudicative alternatives, the question arises whether an investor may invoke the substantive standards contained in the IIA before the local courts, rather than merely litigate its dispute by application of domestic law.[16] Whether there is scope for the application of IIAs by domestic courts depends on the text of the treaty and each domestic legal system. **70**

Treaties (or the domestic instruments accompanying their ratification)[17] rarely specify their own domestic law effects.[18] The answer to the question of whether the provisions of an IIA can be relied upon by private parties before domestic courts (or, **71**

[16]Examples of direct application of IIAs (or their "predecessors", the friendship, commerce, and navigation (FCN) treaties) before domestic courts of some countries have been documented, though they are not frequent. See Kjos (2016), pp. 81–96. See also Elettronica Sicula S.p.A. (ELSI) (Italy v. U.S.), Judgment, 1989 I.C.J. Rep. 15, 28 I.L.M. 1109 (July 20), paras. 61–62, where the chamber of the ICJ addresses Italy's position that individuals had been able to invoke provisions of FCN treaties before the Italian courts. See also *supra* Chap. 3, footnotes 8 and 9.

[17]See, e.g., U.S.-Rwanda BIT (2008), in which the U.S. Senate's report contains the following statements: "The resolution of advice and consent contains a statement reflecting the committee's understanding of the extent to which this Treaty will be self-executing. This provides that Articles 3-10 of the Treaty are self-executing and *do not confer private rights of action enforceable in United States courts*." (emphasis added). U.S. Congress, Investment Treaty With Rwanda, Senate Exec. Report 112-2, 12th Congress, 1st Session, 2 August 2011, 11 available at https://www.foreign.senate.gov/imo/media/doc/110-23.pdf. See also *ibid.*, 14 the "Text of Resolution of Advice and Consent to Ratification" at Title VII, Section 2, last sentence whereby "[n]one of the provisions in this Treaty confers a private right of action". A further example can be seen in the U.S.-Australia FTA (2004), which does not provide for investment arbitration, but merely State-to-State dispute settlement, and for which the U.S. implementing legislation provides that "[n]o person other than the United States [. . .] shall have any cause of action or defense under the Agreement [...] or may challenge [. . .] any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with the Agreement". See United States-Australia Free Trade Agreement Implementation Act, Public Law No 108-286, Sections 102(c)(1)-(2), 118 Statute 919 (2004) (codified at 19 USC section 3805 note). The U.S.-Australia FTA (2004) thereby entails that the substantive standards of protection can only be invoked in a State-to-State diplomatic protection scenario and not before the domestic courts, as noted by Dodge (2006), pp. 25–26.

In the context of the ECT, Article 26, paras. 1-2, provides that the investor has the choice to submit disputes "which concern an alleged breach of an obligation of the [host Contracting Party] under Part III" of the ECT "(a) to the courts or administrative tribunals of the Contracting Party party to the dispute". This provision of the ECT is accompanied by an "Understanding no. 16" whereby "Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law". See generally on this De Luca (2016), available at http://rivista.eurojus.it/direct-effect-of-eus-investment-agreements-and-the-energy-charter-treaty-in-the-eu/ (arguing that "Understanding 16 seems to assume that Part III has direct effect within the domestic legal systems of the Contracting Parties, rather than the opposite").

[18]See Bronckers (2015), pp. 662–664. However see, for instance, CETA, providing that "[n]othing in this Agreement shall be construed as [. . .] permitting this Agreement to be directly invoked in the domestic legal systems of the Parties" (Article 30.6.1) and that "[a] Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement" (Article 30.6.2). Consistent with this approach, the dispute settlement provisions in the investment chapter of the treaty provide that the investor may

in the parlance of certain jurisdictions, whether the treaty provides for a "private right of action" or "private cause of action" before the local courts) is thus left to the legal systems of each treaty party.[19]

72 In the United States, for instance, the U.S. Supreme Court has held that "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts'".[20] Based on this holding, certain U.S. courts have concluded that a private party has no "standing to sue under the treaty" where the treaty in question had "no express language to rebut a presumption against a private right of action".[21]

73 Courts of other States, including Switzerland, have resorted to a number of criteria to determine whether provisions in a treaty can be directly invoked by individuals before the domestic courts. The Swiss Federal Tribunal, for instance, requires the provision at issue to be "sufficiently clear and precise so as to serve as the basis of a decision in a specific case", and "susceptible of application in court"; be concerned with "rights and obligations of private parties"; and "be addressed to the authorities charged with the application of the law" rather than the legislator.[22]

74 If an IIA were to be invoked before the Swiss courts, it would seem that the very fact that the treaty affords the investor an option to file its treaty claims in the domestic courts of the host State in and of itself implies that the treaty standards are susceptible of being applied by a court, regardless of the criteria just referred to. A contrary conclusion would be difficult to reconcile with the State's undertaking in

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only bring a claim for alleged breaches of the CETA investment protection standards before the international tribunal constituted under the treaty, and not before domestic courts.

[19]The question as to whether an individual may invoke a treaty before domestic courts should be distinguished from the so-called "self-executing" nature of treaties (i.e., treaties that create a legal obligation in the absence of implementing legislation). See Hathaway et al. (2012), p. 56, also referring to Restatement (Third) of Foreign Relations, section 111 cmt. G (1987) (whereby "[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies"). See also Kaiser (2013), paras. 1–3.

[20]*Medellin v. Texas*, 522 US 491 (2008).

[21]See Hathaway et al. (2012), pp. 70–76 (discussing U.S. cases applying treaties, including FCN treaties, after the Supreme Court case in *Medellin*, quoted above in the text).

[22]See, e.g., Swiss Federal Tribunal, *L.X. v. M.F*, decision of 22 December 1997, 90, 91, para. 3 (a) (a provision in a treaty must be regarded as directly applicable "wenn die Bestimmung inhaltlich hinreichend bestimmt und klar ist, um im Einzelfall Grundlage eines Entscheides zu bilden; die Norm muss mithin justiziabel sein, die Rechte und Pflichten des Einzelnen zum Inhalt haben, und Adressat der Norm müssen die rechtsanwendenden Behörden sein"/"Pour qu'une règle soit directement applicable, il faut que le contenu de la disposition en cause soit suffisamment clair et précis pour servir de fondement à une décision d'espèce. La règle doit donc être susceptible d'application sur le plan judiciaire, porter sur des droits et des devoirs particuliers et s'adresser aux autorités chargées de l'application du droit"). See also Swiss Federal Tribunal, *D. v. Familienausgleichskasse Zug*, decision of 31 August 2010, 297, 307–308, para. 8.1; Swiss Federal Tribunal, *Schmid und Mitb. v. Regierungsrat und Grossen Rat des Kantons Basel-Stadt*, decision of 7 August 2007, 286, 291, para. 3.2. See generally, Besson (2016), pp. 333–337.

the treaty "that the investor may submit the dispute concerning an obligation under the IIA either to the courts of the Contracting Party in whose territory the investment has been made or to international arbitration". It would also be astonishing that domestic courts could not apply treaty standards, for instance because they would be regarded as insufficiently clear or precise, when the same standards are expected to be applied—and are routinely applied—by arbitral tribunals. Because of the very nature of IIAs, which confer rights on private parties and impose obligations on States vis-à-vis these private parties, the same solution should prevail, i.e. domestic courts should be in a position to apply the IIA, even when the treaty does not expressly provide for the possibility to submit claims arising out of the treaty to national courts.

3.2.2.2 Fork-in-the-Road and Waiver Clauses

IIAs may seek to coordinate domestic and international proceedings in respect of the same investment dispute through so-called "fork-in-the-road" clauses and "waiver"/"no U-turn" provisions.[23] **75**

Through a fork-in-the-road clause, States wish to make sure that, where the investor has a choice between domestic courts and international arbitration, the investor's choice once made is final. In other words, if the fork-in-the-road is triggered, the investor may only continue to pursue its claim in the forum to which it has first turned (*electa una via, non datur recursus ad alteram*).[24] In still other words, once the choice is made, the alternative forum becomes exclusive. **76**

Fork-in-the-road clauses may entail different consequences depending on their wording. Some may make the choice of either domestic courts or international arbitration irreversible, whatever forum is seized first. The Switzerland-Colombia BIT, for instance, provides that "[o]nce the investor has referred the dispute to either a national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final".[25] Other treaties prescribe that only the choice of domestic courts is final.[26] Alternatively, the investor's choice between international arbitration and domestic court proceedings **77**

[23]Some BITs, however, provide that the investor can access domestic courts and investment arbitration one after the other. See Germany-Madagascar BIT (2006), Article 11, para. 2.

[24]Schreuer (2004), pp. 239–240.

[25]Switzerland-Colombia BIT (2006), Article 11, para. 4. See also Switzerland-Egypt BIT (2010), Article 12, para. 6, ("Once the investor has submitted the investment dispute to one of the fora referred to in paragraph (3), that election is final").

[26]See, e.g., Switzerland-Saudi Arabia BIT (2006), Article 10, para. 3 (providing that "[i]f the dispute has been filed with the competent court of the Contracting Party in accordance with paragraph (2) of this Article, the investor may not submit this dispute to international arbitration as referred to in the same paragraph").

may be reversible until the first instance domestic court has issued its judgment, but not later.[27]

78 The ECT provides for a choice of several fora, including domestic courts and international arbitration. The treaty offers the Contracting Parties the possibility to opt into the fork-in-the-road clause pursuant to Article 26, para. 3(b)(i), and, specifically, to limit their consent to international arbitration only to disputes which the investor has not previously submitted to the domestic courts (or other previously agreed dispute settlement procedure). A number of Contracting Parties, including the European Union, some of its Member States, and Japan, have availed themselves of this possibility and provided written statements under Article 26, para. 3(b)(ii) of their "policies, practices and conditions" in respect of the application of the fork-in-the-road clause.[28] With regard to States such as Switzerland who have made no such statement under Article 26, para. 3(b)(ii), the investor's prior initiation of domestic court proceedings does not prevent the investor from subsequently launching an international arbitration against that State.[29]

79 A different type of approach to the coordination of multiple proceedings before domestic and international fora is to include "waiver" or "no-U-turn" clauses. Unlike fork-in-the-road clauses (which make the choice of forum by the investor final), waiver or no-U-turn provisions permit investors to opt for international arbitration after commencing domestic court proceedings in relation to the same measure. However, if the investor decides to submit a claim to international arbitration

[27] See, e.g., Austria-Slovenia BIT (2001), Article 11, para. 4 (providing that "[t]he investor may choose to submit the dispute for resolution according to paragraph 2b [international arbitration] only until there has been a decision concerning the same claim in the first instance in the proceedings according to paragraph 2a [domestic courts]"); Austria-Mexico BIT (1998), Article 10, para. 2 (providing that "[i]f an investor of a Contracting Party or his investment that is an enterprise initiates proceedings before a national tribunal with respect to a measure that is alleged to be a breach of this Agreement, the dispute may only be submitted to arbitration under this Part if the competent national tribunal has not rendered judgment in the first instance on the merits of the case"). Similarly, the Switzerland-Turkey BIT (1988) appears to entitle the investor to initiate ICSID arbitration as long as the domestic court has not issued a final decision. See Switzerland-Turkey BIT (1988), Article 8, para. 3 (providing that "the dispute shall be submitted to [ICSID arbitration] [...], provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Party that is a party to the dispute and there has not been rendered a final award [*sic*]").

[28] See Energy Charter Secretariat, "Transparency Document: Policies, Practices And Conditions Of Contracting Parties Listed In Annex ID Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage As Provided By Contracting Parties (in accordance with Article 26(3)(b)(ii) of the Energy Charter Treaty)", 10 June 2009, available at https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Founding_Docs/June_2009_Annex_ID.pdf.

[29] See, e.g., *Petrobart Ltd v. Kyrgyz Republic*, SCC Case No 126/ 2003, Arbitral Award, 29 March 2005, p. 56 (noting that "even if Petrobart had submitted its claims based on the Treaty to any of the above fora (i.e. domestic court or UNCITRAL arbitration), which it did not, subsequent submission to arbitration under Article 26 would still have been permissible. This would have been the case because [...] the Kyrgyz Republic chose not to be listed in Annex ID of the Treaty").

under the dispute settlement provision in the IIA, it is required to discontinue domestic court proceedings or waive its right to start new such proceedings.

This type of provisions is typically contained in IIAs entered into by the U.S.[30] **80**
The Switzerland-China BIT also provides that "[a] dispute that has been submitted, in accordance with paragraph (2), to a competent court of the Contracting Party concerned, may only be submitted to international arbitration after withdrawal by the investor of the case from the domestic court".[31]

In broad terms, fork-in-the-road and waiver clauses pursue the same objectives: **81**
avoiding parallel proceedings, which entail duplication of costs, risks of double recovery and of inconsistent outcomes. Despite their common goals, the two types of clauses imply somewhat different policies and entail advantages and disadvantages. Fork-in-the-road clauses are aimed at avoiding that a dispute is litigated first before domestic courts, and then before an international tribunal (or vice versa). Their effect is to prevent, in principle, any duplication of proceedings and thus of costs, because the trigger of one forum automatically entails the loss of access to the other. They may, however, prompt investors to immediately access the international forum, for fear of otherwise losing that option if domestic proceedings are started. Waiver clauses, on the other hand, do not pre-empt nor discourage investors from seeking redress before national courts first, as they leave the investors' right to access the international forum intact, if for instance the domestic proceedings are deemed unsatisfactory. This may entail a waste of resources if domestic courts are accessed first and then those proceedings are discontinued once arbitration proceedings are commenced. However, because domestic court proceedings may lead to a satisfactory outcome of the dispute, waiver clauses may have the effect of reducing potential investment arbitration claims.

The interpretation of fork-in-the-road and waiver clauses has occupied arbitral **82**
tribunals who have been faced with numerous questions concerning their scope of application. In particular, questions as to whether identity is required between parties, object, and cause of action (so-called "triple identity test" transposed from *res judicata* and *lis pendens* requirements) in the domestic and international

[30]U.S.-CAFTA-DR (2004), Article 10.18, para. 2(b), for instance, requires the investor's notice of arbitration to be accompanied by a "written waiver" "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16".

[31]Switzerland-China BIT (2009), Article 11, para. 4. See also Switzerland-Japan FTA (2009), Chapter 9, Article 94, para. 6(b). Sometimes, fork-in-the-road or waiver clauses specify that, regardless of the choice that the investor makes between one or the other forum, the investor is not prevented from applying to the host State's courts for provisional measures. See, e.g., Switzerland-Japan FTA (2009), Chapter 9, Article 94, para. 6, second sentence ("It is understood that a disputing investor may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's rights and interests while the conciliation or arbitration is pending").

proceedings, have been invariably raised in investment jurisprudence.[32] The supposed requirement for an identity of cause of action has proven particularly problematic where the claims under the treaty were linked to contractual claims that had been made before domestic courts.[33]

83 A careful drafting of the clauses may clarify to the benefit of investors and States a number of uncertainties that have emerged in arbitral practice.[34] In particular, States may wish to consider the need to phrase fork-in-the-road and waiver clauses in broader terms than are currently provided in many IIAs, so as to cover concurrent or subsequent litigation by closely related parties (thus: not limited to the "same" party) in relation to the same facts or measures (thus: without regard to the legal basis invoked, which is often necessarily different in the two fora), aimed at achieving comparable remedies. In other words, the IIA language should aim at avoiding the limitations resulting from the application of the (too) narrow "triple identity" test, to the extent those limitations are considered inapposite. Furthermore, if States consider it appropriate, rules on coordination may extend beyond regulating domestic court and investment arbitration proceedings and cover overlaps with other *international* dispute settlement mechanisms providing for direct remedies to private parties (e.g., human right courts).[35] Many of the waiver clauses contained in U.S. treaties

[32]This is not the place to do justice to the copious jurisprudence. See generally Schreuer (2004), pp. 239–249; Wegen and Markert (2010), pp. 269–292.

[33]See, in particular, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, 5 ICSID Reports 299, Award, 21 November 2000, paras. 55 and 81; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, 6 ICSID Reports 340, Decision on Annulment, 3 July 2002, paras. 36-42, 55 and 113; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, paras. 331–332; *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Final Award, 18 January 2017, paras. 308-321 and 330; *Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova*, SCC Case No V091/2012, Final Award, 16 April 2013, paras. 173–174; *Middle East Cement Shipping and Handling Co SA v. Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002, para. 71; *Total SA v. Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, para. 443; *Toto Costruzioni Generali SpA v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, paras. 211–212; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No UN3467, Final Award, 1 July 2004, paras. 57–58; *Pantechniki SA Contractors and Engineers v. Albania*, Award, ICSID Case No ARB/07/21, IIC 383 28 July 2009, paras. 61–64; *H&H Enterprises Investments, Inc. v. Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, paras. 356–382; See also *Woodruff Case*, IX RIAA 213, Venez. Mixed Claims Commission, 17 February 1903, pp. 222–223 (where the "fundamental basis" test was first articulated). See also Wegen and Markert (2010), p. 276.

[34]See for instance the recent EU-Viet Nam Investment Protection Agreement (2019) (not yet in force), Article 3.34; EU-Singapore Investment Protection Agreement (2018) (not yet in force), Article 3.7, paras. 1(f) and 2.

[35]By contrast, as explained by Allen and Soave, it is not possible to provide for fork-in-the-road clauses that govern WTO and investment claims arising out of the same measure, because "there is no 'fork-in-the-road' for either the home State or its investor to take. An investor cannot choose a WTO claim over an investment claim, or vice versa. The investor has no control over whether a State or group of States pursues a WTO claim with respect to the same measure. Nor does the home

already contain language that obliges the relevant party to waive or discontinue proceedings "with respect to the measure" not only "before any administrative tribunal or court under the law of any Party" but also before "*other dispute settlement procedures*".[36]

3.2.3 *Prior Recourse to Domestic Courts Before Resorting to Investment Arbitration*

A number of treaties coordinate domestic and international remedies through a "sequential" approach, by requiring investors to seize domestic courts before accessing the international forum. IIAs may incorporate the traditional exhaustion of local remedies requirement (*infra* at Sect. 3.2.3.1) or contain prior domestic litigation requirements short of exhaustion (*infra* at Sect. 3.2.3.2). **84**

3.2.3.1 Exhaustion of Domestic Remedies

Within the field of diplomatic protection, a State "may not bring an international claim in respect of an injury to a national [. . .] before the injured person has [. . .] exhausted all local remedies".[37] Various justifications have been given for the rule.[38] In the *Interhandel* case, the ICJ observed that the rule serves to ensure 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 system".[39] **85**

The rule requires the investor to exhaust any reasonably available remedy before administrative or judicial courts so long as the remedy is not "obviously futile".[40] This normally means obtaining the final judgment of the highest court of the host **86**

State have control over the investor's decision to assert an investment claim". See Allen and Soave (2014), p. 54.

[36]See, e.g., NAFTA, Article 1121, subsections (1)(b) and (2)(b); U.S.-CAFTA-DR (2004), Article 10.18, para. (2)(b).

[37]International Law Commission (2006), *Draft Articles on Diplomatic Protection,* Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc. A/61/10, Article 14(1).

[38]See Crawford and Grant (2007), para. 7.

[39]*Interhandel* (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, (Mar. 21) p. 27.

[40]Finnish Shipowners (Finland) v. Great Britain (Use of Certain Finish Vessels during the War) (9 May 1934), III UNRIAA, 1479, pp. 1503–1505; International Law Commission (2006), *Draft Articles on Diplomatic Protection,* Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc. A/61/10, Article 15; *Certain Norwegian Loans* (France v. Norway), Judgment, 1957 I.C.J. Rep 9, (July 6), (separate opinion of Judge Lauterpacht), pp. 39–41.

State.[41] In order to satisfy the exhaustion of local remedies requirement, the domestic and international proceedings should be "designed to obtain the same result".[42] The form and the arguments of the claims before the domestic and international tribunal may be different, as long as "the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".[43]

87 In addition to the field of diplomatic protection, including inter-State claims under FCN treaties,[44] the rule continues to be applied to individual complaints of international human rights violations.[45]

88 The rise of IIAs has changed considerably the role of the exhaustion of local remedies rule in investment protection claims. Because IIAs and their dispute settlement rules provide for a direct right of the investor to bring claims against the host State, they are considered to "abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to [...] the exhaustion of local remedies".[46] As noted in the ILC Draft Articles on Diplomatic Protection, the rules on diplomatic protection do not apply "to the extent they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments".[47]

89 Within the framework of 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

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[41] International Law Commission (2006), *Draft Articles on Diplomatic Protection with commentaries*, Report of the Fifty-Eighth Session, UN Doc. A/61/10, 2006/II(2) ILC Yearbook, Commentary to Article 14, para. 4.

[42] *Interhandel* (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, (Mar. 21), p. 27.

[43] *Elettronica Sicula S.p.A. (ELSI)* (Italy v. U.S.), Judgment, 1989 I.C.J. Rep. 15, (July 20), para. 59.

[44] In the ELSI case before the ICJ, brought under the United States-Italy FCN treaty, the United States argued that the exhaustion of local remedies rule did not apply as it was not mentioned in the dispute settlement provision of the FCN Treaty. The ICJ found itself "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so". See *Elettronica Sicula S.p.A. (ELSI)* (Italy v. U.S.), Judgment, 1989 I.C.J. Rep. 15, (July 20), para. 50.

[45] See International Covenant on Civil and Political Rights, (19 December 1966), 999 U.N.T.S. 171, Article 41, para. 1(c); Optional Protocol to the International Covenant on Civil and Political Rights, (19 December 1966), 999 U.N.T.S. 302, Article 5, para. 2(b); Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 U.N.T.S. 221, Article 35, para. 1; American Convention on Human Rights, (22 November 1969), O.A.S.T.S. No. 36, Article 46, para. 1(a)–(b), 2; African (Banjul) Charter on Human and Peoples' Rights, (27 June 1981), O.A.U. Doc. No. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 50.

[46] International Law Commission (2006), *Draft Articles on Diplomatic Protection with commentaries*, Report of the Fifty-Eighth Session, UN Doc. A/61/10, 2006/II(2) ILC Yearbook, Commentary to Article 17, para. 1.

[47] International Law Commission (2006), *Draft Articles on Diplomatic Protection,* Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc. A/61/10, Article 17.

> may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[48]

90 Article 26 reverses the situation under customary international law: under the Convention, Contracting States waive the requirement of exhaustion of local remedies unless otherwise stated.[49] The second sentence of Article 26 clarifies that a State may make the exhaustion of local remedies a condition of its consent to arbitration.[50]

91 A few States have sought to re-instate the exhaustion requirement when acceding to or ratifying the Convention. According to the ICSID website,[51] Israel,[52] Costa Rica,[53] and Guatemala[54] have made such declarations.[55]

92 State practice in concluding IIAs shows a diversity of approaches in respect of the exhaustion of local remedies rule. Broadly speaking, IIAs may (1) require exhaustion of local remedies; (2) waive exhaustion of local remedies; or (3) be silent on whether local remedies need to be exhausted prior to commencing arbitration proceedings.

93 Starting with the first type of treaties,[56] the requirement to exhaust domestic remedies before resort to international arbitration can in particular be found in early treaties of the 1970s and 1980s.[57] By contrast, this feature has not appeared in BITs

[48] Article 26 (emphasis added).

[49] Schreuer et al. (2009), p. 403.

[50] Schreuer et al. (2009), p. 403.

[51] See ICSID (2019), *Contracting States and Measures Taken By Them For The Purpose Of The Convention*, Doc. ICSID/8, February 2019, available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf.

[52] On 22 June 1983, Israel notified the Centre that, with reference to Article 26 of the Convention, "Israel requires the exhaustion of local administrative or judicial remedies as a condition under this Convention". This notification was withdrawn by Israel by a communication received by the Centre on 21 March 1991. See ICSID, "Contracting States And Measures Taken By Them For The Purpose Of The Convention", *supra* note 51, p. 1, footnote 5.

[53] On 27 April 1993, Costa Rica notified the Centre that "[t]here may only be recourse to arbitration pursuant to [the Convention] where all existing administrative or judicial remedies have been exhausted". See ICSID, "Contracting States And Measures Taken By Them For The Purpose Of The Convention", *supra* note 51, p. 1, footnote 5.

[54] On 16 January 2003, Guatemala notified the Centre that "the Republic of Guatemala will require the exhaustion of local administrative remedies as a condition of its consent to arbitration under the Convention". See ICSID, "Contracting States And Measures Taken By Them For The Purpose Of The Convention", *supra* note 51, p. 2, footnote 6.

[55] It has been argued that "a general notification of this kind is a statement for information purposes only. [. . .] If a State subsequently consents to ICSID arbitration in terms inconsistent with the prior general notification, the consent will prevail over the notification". See Schreuer et al. (2009), para. 194.

[56] On which see generally Schreuer (2010), pp. 73–74; Schreuer (2005), pp. 1–17; Brauch (2017), pp. 7–12.

[57] See, e.g., Malaysia-Netherlands BIT (1971), Article 12; Netherlands–Singapore BIT (1972), Article XI; Republic of Korea-Netherlands BIT (1974), Article 6; Germany–Israel BIT (1976),

concluded from 2004 to 2012.[58] One Swiss BIT conditioning consent to arbitration to exhaustion of local remedies "in accordance with international law" is the treaty with Jamaica of 1990.[59]

94 More recently, the exhaustion rule has re-appeared in treaties of a few States.[60] Notably, the new Indian Model BIT and a few of the recent treaties entered into by India modelled thereafter,[61] require "exhaustion" of "all judicial and administrative remedies" for 5 years.[62] Despite being termed as "exhaustion", the Indian rule is more akin to a prior litigation requirement (on which see *infra* at Sect. 3.2.3.2) as it does not require the investor to "exhaust" local remedies until the final instance, but calls for litigation of the dispute before the courts for a 5-year period of time.

95 For those treaties that expressly require exhaustion as a condition to the commencement of arbitration proceedings, the exceptions to the rule under customary international law are likely to apply, i.e. domestic remedies need not be exhausted where they would be "futile" or provide no "reasonable possibility of effective redress".[63] The treaty may, however, provide for different exceptions. For instance,

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Article 10, para. 5; Egypt–Sweden BIT (1978), Article 8; Romania–Sri Lanka BIT (1981), Article 7, para. 2; Denmark–Romania BIT (1994), Article 4, para. 2.

[58]Pohl et al. (2012), p. 14.

[59]Switzerland-Jamaica BIT (1990), Article 9, paras. 4–5.

[60]Albania-Lithuania BIT (2007), Article 8, para. 2. The exhaustion of local remedies rule has been proposed in the context of discussions during the negotiations of the TTIP between the U.S. and the EU. See Porterfield (2015), pp. 1–12. In 2011, the European Parliament adopted a resolution on the EU's international investment policy that stated that "changes must be made to the present [investor-state] dispute settlement regime", including recognizing "the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process". See European Parliament, Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)), P7_TA (2011)0141, para. 31.

[61]See India-Belarus BIT (2018), Article 15, para. 2; The India-Taipei Association in Taipei and the Taipei Economic and Cultural Center in India BIT (2018), Article 15, para. 4(b).

[62]India Model BIT (2015), Article 15, para. 2. Commentators have interpreted the clause to mean that "the investor must wait for at least five years even if judicial remedies are exhausted earlier" and suggest that "[t]he underlying rationale for the five-year period might be that the Indian judiciary is heavily backlogged and operates slowly and a five-year period is therefore reasonable in the Indian context". See Hanessian and Duggal (2017), p. 222. The Indian Model BIT also provides a clarification whereby "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". See India Model BIT (2015), commentary to Article 15, para. 1. As noted by commentators, this language is likely inspired by the desire to avoid certain outcomes linked to a strict application of the "triple identity test" in the context of *fork-in-the-road* clauses. See Hanessian and Duggal (2017), pp. 216–226, footnote 44. However, the Indian Model BIT contains no fork-in-the-road clause and, in fact, the exhaustion requirement is conceptually antithetical to the fork-in-the-road as the former mandates prior recourse to domestic courts rather than offering a choice of forum. Thus, the rationale of the clause likely is to prevent investors from "resorting to technicalities and to reduce the arbitral discretion". See Ranjan and Anand (2017), p. 50. See also the doubts expressed by Hepburn (2009).

[63]For the exceptions to the exhaustion of local remedies, see the discussion in the commentary of the International Law Commission (2006), *Draft Articles on Diplomatic Protection with*

the Indian Model BIT sets forth that domestic remedies need not be exhausted "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 this Treaty is claimed".[64] This has been read as giving "effect to the 'futility' exception to the exhaustion of local remedies in international law in a limited sense".[65]

Certain IIAs require exhaustion of local remedies for breaches of some but not other substantive standards. For instance, the Australia-Hungary BIT and the Australia-Poland BIT specify that the investor need not exhaust local remedies before submitting claims of expropriation and nationalization to international arbitration. However, for disputes in relation to other substantive standards of protection, local remedies must be exhausted first.[66] **96**

A second group of treaties expressly waive the exhaustion rule. Such waiver is for instance included in BITs concluded by Austria,[67] the Belgium–Luxembourg Economic Union,[68] as well as Central and Eastern European States, such as Armenia, Bulgaria, Czech Republic, Croatia, Moldova, Montenegro and Serbia.[69] By specifying that exhaustion does not apply, States remove any uncertainty especially for **97**

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commentaries, Report of the Fifty-Eighth Session, UN Doc. A/61/10, 2006/II(2) ILC Yearbook, Commentary to Article 15. See also *Swissborough Diamond Mines (Pty) Limited and others v. Kingdom of Lesotho*, PCA Case No. 2013-29, Judgment of the Singapore Court of Appeal, 27 November 2018, paras. 211–222, holding that the only remedies that need to be exhausted are those that are "reasonably available" and that offer a "reasonable possibility of providing effective redress". The Court of Appeal saw no reason for adopting the "less formalistic" approach that prevails in the practice of the European Court of Human Rights, which focuses on whether there is a "reasonable prospect of success". In *Swissborough*, the applicable treaty, the South African Development Community (SADC) (1992) 32 ILM 116, contained an exhaustion of remedies requirement in the following terms: "Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes." See Article 28, para. 1 of Annex 1 to the Protocol on Finance and Investment (2006) of the SADC.

[64] India Model BIT (2015), Article 15, para.1, third sub-paragraph.

[65] Hanessian and Duggal (2017), p. 222.

[66] Australia–Hungary BIT (1991), Article 12; Australia-Poland BIT (1991), Article 13. Similarly, the Poland-United Arab Emirates BIT conditions access to investment arbitration to the exhaustion of local remedies in respect of all claims, except those of expropriation and transfers. See Poland-United Arab Emirates BIT (1993), Article 9, para. 2.

[67] Austria–Malaysia BIT (1985), Article 9, para. 2; Austria–Tajikistan BIT (2010), Article 15, para. 2.

[68] Belgium–Indonesia BIT (1970), Article 10; Belgium–Luxembourg Economic Union–Montenegro BIT (2010), Article 12, para. 2; Belgium – Luxembourg Economic Union–Cuba BIT (1998), Article 9, para. 2; Belgium–Luxembourg Economic Union–Burundi BIT (1989), Article 8, para. 3.

[69] Croatia–Jordan BIT (1999), Article 10, para. 2(b); Armenia–Netherlands BIT (2005), Article 9, para. 2; Moldovia–Montenegro BIT (2014) (not in force), Article 8, para. 2(b); Bulgaria–Czech Republic BIT (1999), Article 9, para. 4.

any non-ICSID arbitration options included in the treaty, for which Article 26 of the ICSID Convention would not be applicable.[70]

98 Finally, the vast majority of treaties are silent on whether domestic remedies need to be exhausted before resort to international arbitration.[71] Amongst those are the majority of Swiss BITs.[72]

99 Where the IIA is silent on exhaustion and provides for ICSID arbitration, tribunals have had no difficulty in finding that the customary international law rule on exhaustion does not apply as a consequence of Article 26 of the ICSID Convention.[73] Within the non-ICSID context, investment tribunals under the ASEAN,[74] NAFTA Chapter 11,[75] the ECT,[76] the UNCITRAL Rules[77] and the SCC Rules,[78] have held that exhaustion of local remedies is not a condition for bringing an

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[70]See, e.g., Austria-Slovenia BIT (2001), Article 11, para. 3 providing for various arbitration options, including ICSID, ICC, and UNCITRAL arbitration, and specifying that "[e]ach Contracting Party hereby consents unconditionally to the submission of an investment dispute to international conciliation or arbitration. This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted".

[71]Brauch (2017), p. 7.

[72]See Johnson (2015), p. 14.

[73]See *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, paras. 37–39; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paras. 13.4–13.5; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, paras. 1126–1127; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 151; *Helnan International Hotels A/S v. Egypt*, Decision on Annulment, 14 June 2010, paras. 43–47; *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 509, para. 63; *IBM v. Ecuador*, Decision on Jurisdiction, 22 December 2003, 13 ICSID Reports 105, para. 80; *AES v. Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312, paras. 69-70; *Saipem S.p.A. v. The People's Republic of Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 175; Award, 30 June 2009, paras. 174–184; *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, paras. 22–23.

[74]*Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, para. 40.

[75]*Waste Management v. The United Mexican States (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 116, 133; *Waste Management v. The United Mexican States (No. 2)*, ICSID Case No ARB(AF)/00/3, Decision on Mexico's Preliminary Objection, 26 June 2002, para. 30. See also *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Judgment of the Federal Court of Canada, 2 May 2018, para. 191 (observing that "the prevailing view appears to be that Article 1121 of Chapter Eleven of NAFTA tacitly waives the requirement that litigants must exhaust local remedies before accessing the Chapter Eleven NAFTA arbitration process").

[76]*Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, 11 ICSID Reports 158, sec. 2.4.

[77]*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, paras. 412–413; *Mytilineos Holdings SA v. the State Union of Serbia & Montenegro and the Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 220–222.

[78]*RosinvestCo UK v. Russian Federation*, SCC, Award on Jurisdiction, 1 October 2007, para. 153.

investment claim, unless the treaty provides otherwise. This means that in investment arbitration, no matter what arbitration rules govern the proceedings, the customary international rule on exhaustion of local remedies is reversed: the traditional "applicable unless expressly waived" is replaced with "waived unless required".[79] Several reasons are given in support of this proposition.

First, as seen above, many IIAs include a fork-in-the-road provision or require a prior waiver of all domestic proceedings as a condition to access investor-State arbitration. These provisions have the effect opposite to the exhaustion of local remedies rule. The choice-of-forum requirements can only be enforced if read as an implied waiver of the local remedies rule.[80] **100**

Second, it is said that one objective of entering into an arbitration agreement is to re-allocate jurisdiction over a dispute from the local courts to the arbitral tribunal. Hence, unless expressly agreed otherwise, an arbitration agreement should not be read as requiring prior resolution in the courts.[81] **101**

Finally, investment arbitration was established as a system of direct access for investors to international adjudication alternative to diplomatic protection.[82] Therefore, some argue that the diplomatic protection principles developed for the invocation of responsibility by a State should not apply to the prosecution of claims by private parties.[83] **102**

Providing greater scope for the exhaustion of local remedies rule in IIAs in investment arbitration has both supporters and detractors. Those who advocate for a more meaningful role of local remedies before resort to international arbitration argue that the exhaustion requirement would strengthen the rule of law in the host States.[84] Along the same lines, it is said that the fostering of well-functioning judicial institutions in host States "may ultimately help to remedy some of the host-State institutional deficiencies which [investment arbitration was] designed to address",[85] whereas removing investment disputes from the domestic courts discourages local courts from improving the quality of domestic adjudication,[86] and prevents them "from deciding increasingly important matters".[87] Furthermore, deferring an investor-State claim until after domestic courts have resolved the dispute may **103**

[79]Douglas (2012), pp. 98–99; Sornarajah (2010), p. 221; Crawford (2008), p. 352; Schreuer (2010), pp. 72–73; Muchlinski (2009), p. 345.

[80]*Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 220–221; Puig (2013), pp. 214–215.

[81]Douglas (2012), p. 98.

[82]See supra at Chap. 2.

[83]Douglas (2004), p. 189; Douglas (2012), pp. 94–96.

[84]Porterfield (2015), p. 5.

[85]UNCTAD (2015), World Investment Report 2015—Reforming International Investment Governance, p. 149 available at https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

[86]Ginsburg (2005), pp. 118–119.

[87]Fix-Fierro and López-Ayllón (1997), p. 797.

allow the arbitrator to "benefit from the courts' characterization of the relevant domestic law",[88] in particular, the existence and scope of the property rights.

104 On the other hand, requiring investors to pursue domestic remedies has been criticized for causing delay and increasing costs,[89] especially since in many States it can take several years and layers of judicial review to reach a final judgment. According to some, insisting on exhaustion of local remedies would also carry disadvantages for the host State, as "[p]ublic proceedings in the domestic courts are likely to exacerbate the dispute and may affect the host State's investment climate".[90] Furthermore, "once the host State's highest court has made a decision, it may be more difficult for the government to accept a compromise or a contrary international judicial decision".[91] The very idea that an investment tribunal has authority to review the decision of the host State's highest court may indeed lie uneasy with a number of States.

3.2.3.2 Domestic Litigation Requirements Short of Exhaustion

105 A minority of BITs[92] "soften" the exhaustion of local remedies rule by subjecting it to a time limit.[93] In other words, instead of being required to "exhaust" local remedies, the investor must pursue domestic proceedings for a specified period before it may initiate investor-State arbitration.[94] For the purposes of the domestic litigation requirement, local remedies may include domestic arbitration.[95]

106 A few Swiss BITs with Latin American States include a prior domestic litigation requirement, with some variants from one BIT to the other. The BIT with Argentina requires investors to attempt to settle the dispute before domestic courts for a period of 18 months. If the competent courts do not issue a final judgment ("*jugement de dernière instance*") within such time period, the investor is entitled to start arbitration proceedings.[96] The Swiss BIT with Peru also provides a domestic litigation requirement before arbitration proceedings can be started, and specifies that the investor may commence proceedings if "after a period of 18 months there is no decision on the subject matter by the competent national court, or if, existing such a decision, a party to the dispute takes the view that it infringes a provision of [the

[88] Porterfield (2015), p. 6.

[89] Tietje and Baetens (2014), p. 95.

[90] Schreuer (2010), p. 73.

[91] Schreuer (2010), p. 73.

[92] Pohl et al. (2012), p. 13. See also Schreuer (2010), p. 74.

[93] See for example, Switzerland-Uruguay BIT (1988), Article 10, para. 2; Convention concerning the Reciprocal Encouragement and Protection of Investments, Belgo–Luxembourg Economic Union–Rwanda (1983), Article 10, paras. 3–4; Jordan–Romania BIT (1992), Article 8, paras. 3–4.

[94] Ortiz et al. (2016), p. 334.

[95] United Arab Emirates-Bangladesh BIT (2011) (not in force), Article 9, para. 3.

[96] Switzerland-Argentina BIT (1991), Article 9.

BIT]".[97] The BITs with Chile and Paraguay are somewhat different in that they offer a choice of forum between domestic courts and investment arbitration, without obliging the investor to pursue the one before the other. However, if the investor has opted for domestic courts, it may commence arbitral proceedings "only if after a period of 18 months there is no decision on the subject matter by the competent national court".[98]

Similar variations can be observed in BITs entered into by other countries.[99] The **107** time period during which the investor is required to pursue domestic remedies varies from 3 months[100] to several years.[101] Commonly, the investor is required to pursue domestic proceedings for 18 months.[102] Some BITs require pursuit of local remedies without a precise time limitation.[103]

Arbitral tribunals have applied prior domestic litigation requirements on a num- **108** ber of occasions. Where the investor had started arbitration proceedings without complying with the domestic litigation requirement under the treaty, tribunals have taken different views as to whether the investor could dispense with this requirement in circumstances where domestic remedies would have been futile or would not have allowed a decision to be reached within the prescribed time limit.[104]

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[97]Switzerland-Peru BIT (1991), Article 9, para. 3.

[98]Switzerland-Chile BIT (1999), Article 9, para. 3. See also Switzerland-Paraguay BIT (1992), Article 9, para. 3.

[99]See, e.g., Korea-Indonesia BIT (2000), Article 9, para. 2 (entitling the investor to submit the dispute to international arbitration if the "dispute cannot be settled within twelve months between the parties to the dispute through pursuit of local remedies"); U.K.-Argentina BIT (1990), Article 8, para. 2(a) (entitling the investor to submit the dispute to international arbitration if the courts have failed to issue a decision within 18 months or, where the decision has been made, but "the Parties are still in dispute"); U.K.-Uruguay BIT (1991), Article 8, para. 2(a) (entitling the investor to submit the dispute to international arbitration if the courts have failed to issue a final decision within 18 months or where the decision is "manifestly unjust or violates the provisions of this Agreement"); Spain-Uruguay BIT (1992), Article XI, para. 3(a) (providing that the dispute may be submitted to international arbitration "if no decision has been taken on the matter 18 months from the initiation of the judicial proceedings [...], or if such a decision exists but the dispute continues between the parties because one of them considers that the said decision is manifestly unjust or contravenes the provisions of this Agreement or any other norm of international law").

[100]See, e.g., Egypt-U.K. BIT (1975), Article 8, para. 1.

[101]As mentioned above, the Indian Model BIT provides for a 5-year period.

[102]See Pohl et al. (2012), p. 14.

[103]See, e.g., Netherlands-United Arab Emirates BIT (2013), Article 9, para. 3 (providing that "[i]n case of a legal dispute concerning an investment in the territory of the United Arab Emirates, the dispute may only be referred to ICSID if the national, party to the dispute, has first submitted the dispute to the competent court of the United Arab Emirates and the dispute has not been settled to the satisfaction of the national").

[104]Compare, e.g., *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, paras. 140–156; *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 620; *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA Case No. 2010–9, Award on Jurisdiction, 10 February 2012, paras. 265, 269, 273; *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility,