Trade Law Clinic (E780)

Geneva, 10 June 2011

APPLICATION OF INTERNATIONAL INVESTMENT AGREEMENTS BY DOMESTIC COURTS

BY: BAHAKAL YIMER, NICOLAS CISNEROS,
LAURA BISIANI, RAHUL DONDE

TABLE OF CONTENTS

EXECUTIVE SUMMARY

This memorandum is the outcome of the research topic submitted by the United Nations Conference for Trade and Development in the framework of the Investment and Trade Law Clinic at the Graduate Institute of International and Developmental Studies. Our project, as requested by UNCTAD, was to explore whether domestic courts in various countries are in a position to apply international investment treaties. This question has to be considered in a context in which more and more states and actors are calling for an increased role of host-State courts in settling investment disputes.

Some countries have recently revised their policy relating to the conclusion of IIAs by excluding investor-State arbitration for the settlement of disputes (Australia), calling for a greater involvement of the host country domestic courts. This has occurred as an attempt to protect their public policies from investor's claims (South Africa) or by denunciating the ICSID convention (Ecuador and Bolivia). Investors are reluctant to submit their disputes to host-State courts on the assumption that they are biased, lack expertise in the area of international investment law, or that they will only apply national laws.

In this context, this paper seeks to explore the current role and future potential of domestic courts in investment dispute resolution. Consequently, our paper has sought to identify any existing practice on international treaty application (IIA and non-investment related) by domestic courts. Where direct IIA application was not present, there was an attempt to explore the feasibility and permissibility by analyzing general direct treaty application.

In order to assess the possibility of domestic courts applying IIAs, the research has gone through the legal structure, BIT framework, and legal practice of nine countries selected to offer a diverse view at different legal regimes. Our first finding is that so far, there has been little practice in regards to application and interpretation of IIAs by domestic courts. Indeed, few countries have been faced with questions of interpretation and/or application of IIAs and their domestic courts have either evaded the question, or have adopted a lackadaisical approach to the matter. This paper found a very diverse country practice; many jurisdictions do not have the

power to interpret or apply IIAs, others readily interpret and apply BITs, and others have not considered the question.

The drafters of this paper have suggested that the outcome is dependent on the legal system of the country concerned, for example whether it is a monist or dualist system. Another factor that plays a significant role is the type of dispute settlement clauses. In general, dispute settlement clauses restrict the role that local courts can have. Many of them give a role to domestic courts, but in most cases international arbitration is always an option. Relatively few IIA contain dispute settlement clauses which give domestic courts a strong role in investment dispute resolution. The role of domestic courts could be significantly increased by redrafting the dispute settlement clauses in BITs, giving them a more significant role. Nevertheless this cannot happen in isolation. Arbitral tribunals also have to do their part by interpreting fork-in-the-road clauses, for example, in a more restrictive way.

This research has made clear that no universal formula can be laid down: every country's legal system and its relation with international law should be carefully assessed. Even when there was a lack of conclusive and homogenous findings, this paper does point to the possibility of domestic courts directly applying IIAs. This can have important implications for the future of international investment law.

I. INTRODUCTION- LEGITIMACY CRISIS

In recent years there have been critiques to the established system of Investor-State dispute settlement and there has been a call for an increased role of domestic courts. Australia, following the conclusion and ratification of the AUSFTA has excluded the traditional investor-State dispute settlement mechanism from the free trade agreement it signed with the United States. This same approach is adopted in the recent Closer Economic Relation (CER) Investment Protocol that Australia signed with New Zealand in 16 February 2011. Australia also has announced that this exclusion will also apply with its future negotiations with developing countries.[1]

Some Latin American countries have recently jumped into the radar of the international investment community. Ecuador and Bolivia have both denounced the ICSID Convention, eliminating the access to ICSID tribunals for investors seeking protection for their investments. Ecuador has further declared the signing of treaties that give jurisdiction to international tribunals as unconstitutional, resulting in the denunciation of several BITs. Argentina's failure to satisfy the more than 40 awards rendered against it also represents a blow to ICSID and international arbitration.

South Africa, in response to an ICSID claim, brought against its Black Economic Empowerment program by two Italian investors is seriously reconsidering the terms of existing treaties, in particular the investor-State arbitration dispute settlement regime.[2] A group of renowned academics also issued a public statement attacking the fairness of the international investment regime and its dispute settlement mechanism, thus calling on States, International organizations, international business communities and civil societies to join hands and bring about change in the system.[3] Whether these trends will have a domino effect is yet to be seen.

---

[1] http://www.buyusa.gov/australia/en/fta.html#_section14. The trade policy paper makes a blunt statement that '[I]f Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.' See also http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf

[2] *Bilateral Investment Treaty Policy Framework Review*, Government Position Paper Department of Trade and Industry of RSA, (June 2009), pp. 45-46.

[3] Public Statement on the International Investment Regime, 31 August 2010, http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf.

In the context of these challenges to the Investor-State dispute settlement system, several authors have written about improving the system of international arbitration, particularly in the context of ICSID institutional reform. This paper will focus on a rarely explored alternative: Can host-State courts have an increased role in settling investment disputes?

Accordingly, a theoretical foundation on the role of domestic courts, superseded by a country specific empirical analysis of different legal systems in the following Sections will help draw a conclusion as to whether domestic courts are feasible alternatives to investor-State arbitration.

II. METHODOLOGY

First, Section III will provide an overview of the current role that local courts play in investment arbitration. In this section the monist/dualist distinction will be made, and the different types of clauses will be detailed. At the end of this section, there will be a brief analysis of the pros and cons of domestic courts' involvement in settling investment disputes.

Section IV will focus on this specific country analysis. In order to examine whether BITs have been applied in domestic courts, or whether that would be possible in practice, this research will analyze the domestic legal systems of a select number of countries in respect to the application of IIAs or general international law.[4] The countries that will be covered in this study are: Argentina, Australia, Canada, Ecuador, France, India, South Africa, the United Kingdom, the United States of America, and Venezuela. For each country there will be an analysis of the existing legal system, the types of clauses present in Bilateral Investment Treaties / International Investment Agreements (hereafter "BITs" or "IIAs"), and a review of the cases in which local

[4] Several criteria have been taken into account to select the group of countries that this study will focus on. The criteria for the selection of countries are the following: countries should include frequent respondents in international arbitration (Argentina, Ecuador, Venezuela and Mexico), developed countries (United States of America, United Kingdom, France, and Canada) and emerging and developing countries (India and China) as well as legal systems under common law and civil law. This selection is also taking into account the availability of national law and case law data bases, language skills of the drafters of this memo, .

courts applied BITs (if any). In the absence of BIT application a more general analysis of international law application will be performed.

Section V will then draw on general conclusions and patterns observed from these countries.

III. ROLE OF DOMESTIC COURTS IN APPLYING INTERNATIONAL INVESTMENT AGREEMENTS

Before beginning to discuss the application of international investment agreements before domestic courts, it would be proper to put the fundamental discussion of the application of international law by domestic courts in context. The application of international investment agreements before domestic courts depends on the legal system of each particular country and the Constitutional order and structure of each. For this reason, under this section, a brief review of the theories of monism and dualism will serve as background in understanding two differing views of the world legal order, which will affect in turn the application of international law by domestic courts.

i. Monism v. Dualism Epilogue

Monists assume that the internal and international legal systems form a unity. International law does not need to be translated into national law. The act of ratifying international law immediately incorporates the law into national law. International law may be directly applied by a national judge, and can be directly invoked by citizens.

In a dualist legal system there is a separation between the national and international legal systems. International law does not exist as law within the state. National judges apply international law only to the extent it has been translated into national law. Translation occurs most commonly by the legislature enacting legislation incorporating a treaty into domestic law.[5]

[5] D. Sloss, *The Role of domestic Courts in Treaty Enforcement: a Comparative Study*, (Cambridge: CUP, 2009), pg. 3.

Courts in dualist legal systems presume conformity of domestic legislation with international treaties. Consequently, private parties seeking to enforce treaty-based rights can usually obtain a domestic legal remedy, even though courts do not apply treaties directly.[6]

The actual legal systems of many states do not fit neatly into either of these two categories. Russia, South Africa, and the United States are hybrid monist states; in these states, at least some treaties do have the force of law within the domestic legal system. There does not appear to be any significant correlation between the monist-dualist dichotomy and the actual practice of domestic courts, except for the purely formal matter that courts in hybrid monist states sometimes apply treaties directly, whereas courts in dualist states apply treaties only indirectly.[7]

Monist and dualist attitudes towards enforcement of international treaties should not be confused with the nature of the treaty itself. A treaty provision that depends on the enactment of a statute is not self-executing; other treaty provisions are self-executing. Put differently, a self-executing treaty is invoked by private parties and can be applied directly by the courts.[8] Treaty provisions that are not considered self-executing are understood to require implementing legislation to carry out the functions and obligations contemplated by the agreement or to make them enforceable in court by private parties.[9] There is significant scholarly debate regarding the distinction between self-executing and non-self-executing agreements, including the ability of courts to apply and enforce them.[10]

---

[6] *Ibid.*, pg. 4.
[7] *Ibid.*, pg.11.
[8] *Ibid.*, pg.12.
[9] *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject.").
[10] J. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 Am. J. Int'l L. 310 (1992); J. Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760 (1988); C. Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 Harv. L. Rev. 599 (2008).

ii. Application of International Investment Agreements Before Domestic Courts

Within the existing dispute settlement processes, there are a number of instances where domestic courts could play a role within the broader framework of the international investment law regime. These instances can be summarized here in two broad categories.

- Situations where domestic courts exercise jurisdiction on their own right, in competition with international investment tribunals or where exhaustion of local remedies is precondition to an international remedy.

- Situations where domestic courts aide or resist/interfering with international investment arbitrations. Courts could aid international arbitration in the form of ordering interim measures, rendering assistance in the collection of evidence and enforcement of awards.[11] In the same token, courts could resist/interfere with international arbitration by passing anti-arbitration injunctions, refusing to aid and by reviewing extensively awards of international tribunals in set aside and enforcement proceedings.[12]

This paper will focus on the first category above: instances where there is substantive application of IIAs before domestic courts. The following sections provide an overview of the different instances, where domestic courts exercise jurisdiction on their own right. This will set the foundation for the country-specific analysis that will be undertaken in Section V.

i. Exhaustion of Local Remedies

Article 14 of the ILC Draft Article on Diplomatic Protection provides that local remedies are to be exhausted before an international claim is brought against a State.[13] Although the significance of this rule has reduced in the current system of international investment law, it is not irrelevant. IIAs basically provide for waiver of this general requirement by giving investors

[11] Ibid, p. 11-14.
[12] It is worthy to note here that Art. 53 of the ICSID Convention provides that awards rendered under it are not subject to appeal or to any other remedies except those provided for in the Convention. Thus as a matter of principle, ICSID Convention awards are not subject to domestic court set aside and/or challenge proceedings.
[13] See the *Interhandel Case*, 1959 ICJ Reports p. 27; See also the *ELSI Case*, 1989 ICJ Reports p. 15

the right to directly bring suits before an international tribunal.[14] Art. 26 of the ICSID Convention[15] is a good example, though the waiting period requirement has been read to be an exception to such waiver.[16]

ii. Waiting Period

The waiting period requires the parties to a dispute to use domestic remedies for a certain period of time. This rule allows an investor to commence international arbitration, only after the time provided as 'waiting period' (often 3-6 months), has lapsed.[17] This rule, contrary to a fork in the road clause, does not compel the investor to make a definitive choice of one forum or another. Rather, it simply mandates disputes to appear before domestic courts until the time requirement is met. This is thus different from the exhaustion of local remedies rule, and considered by Schreuer as half-hearted revival of local remedies rule.[18]

iii. Resort to domestic courts as a substantive requirement for an international claim to mature

Domestic courts may also be involved in circumstances where justification of a treaty breach requires the rejection of redress sought by parties before domestic courts.[19] This requirement is neither a jurisdictional nor an admissibility issue. It comes at the merits stage.[20] It

---

[14] C. F. Amerasinghe, Local Remedies in International Law, Second Edition, Cambridge Studies in International and Comparative Law, Cambridge University Press, p. 247; See also Art. 15(e) of ILC Draft on Diplomatic Protection.
[15] *Lanco v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998, par. 39; CME *v. Czech Republic*, Partial Award, 13 September 2001, par. 417; *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, par. 13.1-13.6.
[16] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Germany/Argentina BIT), Award, 8 December 2008.
[17] C. Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, The Law and Practice of International Courts and Tribunals 1: Koninklijke Brill NV, Leiden, The Netherlands, 2005, p. 3. Available online at http://www.univie.ac.at/intlaw/pdf/cspubl_75.pdf. But see Siemens A.G. v. The Argentine Republic (Decision on Jurisdiciton), ICSID Case No. ARB/02/8, 3 August 2004 and Mafezzini v. Spain too, where MFN Clause was invoked to go around avoiding the waiting period requirement in the main treaty.
[18] In *Maffezini v. Spain* and *Siemens v. Argentina*, Claimants relied on the MFN clause to import favourable jurisdictional requirements, minimizing the relevance of the waiting period requirement.
[19] C. Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration ", p. 13. Available online at : http://www.univie.ac.at/intlaw/pdf/cspubl_75.pdf.
[20] Ibid.

is conceptually embodied into substantive standard and is a requirement of maturity of an international claim.[21] This is most apparent in denial of justice cases.[22]

iv. Fork-in-the-road

A fork in the road clause in a treaty would require an investor to make an irreversible choice between international arbitration and the host State's domestic court. It is established in practice that a fork in the road clause will serve as a bar to international arbitration only if the same dispute, same parties and the same cause of action had been brought both before domestic courts and the international tribunal. Due to these numerous cumulative requirements needed for the fork-in-the-road clauses to come into effect, tribunals seldom find that an investor's prior domestic court proceedings ban them from international arbitration. In fact, the case *Pantechniki v. Albania* seems to be the only case publicly available in which the previous domestic court proceedings of the claimant barred it from having access to international arbitration.[23]

Even when this alternative provides for the participation of domestic courts, their role should not be overemphasized since investors, knowing of such restrictions, are less likely to opt for domestic courts due to their potential limiting capacity to access international arbitration. The unrestrictive interpretation of the fork-in-the-road clause taken by arbitral tribunals also diminishes the authority and role of domestic courts, since international arbitration will still be the final instance in the dispute resolution process.

v. Types of Clauses

In the previous sections there has been an overview of the varying degrees and types of involvement that local courts can have in the resolution of investment disputes. The only way in

---

[21] *Mondev Intl. v. United States*, Award, 11 October 2002, par. 96, 42 ILM 85 (2003); *Metaclad Corp. v. United Mexican States*, Award, 30 August 2000; and *Waste Management, Inc, v. United Mexican States*, Award, June 2, 2000, 40 ILM 56 (2001), 5 ICSID Reports 443.

[22] *The Loewen Group, Inc, and Raymond Loewen v. United States of America*, Award, 26 June 2003, par. 153, 42 ILM 811, 836 (2003), cited in Christoph Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *op. cit.*, p. 14.

[23] http://www.iisd.org/itn/2009/09/02/commentary-pantechniki-v-albania-decision-offers-pragmatic-approach-to-interpreting-fork-in-the-road-clauses/

which these principles/mechanisms become relevant in the framework of international investment law, is if they are embodied in particular clauses of BITs. The clauses that can be distilled from the previous section are the Waiting Period and the Fork-in-the-Road type clauses. The importance of these clauses is that in some way they provide for the involvement of domestic courts in the resolution of disputes emerging out of an investment. A clause with identical practical results as the Fork-in-the-Road clause is the Three Options one. This clause consists of three options: 1) domestic courts, 2) other previously agreed dispute resolution mechanisms (ad hoc arbitration for example), or 3) international arbitration. Access to international arbitration is only possible if the investor has not opted for options 1) or 2).

Interacting with this clauses are other requirements put forth in BITs, namely a *Cooling Off Period* and a requirement of *Amicable Settlement*. The *Cooling Off Period* is intended for the parties to a dispute to engage in consultation and negotiations. The purpose of this time requirement is to give the parties an opportunity to resolve any differences in an amicable and confidential manner.[24] In most BITs, the cooling off periods are between 3 and 6 months. The *Amicable Settlement* requirement calls for the parties to engage in consultation and negotiations, like the *Cooling Off Period*, but does not specify a certain amount of time that has to elapse. The reason why these two types of clauses are important is because they are prerequisites to having access to the access to local courts. Also, in some BITs, local courts can be involved in the 6 month Cooling Off period.

These clauses are summarized in **Table 1**. It is important to note that though these clauses are the ones generally seen, each BIT may contain slightly different and nuanced versions.

Table 1

Clause Type	Description
Amicable Settlement	No time is specified
Cooling Off Period	Amicable negotiation/consultation (3-6 months)

[24] http://cms-arbitration.com/wiki/index.php?title=International_Investment_Arbitration

Waiting Period	Local courts for a particular time period (18 months)
Fork-in-the-Road	Final choice between local courts or international arbitration
Three Options	Choice between 1) domestic courts, 2) other dispute settlement mechanism, and 3) international arbitration.

vi. Pros and Cons of Domestic Courts' Involvement in ISDS

These 'nexus points' identified by Schreuer and the different types of clauses paint a general picture of various instances where domestic courts play a role in the settlement of investor-State disputes. Given this role, what are the advantages and disadvantages of local courts involvement? Indeed domestic courts benefit from attributes of their public character and transparency; represent a local feel of public policy concerns, and operate under a system of organized State structure which is sufficiently developed to merit predictability and legitimacy. The downside of domestic courts is that they are organs of the government. Consequently, they are perceived to be partial and political. Further, there is a common belief that domestic courts lack the expertise, man-power and time availability to deal with complex international investment law issues.

vii. Investor-state arbitration v. local remedies

Investor-state disputes settlement mechanisms as they were established within the ICSID give private standing to the investor, allowing him to claim its own rights under the BIT without needing to renew the host state consent, hence creating "a change in paradigm in international investment law"[25]. These mechanisms are provided by the dispute settlement clauses in the BITs and grant the investor the possibility to bring his claim to arbitration, thus allowing him to circumvent the jurisdiction of the host state tribunals. These mechanisms were designed in order

[25] S. Schill, "The multilateralization of International Investment Law", Cambridge University Press, 2009, p. 87

to bring a balance and to protect the investor from the asymmetry of power arising from the risk of investing into a country whose laws might fluctuate at the investor's disfavor.

These arbitration clauses allow the investor to bypass local courts and the obstacles that it fears might arise from local remedies. The main concerns arising from the submission of investment disputes to local courts are the following:

(1) Domestic remedies in developing states might be inadequate because they are biased, corrupt and unreliable. The investors will fear a lack of impartiality as, in many countries, the independence of the judiciary cannot be taken for granted and political pressures are likely to influence the outcome of the proceedings.[26]

(2) These courts might rely on the act of state doctrine and the foreign sovereignty immunity, if the host state acts in the exercise of sovereign powers, rather than in a commercial capacity[27]

(3) Another argument raised is that local courts might be bound to apply national law even if they are at odds with the rights of the investors under the BIT. In that respect, the State can unilaterally change its laws in the disfavour of the investors and the courts would have to apply domestic laws instead of the BIT.

(4) Moreover, it is argued that the domestic courts lack the expertise to correctly apply and enforce international investment law.[28]

(5) Finally, local courts are often overflowing with cases and tied to inefficient procedures that do not allow for a quick resolution of the dispute.

Apposite, international arbitration offers several features which are believed to override the challenges encountered in domestic courts:

(1) The investor's rights under an IIA can be invoked as the arbitral tribunals will apply international investment law and the standards contained in the IIA, which are often more favorable to the investor than national laws.

[26] R. Dolzer and C. Schreuer, p. 214.
[27] W. Dodge, "National Courts and International arbitration: Exhaustion of local Remedies and Res judicata under Chapter Eleven of NAFTA", *Hasting International and comparative Law review*, vol. 23, p. 358
[28] R. Dolzer and C. Schreuer, p. 214.

(2) The mechanisms allow the investor to choose at least one arbitrator and the issue will usually be dealt with confidentially.
(3) Moreover, such tribunal will not entertain the objections of state immunity and ‘act of state.’

Nevertheless, for various reasons, some voices have been calling for a greater role of domestic courts. Domestic courts are seen as having a greater legitimacy and offer a greater transparency. In the perspective of the host State and its sovereignty, they are also viewed as a more appropriate forum in which to assess whether the policy of a State is in breach with a BIT.

In order to assess whether domestic courts are able to play a greater role in investment dispute settlement, it should be verified today whether the assumption that domestic courts cannot be considered as reliable forum for investors to settle their claims against the host state is still valid.

The following table lists the main arguments for and against submitting an investment claim to domestic courts, as well as the pros and cons of such a claim to international arbitration.

Table 2

Pros and cons of domestic courts in investment dispute settlement		Pros and cons of international arbitration in investment dispute settlement	
PROS	**CONS**	**PROS**	**CONS**
	Local courts are biased and corrupt.	The parties to an arbitration can choose the arbitrators, so that the interests of both parties are equally represented	
	Defences such as sovereign immunities excluding examination of the legality of acts of foreign states may be raised.	Arbitration tribunals apply international law as well as domestic law.	Weak knowledge in domestic law and no account taken of policy incentives
	Local courts might be bound to apply national law instead of International law.	Arbitrators are most of the time highly recognized investment law practitioners and have experience and knowledge when it comes to apply International Law	
Domestic judges have a better knowledge of national law and more legitimacy to rule against a law that is alleged to breach an IIA	Domestic judges are unfamiliar with the technicalities of International Investment law.		

V. COUNTRY REVIEW

This section of the memo will examine the application of IIA's or general international law, in domestic courts for each of the selected countries (Argentina, Australia, Canada, Ecuador, France, India, Republic of South Africa, United Kingdom, United States and Venezuela). For each country there will be a review of the legal system to determine the hierarchy of international law vis-à-vis the constitution and domestic law, and also to shed some light on the treaty making process. Secondly, there will be a review of the BITs concluded by each country, focusing both on the types of clauses and the extent to which domestic courts are given a role in the dispute settlement process. Thirdly, there will be a survey of cases where BITs have been invoked and if so, how courts applied the BITs. Finally, for each country there will be a conclusion analyzing the possible reasons for the application, or lack thereof, of IIAs by local courts.

A. ARGENTINA

i. Legal System

The Argentine legal system is a civil law legal system, having both federal and provincial courts administering justice. Article 31 of the Argentine Constitution establishes that "[t]his Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation;"[29]. The hierarchy of these laws is as follows: 1) Constitution, 2) human rights treaties, 3) other treaties and concordats, and 4) other laws.[30] It can be observed that as a signatory of the Vienna Convention on the Law of Treaties, which entered into force in 1980, international law has primacy over domestic Argentine law.

The conclusion of treaties in Argentina is a multistep process: negotiation, adoption and authentication of the text, approval of the text, and ratification. Special emphasis needs to be

[29] Constitution of the Argentine Nation, available at http://www.senado.gov.ar/web/interes/constitucion/english.php
[30] Gonzalez Napolitano, Silvina S. "Las Relaciones Entre el Derecho Internacional y el Derecho Interno Argentino". Pg. 18.

given to the approval and ratification phases. The legislative power approves the text of a treaty through the passing of a law. Its approval is an intermediate step in the conclusion of a treaty and is not a step that incorporates the treaty into the domestic legal order. The approval only allows the Executive Power to have the authority to bind itself through the ratification of given text. Once the treaty is ratified or adhered to, the treaty is automatically incorporated into the domestic legal order without any further action or need to pass a law doing so. The process of incorporation is not necessary since international treaties and domestic laws are both considered to be the "supreme law of the nation", being two distinct and autonomous sources of law.[31]

ii. BIT Review

Argentina has signed more than 50 BITs.[32] The following is intended to provide an overview of the different provision types that give recourse to local courts. The different types of clauses present in Argentinean BITs are summarized in **Table 2**. All of these clauses have been previously explained with the exception of the *Three Options* clause.

The *Three Options* clause is a variation of the fork-in-the-road clause. This type of provision allows for three different dispute resolution mechanisms after a certain cooling off period: 1) local courts, 2) previously agreed dispute-settlement procedures (ad hoc arbitration for example), or 3) arbitration. An investor can only have access to option 3), international arbitration, if it has not submitted the dispute under 1) or 2) above. This type of clause is present in the BIT between Argentina and the US. The Three Options clause has the same the same practical effects as the fork-in-the-road provision, and the tribunals in *CMS Gas Transmission Company* and *Azurix Corp.*, both against Argentina, considered them to be fork-in-the-road clauses.

[31] Ibid, Pg. 3.
[32] According to UNCTAD. See: http://www.unctadxi.org/templates/docsearch.aspx?id=779
According to OAS, there are 56. See: http://www.sice.oas.org/ctyindex/ARG/ARGBITS_e.asp

Table 3

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Belgium[33]	Y	N	N	N	Y	N
China[34]	N	Y	N	Y	N	N
Germany[35]	N	Y	N	N	Y	N
Spain[36]	N	Y	N	N	Y	N
Switzerland[37]	Y	N	N	N	Y	N

As it can be seen from **Table 2**, the clauses in most Argentinean BITs give access to local courts in one way or the other. The Waiting Period Type provision actually forces the parties to submit the dispute to local courts first. The Fork-in-the-road provisions at least give the option for domestic court participation.

iii. Application of BITs

There have been several cases were BITs are invoked in Argentine local courts. In the following summary there will be a distinction between those cases where the courts referred to the BIT in their decision, and those were the court's decision did not refer to the BIT. This distinction seems important to make since it points to the actual application of the BIT by the

[33] Argentina-Belgium BIT (1990), available at http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_argentina_esp.pdf
[34] Argentina-China BIT (1992), available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_china.pdf
[35] Argentina-Germany BIT (1991), available at http://www.unctad.org/sections/dite/iia/docs/bits/germany_argentina_sp.pdf
[36] Argentina-Spain BIT (1991), available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_spain_sp.pdf
[37] Argentina-Switzerland BIT (1991), available at http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_argentina_fr.pdf

local courts and not just the invocation of the BIT by the claimant. The cases were obtained by using the webpage of the Argentine Supreme Court of Justice.[38]

1. BIT Invoked but Not Applied

In *DIA Argentina*[39] *v the Province of Buenos Aires*, the investor invoked international treaties between the Argentine Republic and the Kingdom of Spain. Specifically, the investor invoked the Argentina-Spain BIT. DIA Argentina specialized in the neighborhood store low-cost market, and it argued that a passed law prejudiced its investments, changed the conditions under which the investments were performed, rendered meaningless expensive market studies, reduced the market value of the company, and represented discrimination. The court accepted the claim, but ruled that Claimant did not show that there was any activity that endangered the constitutional rights invoked, or that injured the claimant in any concrete form so as to prompt the participation of the judicial power. The court never referred to the BIT in its decision.

In the case *Apache Energia Argentina v. the Province of Rio Negro*[40], the claimant invoked the Argentina-US BIT in a declaration of unconstitutionality[41]. A passed regulation increased property taxes and affected the investment of the claimant, namely the exploitation, transport, and distribution of hydrocarbons. In the end the court determined that the measures taken under the passed regulation were unconstitutional, but it never referred to the BIT.

2. BIT Invoked and Applied

In the case *Prodesur S.A. v. the General Customs Directorate of Argentina*[42], claimant invoked the BIT between the Republic of Argentina and the People's Republic of China.

---

[38] Consulta de Jurisprudencia. Corte Suprema de Justicia de la Nacion, Republica Argentina, available at http://jurisprudencia.pjn.gov.ar/jurisp/principal.htm

[39] *Dia Argentina S.A. y otra c/ Buenos Aires, Provincia de s/ accion de inconstitucionalidad.*15/06/10.

[40] *Apache Energia Argentina SRL c/ Rio Negro, provincia de s/ accion declarativa de inconstitucionalidad.* 26/03/09.

[41] Related case: *Pioneer Natural Resources (Argentina) S.A. c/ Rio Negro, Provincia de (citado como tercero el Estado Nacional) s/ accion declarativa de inconstitucionalidad – incidente sobre medida cautelar.* 01/09/03.

[42] *Prodesur S.A. (T.F. 10.207-A) c/ D.G.A.* 07/01/03.

Claimant argued that the passing of a law authorizing tax benefits from the customs authority and excluding tax benefits for sea products manufactured on ships, violated said BIT. The Attorney General determined that there was no violation of the commitments acquired by Argentine vis-à-vis the PRC. Specifically, the Attorney General determined there was no harassment, no discrimination, no prosecution, no national treatment, or MFN violation, to Chinese investors, and therefore, there was no BIT violation. For this reason no claims could be brought under the BIT, and the court ratified the validity of the tributary law.

A case that goes into the specifics of the relation between national laws and BITs is *Cablevision SA*[43]. The Court of Appeals first explained why Argentine sovereignty would not be seriously affected by the application of the BIT between Argentina and the United States of America. The Court determined that the compatibility between the treaty and national sovereignty was done when the Executive and Legislative powers passed the law authorizing the text of said BIT in 1992.[44] The court found that it had no competence in determining if it was the correct decision not to exclude radio broadcasting from the substantive protection given by the BIT; that was a political matter that could not be revised by judges of the local courts. The court went on to say that the internal legal order should be applied without contradicting the purpose of the BIT, and without complicating or omitting its practical implementation. In the end, the court determined that there was no violation of Art. 2 of the BIT, namely the most favored nation clause.

Another case were a BIT was applied by the provincial courts of Argentina was in the case *Abengoa S.A. v. the Province of Salta*[45]. The province determined through a decree that the claimant had to pay the province a certain amount in taxes after the construction of a thermoelectric station. Abengoa, a Spanish company, took formal measures to officially begin the cooling off period in the Argentina-Spain BIT. Regardless of the actions on the part of Claimant, the decree came into force. Claimant sued the province claiming that it did not respect the 6 month cooling off period in the BIT. Claimant did not question the tax itself, but instead

[43] *Cablevision SA s/ Acuerdo Preventivo Extrajudicial.* 31/03/08
[44] Text of the law available at http://biblioteca.afip.gob.ar/afip/gateway.dll/Normas/Leyes/ley_c_024124_1992_08_25.xml
[45] *Abengoa S.A. c/ Salta, Provincia de s/ inconstitucionalidad.* 14/06/05.

emphasized the disrespect of the dispute settlement procedures detailed in the BIT. The court did refer explicitly to Art. 10 of the BIT, but considered that the waiting period was not relevant any more since it had already elapsed. In the end, the court considered that the claim was abstract and dismissed the claims. [46]

In *Desarrollos en Salud*[47] the Argentine-Belgium BIT was invoked after a contract was converted from US dollars to Argentine pesos.[48] A commercial court determined that the BIT could be invoked, and directly interpreted the concept of an investment, an investor, and the provision on expropriation. In the case *IGJ v. Empresa Naviera Petrolera Atlantica S.A.*[49], an Argentine court directly applied and interpreted the Argentina-Spain BIT, specifically interpreting the free transfer provision and the definition of an investment.

iv. Conclusion

In the Argentine case, local courts play an active role in the resolution of investment disputes. The different types of dispute settlement clauses always give the option to access local courts for dispute resolution, and in some cases even requires disputes to be taken to domestic courts before they can go to international arbitration. The Argentine legal structure does allow for the direct interpretation of international treaties such as BITs. In fact, several Argentine courts, both local and federal, have directly applied provisions in BITs.

B. AUSTRALIA

i. Legal System

Australia's Constitution was drafted in the 1890s and came into force in 1901. It stipulates very little when it comes to the status of international law in the federation. Owing to

[46] Related case: *Teyma Abengoa S.A. c/ Salta, Provincia de s/ inconstitucionalidad.* 14/06/05.
[47] *Desarrollos en Salud S.A. s/Concurso Preventivo s/ Incidente de Revision*. 10/11/03, available at http://ita.law.uvic.ca/documents/ArgentinaCommercialCourt_10Nov2003.pdf
[48] W. B. Hamida, *Investment Treaties and Domestic Courts: A Transnational Mosaic Reviving Thomas Walde's Legacy*. "A Liber Amicorum: Thomas Walde", p. 80.
[49] *Inspeccion General de Justicia v. Empresa Naviera Petrolera Atlantica S.A.* 17/05/07, available at http://fallos.diprargentina.com/2007/09/igj-c-empresa-naviera-petrolera.html

the ambiguity in the Constitution, there have long been numerous debates regarding the Commonwealth's power over external affairs.[50] In reality, Australia adopts a dualist approach towards international law. The highest appellate court in the country, High Court of Australia, has principal jurisdiction over matters directly arising under international law, including treaties, or a Commonwealth statute concerning international law.[51]

As regards the hierarchy between internal laws, Australia's Constitution provides that the law of the Commonwealth prevails over that of the States' in cases of contradiction.[52] The Constitution is silent on possible conflicts between international law and domestic law. Case law has clarified the issue.

In *Chu Kheng Lim case*,[53] the High Court held that where legislative intent of the Commonwealth Parliament supports it, inconsistent domestic legislations 'prevail over earlier statutes and (to the extent – if at all – that they are operative within the Commonwealth) international treaties.'[54] Customary international law, though not higher in hierarchy over Parliamentary enactment or common law, it is considered 'a legitimate and important influence on the development of common law',[55] especially in universal human right respects.

ii. BIT Review

Australia has 21 treaties registered in the UNCTAD BIT database. Australia has signed three FTAs with investment chapters; the Singapore-Australia FTA, the Thailand-Australia FTA and the much discussed Australia-United States FTA (AUSFTA). On 16 February 2001, New Zealand and Australia also signed the Closer Economic Relation (CER) Investment Protocol. The practice of Australia has been to include investor-state dispute settlement clauses with some

[50] Donald Rothwell, Id., p. 126-8.
[51] Donald Rothwell, Id, p. 125. See also Brian Opeskin and Fiona Wheeler (eds.), *The Australian Federal, Judicial System* (2000).
[52] Commonwealth of Australia Constitution, s. 109.
[53] *Chu Kheng Lim v. Minister for Immigration*, Local Government and Ethnic Affairs, (1992), 176 CLR 1, p. 38.
[54] In this case, the contradiction was between the Migration Amendment Act 1992 (Cth) [which prohibited any court from ordering the release from custody of anyone of a defined class of persons (including plaintiffs in the case)] and the Convention relating to the Status of Refugees 1951 and its 1967 Protocol, and the ICCPR.
[55] *Mabo v. Queeensland* [No. 2] (1992) 175 CLR 1 at 42; also cited in Rothwell, p. 129.

countries, but not all. In the AUSFTA, and CER Investment protocol for example, there is no Investor-State dispute settlement mechanism envisaged.

The Australia-Argentina Agreement on the Promotion and Protection of Investments,[56] entered into force on 11 January 1997. Article 13 thereof provides the mechanism employed to settle Investor-State disputes. This provision provides first for the amicable settlement of disputes. Failing an amicable settlement, there is what seems to be a fork in the road clause in Article 13(1) and 13(2). Article 13(1) gives an option to investors to either approach domestic courts or to take up its claim before an international tribunal according to the procedures agreed in paragraph 3. Accordingly, an investor who chooses to take up its complaint before the domestic court has, in effect, waived its right to seek redress before the domestic court.

Article 13 of the Australia-Poland Agreement on the Reciprocal Promotion and Protection of Investment,[57] entered into force in 27 March 1992, provides a procedure different from that seen above. Initial stages of dispute settlement involve negotiation and consultations. And where these processes fail to resolve the dispute, the investor 'may' approach the domestic court of the host State to resolve the matter. However, Article 13(3) makes an exception for cases of expropriation under Article 7: there is no need to exhaust local remedies. A contrario, it is arguable that resort to domestic courts under Article 13(2) could be read as providing an exhaustion of local remedies rule for complaints falling outside of Article 7.

Interestingly, Article 22 of the Australia-Mexico Agreement On The Promotion And Reciprocal Protection Of Investments[58] provides for a treatment no less favorable than accorded to the host countries' investors or investors of any third party in its own courts and administrative tribunals.

[56] http://www.unctad.org/sections/dite/iia/docs/bits/argentina_australia.pdf
[57] (http://www.unctad.org/sections/dite/iia/docs/bits/australia_poland.pdf)
[58] http://www.unctad.org/sections/dite/iia/docs/bits/Australia_Mexico.PDF

Table 4

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Arbitration Only*
Argentina[59]	Y	N	N	Y	N	N
China[60]	Y	Y	N	N	N	N
Czech Republic[61]	Y	N	N	N	N	N
Egypt[62]	Y	N	Y	N	N	N
India[63]	Y	N	Y	N	N	N
AUSFTA	Y	N		N	N	N
Pakistan[64]	Y	N	Y	N	N	N
Romania[65]	Y	N	Y	N	N	N
Mexico[66]	Y	Y	Y	N	N	N

iii. Application

Despite the constitutional gap in effectively regulating the place of international law in the legal order, Australian courts have been faced with numerous applications having their foundation in treaty law. For this purpose, the courts have made certain distinctions between whether the remedies asked arise from a statute that is directly based on a treaty or a statute that

[59] http://www.unctad.org/sections/dite/iia/docs/bits/argentina_australia.pdf
[60] http://www.unctad.org/sections/dite/iia/docs/bits/australia_china.pdf
[61] http://www.unctad.org/sections/dite/iia/docs/bits/australia_czech_rep.pdf
[62] http://www.unctad.org/sections/dite/iia/docs/bits/australia_egypt.pdf.
[63] http://www.unctad.org/sections/dite/iia/docs/bits/australia_india.pdf.
[64] http://www.unctad.org/sections/dite/iia/docs/bits/australia_pakistan.pdf.
[65] http://www.unctad.org/sections/dite/iia/docs/bits/australia_romania.pdf.
[66] http://www.sice.oas.org/Investment/BITSbyCountry/BITs/MEX_Australia_e.asp.

infers or imports certain treaty rights and obligations. In the absence of implementing legislation, the chances of success for an applicant are significantly diminished though there still is the possibility to argue that the treaty based right is reflected in customary international law and if proved, will be successful in Australia.[67]

Because of dearth of cases invoking BITs before Australian domestic courts, a review of how the courts applied other international law obligations follows.

1. Treaties Incorporated under Australian Law

In principle, treaties incorporated in Australia with an implementing legislation give remedies based on the treaty rights and obligations. However, the extent to which the treaty will be applicable in the domestic arena will much depend on whether the actual legislative scheme incorporating the treaty is one of full implementation or the more common situation where partial effect is given by modifying the treaty terms to reflect local circumstances.[68]

In interpreting the 1958 Migration Act, which partially gave effect to the 1951 Refugee Convention, Australian courts have considered the extent to which the courts can have regard to the Refugee Convention on the basis of the Act. In *Minister for Immigration and Multicultural Affairs v. Khawar*, the Court noted that the scope of the Immigration Act is much narrower and also does not incorporate all protections recognized under the Convention.[69] In *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH,* the Court again decided to restrict itself to the strict wording of the Refugee Act and concluded that it is the words of the Act, which govern its scope of power despite other possible constructions in light of the

[67] Rothwell, p. 136.
[68] Rothwell, p. 138.
[69] 'The Act is not concerned to enact in Australian municipal law the various protection obligations of the Contracting States found in Chs II, III, and IV of the Convention. The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses upon the definition of Art. 1 of the Convention as the criterion of operation of the protection visa system.' But Justice Kirby's observations are different in that he prefers the Court to give meaning to provisions of the Act to ensure Australia's international obligations are fully given effect. See Rothwell, p. 139.

Convention.[70] Ultimately, the bone of contention in these cases is statutory interpretation and legislative intent.[71]

In *Friends of Hinchinbrook Society v. Minister for the Environment*, where the consistency of a development proposal with the World Heritage Properties Conservation Act of 1983 was considered, the Federal Court reviewed the matter under the Convention among other applicable domestic acts, though finally no consistency problem was found.[72]

In *Project Blue Sky*,[73] the interpretation of the effect of the 1988 Protocol on Trade in Services to the Australian New Zealand Closer Economic Relations Trade Agreement (CER) on the operation of the Australian broadcasting authority (ABA) under the provisions of the Broadcasting Services Act of 1992 (BSA) was at issue. S. 160 (d) of the BSA provided that ABA will carry out its services in a manner which is consistent with 'Australia's obligation under any Convention or any agreement between Australia and a foreign country.' What Project Blue Sky's challenge focused on is a standard adopted by the ABA introducing requirements for certain levels of Australian content in Australian television broadcasting. Having gone through different stages, the matter was finally brought before the High Court, and it was decided there that though ABA had authority to determine the Australian content under BSA, but this had to be done within the meaning of Section 160 of BSA which makes a reference to treaties and other international agreements, and the CER and its protocol were such.[74]

---

[70] Australian Courts will endeavour to adopt a construction of the Act and the Regulations, if that construction is available, which conforms to the Convention. And this Court would seek to adopt, if it were available, a construction of the definition in Art. 1A of the Convention that conformed with any generally accepted construction in other countries subscribing to the Convention, as it would with any provision of an international instrument to which Australia is a party and which has been received into domestic law… But despite these respects in which the Convention may be used in construing the Act, it is the words of the Act which govern.' Justice Kirby's opinion is at difference here again when he states 'because, in this way, art 1 is incorporated into Australian law, it cannot be said that having recourse to the requirements, object and scope and purpose of that article amounts to a subordination of municipal law to the demands of the Convention, as the joint reasons of this Court would suggest. On the contrary, any other approach would involve a departure from the letter of Australian law.

[71] Rothwell, p. 138-40.

[72] *Friends of Hinchinbrook Society v. Minister for the Environment*, [1997] 55 FCA (14 February 1997) (Federal Court of Australia), available online at : http://www.austlii.edu.au/au/cases/cth/federal_ct/1997/55.html

[73] *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 153 ALR 490.

[74] Rothwell, p. 144.

2. Treaties not yet incorporated

Invoking a treaty binding at the international forum, but not yet ratified in the Australian legal framework through incorporation/implementation is not very encouraging. In particular, most human right treaties, with the exception of Racial Discrimination Act of 1975 and the Human Rights (Sexual Conduct) Act of 1994, are not implemented domestically. This thus poses a great challenge to bringing international human right matters before Australian Courts. For example, in *Toonen*, a gay man from Tasmania invoking his right to sexual privacy under the 1966 ICCPR Convention had to approach the UN Human Rights Committee to bring complaint as this protection was not implemented in Australia's internal legal system then.[75]

However, in *Minister of State for Immigration and Ethnic Affairs v. Teoh,*[76] the Convention on the Rights of the Child, entered into by Australia but not domesticated under local processes, gives a 'legitimate expectation' that the government and its agencies will act in accordance with the terms of the treaty irrespective of its incorporation into Australian law. The court also indicated that this will not always be the case, especially where there is a clear statutory or executive indication that no legitimate expectation would not arise.

Following on this indication by the court, the Minister of Foreign Affairs, Mr Downer, and the then Attorney-General, Mr Williams, issued a joint statement in 1997 stating that the act of entering into a treaty is not to give a legitimate expectations in administrative law. Then in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, the High Court, without completely discarding the theory set in *Teoh*, expressed concern that ratification 'as an executive act, does not in the domestic constitutional structure confer rights upon citizens or impose liabilities upon them.' In *Collins*, the relief requested under Art. 10 of ICCPR was refused because the Convention has not been incorporated in the domestic legal system.[77] Recent case laws show the continuing irrelevance of unincorporated treaties under domestic law.[78]

---

[75] Human Rights Committee, View, Communication No. 488/1992 (CCPR/C/50/488/1992: 4 April 1994), available online at: http://www1.umn.edu/humanrts/undocs/html/vws488.htm
[76] *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.
[77] *Collins v. South Australia* [1999] SASC 257, p. 47.
[78] G.P.J. McGinley, "The Status of Treaties in Australian Municipal Law: The Principle of Walker v. Baird Reconsidered", (1989-90) *12 Adelaide L. Rev.* p.367.

iv. Conclusion

In the international investment law context, unless there is an implementing legislation at the domestic level incorporating the relevant treaty, it is unlikely that investors will be able to invoke substantive rights for protection, unless, the legitimate expectation argument from *Teoh* is applied, which is not likely to be upheld currently.

Regarding the AUSFTA, a domestic implementing legislation has entered into force on 1 January 2005.[79] Other domestic legislations such as the Foreign Acquisitions and Takeover Act of 1975, and its 2010 Amendments could be regarded as giving protection to foreign investors at the local level. Alas, the AUSFTA states that 'neither Party [Contracting] may 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.'[80] This effectively rules out any possibility for an investor to invoke treaty protection challenging a measure at the international or/and domestic level.[81] Same position is taken by the CER Investment Protocol. This signals a resurgence of diplomatic protection, at least in light of the above developments. [82]

C. CANADA

i. Legal system

Canada has a dualist legal system. There is no set rule governing the implementation of international agreements into domestic law and no formal approach to implementation, which leads to a variety of forms of enactments.[83] It can be declared by the legislature that the treaty has force of law, and that the text of the treaty is included into the enactment. National law can

---

[79] The US House of Representatives passed the FTA on 14 July 2004 and the US Senate passed it on 15 July. The FTA implementing Bill was passed by the Australian House of Representatives on the 24 June 2004 and by the Senate on 13 August, cited in Thomas Westcott, Foreign investment issues in the Australia-United States Free Trade Agreement, p. 73.

[80] Art. 21.15 of AUSFTA

[81] William S. Dodge, Investor-State Dispute Settlement Between Developed Countries: Reflection on the Australia-United States Free Trade Agreement, Vanderbilt Journal of Transnational Law, Vol. 39, No. 1, January 2006, p. 25.

[82] Id.

[83] G. VAN ERT, "Canada", in SLOSS, David, (ed.), *The Role of domestic Courts in Treaty Enforcement: a Comparative Study*, Cambrigde University Press, 2009, p. 169-170

also be amended to bring it in conformity with the treaty's requirements, without the treaty being mentioned expressly. This practice has led to a confusion by domestic courts about the status of treaties in domestic law and some treaties have been declared 'unimplemented' because the treaties where not mentioned in any statute[84].

In Canada, BITs are called Foreign Investment Protection and Promotion Agreements (FIPAs).[85] These treaties, along with FTA and NAFTA have to be submitted to the Governor General in Council for approval, and that approval will mark its ratification. The commitments can, however, entail the passage or amendment of legislation, as the final stage of the implementation of the Agreement.[86]

Canadian domestic courts apply only the laws passed by Canadian legislative bodies, and thus in general apply treaty provisions only if these have been implemented by a domestic law. They will refer to the text of a treaty only to clarify the drafter's intentions, if these are not sufficiently evident in the implementing legislation. Should there prove to be an inconsistency between the terms of the treaty and the legislative provisions, domestic tribunals will give precedence to domestic legislation.[87]

ii. BIT review

Among the different BITs allowing the recourse to domestic courts, the Canada-Argentina BIT[88] provides for a greater implication of domestic courts through two of the alternative conditions necessary for a claim to be submitted to arbitration. The BIT provides that the investment disputes shall be submitted to the decision of the competent tribunal of the host State. The dispute can be brought to arbitration only if (1) the parties agree to that, (2) if after a

---

[84] VAN ERT, p. 171.
[85] "Bilateral Investment treaties : a canadian primer", working document issued by *Canada's Coalition to end Global Poverty*, available at http://www.ccic.ca/_files/en/what_we_do/trade_2010-04_investmt_treaties_primer_e.pdf
[86] D. DUPRAS, *NAFTA : resolving conflict between treaty provisions and domestic law*, Law and Government division, (February 1993), available at : http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp331-e.htm#%284%29
[87] *Ibidem.*
[88] Art. X (2), http://www.unctad.org/sections/dite/iia/docs/bits/argen_canada.pdf

period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or if (3) the final decision of the aforementioned tribunal has been made but the Parties are still in dispute. Other BITs contain provision under which the investor has access to local remedies but can waive that right in favour of international arbitration (BIT with El Salvador[89], Uruguay[90] Thailand or Romania).[91] Other BITs (Czech Republic, Russia, Slovakia, Jordan) do not contain such clauses and give direct access to arbitration.

The NAFTA treaty contains a specific dispute settlement mechanism described in NAFTA Chapter 11. Under this treaty, the investor may either pursue local remedies or the arbitration mechanism provided in the treaty. According to Art. 1121, the election to arbitrate the dispute will bar the seek local remedies as one of the conditions for the submission to arbitration is that the investor has to waive "their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116.[92]

The following table provides a summary of the different types of clauses present in some of the Canadian BITs.

Table 5

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Argentina[93]	Y	N	Y	N	Y	N

[89] Art. XII, http://www.unctad.org/sections/dite/iia/docs/bits/canada_elsalvador.pdf
[90] Art. XII, http://www.unctad.org/sections/dite/iia/docs/bits/canada_uruguay.pdf
[91] Also Venezuela, Trinitad e Tobago.
[92] D. Campbell, "Canada", in *International Protection of Foreign Investment*, 2nd edition, 2010.
[93] Art. X Canada-Argentina BIT, http://www.unctad.org/sections/dite/iia/docs/bits/argen_canada.pdf

South Africa[94]	Y	Y	N	Y	N	N
Venezuela[95]	Y	Y	N	Y	N	N
Egypt[96]	Y	Y	N	Y	N	N
Ukraine[97]	Y	Y	N	Y	N	N

iii. Application

Canada's direct experience with arbitration under investment treaties has been as a respondent in four NAFTA Chapter 11 arbitrations: *Ethyl, Pope & Talbot, S.D. Myers and UPS.*

In the case *Council of Canadians, CUPW and the Charter Committee on poverty issues v. Attorney General of Canada*, Canadian courts have reviewed the constitutionality of NAFTA Chapter 11. It was alleged that the dispute settlement mechanisms under NAFTA Chapter 11 violated the Canadian Charter of Rights and Freedoms, as well as the *Constitution Act* because it deprives domestic courts of the jurisdiction to settle claims by private parties against the State. The claim was dismissed. It was first addressed whether s. 96[98] of the *Constitution Act, 1867* applies at all to the investor–state arbitration mechanism in Chapter 11 of NAFTA, which it was found did not, for two reasons. First, the NAFTA provisions and significantly other international bilateral tax conventions and Free Trade Agreements have been made part of Canada's domestic law. Second, while standing is provided to the foreign investor, the obligations enforced by NAFTA tribunals are international commitments made in that Treaty by the three NAFTA

[94] http://www.unctad.org/sections/dite/iia/docs/bits/canada_southafrica.pdf
[95] Art. XII Canada-Venezuela BIT, http://www.unctad.org/sections/dite/iia/docs/bits/canada_venezuela.pdf
[96] Art. XIII Canada-Egypt BIT, http://www.unctad.org/sections/dite/iia/docs/bits/canada_egypt.pdf
[97] Art. XIII Canada-Ukraine BIT, http://www.unctad.org/sections/dite/iia/docs/bits/canada_ukraine.pdf
[98] Section 96 of the Constitution ensures the independence of the judiciary and...provide uniformity to the judicial system throughout the country" The legal test for determining the application of s. 96 involves an historical inquiry into the powers granted to superior courts at the time of Confederation. The Court of Appeal held that the NAFTA tribunals did not usurp the power granted to Canadian superior courts by s. 96. The historical inquiry revealed that the "power conferred on [NAFTA] tribunal[s] [is] not analogous to one exercised by superior courts at the time of Confederation" [4]. The subject matter of the disputes before the tribunals – the alleged violation of state obligations under Chapter 11 – had "no counter-part to pre-1867 domestic law in Canada". The Court also considered the fact that the tribunals cannot alter Canadian laws; the tribunal's decision is incorporated into domestic law insofar as it is binding on the parties. See M. Pethen, NAFTA Tribunal are constitutional, (2007) available at: http://www.law.ualberta.ca/centres/ccs/rulings/naftatribunalsareconstitutional.php.

Parties. Thus, as an international treaty, NAFTA is unaffected by s. 96 of the *Constitution Act, 1867*[99].

According to the court, "there is a clear distinction between parliamentary approval of a treaty on the one hand, and incorporation of that treaty into Canadian domestic law on the other[100]" and "the *NAFTA Implementation Act* clearly does the former, and just as clearly does not purport to do the latter". The *Commercial Arbitration Act* that provides that decisions rendered by NAFTA tribunals are enforceable in Canadian courts does not incorporate the investor–state adjudication process into Canadian law and only the decisions made is incorporated into domestic law[101].

In the case *Mexico v. Metalclad*, the British Columbia Supreme Court, which has jurisdiction to review arbitration decisions when the seat of arbitration is British Columbia, partially annulled the award, thus becoming the only example where a domestic court set aside a decision of a tribunal constituted under an IIA. The Court examined the correct interpretation of NAFTA Art. 1105 and 1110 to determine whether the arbitral tribunal had exceeded its jurisdiction. The court ruled that the tribunal had improperly imposed a requirement of "transparency" into Chapter 11 of NAFTA. As the "transparency" rationale was used by the tribunal to find that the denial of the municipal permit constituted an expropriation and a violation of the fair and equitable standard, the court set aside that portion of the decision.

In *SD. Myer Inc. v. Canada*, the Federal Court of Canada rendered an interpretation of the notion of control under NAFTA, and interpreted broadly considering the aim and purpose of NAFTA, as opposed to the notion in the *Canadian Business Corporation Act* on which Canada relied.

iv. Conclusion:

Without specific incorporation of IIAs into the domestic laws of Canada, it seems highly unlikely that Canadian courts would apply IIAs.

---

[99] *Council of Canadians v. Attorney General of Canada*, p. 5-6.
[100] See *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 (P.C.) (*Labour Conventions*).
[101] *Council of Canadians v. Attorney General of Canada*, p. 7.

D. ECUADOR

i. Legal System

The Ecuadorian legal system is a civil law system. Regarding the hierarchy of laws, Art. 424 of the Constitution establishes that the constitution is the supreme law of the country and will prevail over any other judicial ordering.[102] That same article puts human rights treaties at the same level as the constitution if they grant more favorable rights than the constitution. The hierarchy of laws, per Art. 425 of the Constitution, is as follows: 1) the constitution and some human rights treaties, 2) international treaties, and 3) other laws. Art. 426 establishes that human rights treaties have direct application and should be immediately complied with, having a self-executing nature.

In 2008 Ecuador passed a new Constitution that explicitly excludes the possibility to enter into international treaties in which the state waives jurisdiction to international arbitration in disputes with private individuals or corporations (Art. 422). This has resulted in the declaration of the dispute resolution clauses of several BITs as anti-Constitutional. This has lead to the denunciation of several BITs[103] and in July 2009, the denunciation of the ICSID Convention.

ii. BIT Review

Ecuador has signed around 24 BITs.[104] Within these treaties, there are a wide range of BIT provisions that give local courts an active role in investment dispute resolution. On the one extreme, there are treaties that explicitly allow for the submission of disputes to local courts. Such is the case of the Paraguay BIT, which has a modified fork in the road type provision. After the dispute arises, there needs to be a 6 month cooling off period. If after this time the

[102] Constitucion del Ecuador, available at http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf
[103] See Judgement on the Constitutionality of the UK/Ecuador and Germany/Ecuador BITs available at http://ita.law.uvic.ca/documents/EcuadorConstitutionalCourtRulingAug32010.pdf and Judgment on the Constitutionality of the China/Ecuador and Finland/Ecuador BITs at http://ita.law.uvic.ca/documents/EcuadorConstitutionalCourtrulingAug172010.doc
[104] According to UNCTAD. See: http://www.unctadxi.org/templates/docsearch.aspx?id=779

dispute hasn't been settled, only the investor may submit the dispute to the local courts of the host country, or to international arbitration. If the investor opts for national courts, it may not seek international arbitration as an option, unless after 18 months there has been no sentence, and if both parties agree to drop the proceedings in local courts and agree to submit them to international arbitration.

The Ecuador-US BIT provides for a "Three Options" type clause, giving either party the choice between local courts, international arbitration, or any other previously agreed dispute-settlement procedures.

The Ecuador-France BIT gives a lesser role to local courts. The dispute settlement provision has a cooling off period of 6 months where the dispute has to be solved through jurisdictional means of the host state or any other means. If after this period the dispute has not been settled, then the dispute can be submitted by request of either party to an ICSID tribunal. This type of Cooling Off Period clause is different than the ones commonly seen in other BITs since it allows for involvement of courts in the 6 month cooling off period. All of these previous provisions are summarized in **Table 6**.

Table 6

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
US[105]	Y	Y	Y	N	N	N
Paraguay[106]	N	Y	N	Y	Y	N
France[107]	N	Y	N	N	N	N

iii. Application of BITs

[105] Ecuador-US BIT (1993), available at http://www.unctad.org/sections/dite/iia/docs/bits/us_ecuador.pdf
[106] Ecuador-Paraguay BIT (1994), available at http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_paraguay_sp.pdf
[107] Ecuador-France BIT (1994), available at http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_france_fr.pdf

Even when the BITs signed by Ecuador do provide for domestic court participation, there have been no cases found where Ecuadorean courts have directly applied or interpreted BITs and their provisions. The restrictive setup of IIAs with regards to domestic court participation might be the reason for the lack of this type of case law. This restrictiveness can be one of the reasons why Ecuador feels that BITs challenge its sovereignty, resulting in the recent backlash against the system of international investment protection.

iv. Conclusion

The lack of cases may be a result of dispute resolution clauses that favor international arbitration over domestic courts as a dispute settlement mechanism. This can be contrasted to Argentine BITs, which give local courts the opportunity to have a greater involvement, even requiring investors to go to local courts before they can have access to international arbitration.

Given the backlash Ecuador has had against international arbitration, the conditions are appropriate for considering an increased role of local courts in solving investment disputes. The Constitution of Ecuador, in theory, per Article 425, does allow for the application of BITs by domestic courts, given that they are a constitutive element of the Ecuadorean legal order. Nevertheless, the perception that BITs benefit multinational corporations and prejudice the national interest, make it an unlikely option. Art. 422 of the Constitution instead points to regional arbitration fora as a possible alternative, being the only type of arbitration that it explicitly allows for.

E. FRANCE

i. Legal system

In France, the Constitution of 1958 provides that duly ratified and published treaties operate as laws within the domestic system. Art. 55 of the Constitution grants these treaties the priority over domestic statutes, under the condition of reciprocity, subject to the application of

the treaty by the other party[108], which the judge will have to verify. Indeed, a French court will only apply a treaty provision if it has made sure that the provision has also been applied in the other signatory State. The French courts may also declare a statute inapplicable for conflicting with an earlier treaty. However, when the constitution conflicts with an international agreement, the former will prevail.[109] Moreover, a treaty can only be invoked in domestic courts if it is self-executing and if it grants or imposes directs rights or obligations on individuals.

ii. BIT Review

Some BITs provide local remedies as well as arbitration, alongside with a fork in the road provision. (BITs with Argentina, Bulgaria[110], Chile[111], China, Guatemala, Mexico). Others provide that if an agreement cannot be reached within three or six months through local remedies or otherwise, the dispute will be taken to arbitration (BIT with Ecuador[112]).

Still others do not contain such clauses and give direct access to arbitration (Bolivia, Cambodia, Czech Republic, El Salvador, India or South Africa).

Table 7

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Argentina[113]	Y	N	N	Y	N	N
China[114]	Y	Y	N	Y	N	N
Hong-Kong[115]	Y	Y	N	N	N	Y
Venezuela[116]	Y	Y	N	Y	N	N

[108] M. N. Shaw, *International Law*, Cambridge University Press, 6th edition (2008) p. 173-174
[109] J. Nijman and A. Nollkaemper, (edit.), *New Perspective on the Divide Between National and International Law*, 2007, Oxford University Press, pp. 264-265
[110] Art. 8 (2), http://www.unctad.org/sections/dite/iia/docs/bits/france_bulgaria_fr.pdf
[111] Art. 8 (2), http://www.unctad.org/sections/dite/iia/docs/bits/chile_france_sp.pdf
[112] Art. 7, http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_france_fr.pdf
[113] Art. 8 France- Argentina BIT, http://www.unctad.org/sections/dite/iia/docs/bits/france_argentina_fr.pdf
[114] Art. 8 France- China BIT, http://www.unctad.org/sections/dite/iia/docs/bits/france_china_fr.pdf
[115] Art. 9 France- Hong-Kong BIT, http://www.unctad.org/sections/dite/iia/docs/bits/hongkong_france.pdf

Mexico[117]	N	Y	N	Y	N	N
Slovenia[118]	Y	Y	N	N	N	Y

iii. Application

In respect of the possibility of bringing investment claims under a BIT within French domestic courts, it should be noted that Art. 1458 of the *Code de procédure civile*, provides that where a dispute is submitted to an arbitral tribunal pursuant to an arbitration agreement \ filed before a French court, the latter shall decline jurisdiction. Moreover, where the dispute has not yet been submitted to an arbitral tribunal, the court shall also decline jurisdiction unless the arbitration agreement is manifestly void Art. 1466 recalls that if a party challenges the principle or scope of the arbitrator's jurisdiction before the arbitrator, the arbitrator shall decide upon the validity or scope of his or her jurisdiction. Articles 1458 and 1466 have been initially drafted for French domestic arbitration, but French courts have later expressly admitted that these provisions apply identically to international arbitration (Cour de cassation, 28 June 1989, *Eurodiff* and 7 June 1989, *Anhydro*).[119]

So far, French courts have ruled that BITs could not be invoked before domestic courts because they did not contain any self-executing provisions and were thus not enforceable in domestic proceedings. The following cases are illustrative of this principle.

In a case involving a tax claim, the French Tax Administration asserted that the BIT between France and Panama of November 1982, which provides for arbitration under UNCITRAL rules, did not contain any provision directly applicable to nationals and companies and cannot grant them a direct right of action before French courts[120]. In this case, a company having its headquarters in Panama, was subject to paying taxes applicable to companies

---

[116] Art. 8 France- Venezuela BIT, http://www.unctad.org/sections/dite/iia/docs/bits/france_venezuela_fr.pdf
[117] Art. 9 France- Mexico BIT, http://www.unctad.org/sections/dite/iia/docs/bits/mexico_france.pdf
[118] Art. 9 France-Slovenia BIT, http://www.unctad.org/sections/dite/iia/docs/bits/france_slovenie_fr.pdf
[119] MISTELIS, Loukas, *Concise International Arbitration*, Kluwer Law International, 2010, p.881
[120] Cour de Cassation, Chambre commerciale, Decision of October 17, 1995. Available at http://www.legifrance.gouv.fr/.

headquartered abroad and requested a refund of amounts it had paid after the notice of recovery resulting from the adjustment. The court decided that according to Art. 4 and 11 of the Agreement between France and Panama, it did not set out substantial rules directly applicable individuals or firms and was not directly invoked before domestic tribunals.

In another case, the *Conseil d'Etat*, the French higher administrative court held that Art. 3 of the Algeria-France BIT, that relates to fair and equitable treatment and the prohibition of discriminatory measures, created only inter-state obligations and a private person cannot rely on such a provision in support of its claim against the decision refusing the claimant, a visa to enter France[121].

In a recent ruling issued on October 8th 2010, the *Conseil d'Etat* has examined the provisions of the BIT between France and the Democratic Republic of the Congo. The case involved taxpayers that had been subjected to additional assessments of income tax and social contributions as income property taken from a property they held in the Democratic Republic of Congo, which they did not include in their tax declaration. In their application, the claimants relied on the provisions of the French BIT[122]. The *Conseil d'Etat* specified in particular that the provisions of Article 7 of the BIT "have no other purpose or effect than to ensure that the tax law of both States Parties to Convention provides treatment at least as favorable to the citizen of another State Party, with investment in that State as its own nationals who are in the same situation. As a result, it decided that the Administrative Court of Appeal of Paris did not err in law in holding that these provisions had neither the purpose nor the effect of providing that French nationals with assets in the Democratic Republic of Congo would be taxed under the same rules that Congolese nationals with property in France[123].

It also added that since under Article 10 of the BIT, any dispute concerning the interpretation or application of the BIT which cannot be settled within six months of negotiation

[121] Conseil d'Etat, N° 280264, Decision of October 21, 2007, available at http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018007852&fastReqId=362422170&fastPos=1

[122] Conseil d'Etat, N° 323046, Decision of October 8, 2010, available at http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022900782&fastReqId=578395936&fastPos=2

[123] *Ibidem.*

between the Contracting States shall, at the request of any State be submitted to an arbitral tribunal. Since these provisions, which concern only the relations between the Contracting States and do not produce any direct effects towards individuals, they cannot be relied on in support of claims for the cancellation of an individual decision. Consequently, the court did not err in law in holding inoperative the plea submitted by the claimants[124].

iv. Conclusion

It can be concluded that BIT protection has been denied on the ground that the BIT's provisions are not directly applicable so as to grant investors the possibility to invoke rights under them. Consequently, as an investor would be unable to invoke rights arising under a BIT, it seems unlikely that the French courts will play a role in the settlement of international investment disputes.

F. INDIA

i. Legal System

India follows the "dualist" school of law in respect of implementation of international law at domestic level.[125] Therefore, in India, international treaties do not automatically form part of national law. They must, where appropriate, be incorporated into the legal system by a legislation made by the Parliament.

The Central Government or Government of India has executive power to enter into and implement international treaties under Articles 73 of the Constitution. Power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule of the Indian Constitution. The basic provision of the Constitution of India, by virtue of which international law becomes implementable through municipal laws of India is Article 253

[124] *Ibidem.*
[125] *Jolly Jeorge Vs. Bank of Cochin*, AIR 1980 SC 470

of the Constitution which declares that the Indian Parliament has the power to make law for implementing a treaty with any other country.

The judiciary, though not empowered to make legislations, is free to interpret India's obligations under international law into the municipal laws of the country in pronouncing its decision in a case concerning issues of international law. In this respect, the Indian judiciary has played a proactive role in implementing India's international obligations under international treaties. Wherever necessary, Indian courts can look into international conventions as an external aid for construction of a national legislation.[126]

The Supreme Court has held that international treaties signed by India have the status of law in India, so long as these treaties are not inconsistent with Indian law.[127]Treaties which 'affect the rights of citizens or others or modify the laws of the State' require domestic legislation to be justiciable.[128]

ii. IIA review

India has signed BITs with 75 countries. Out of these 66 BIT's are already in force and nine are yet to be enforced. In addition there are 3 comprehensive agreements in force which include an investment chapter.[129]

Article 9 of the Indian Model Bilateral Investment Promotion and Protection Agreement allows recourse to domestic courts:

> *"2. Any such dispute which has not been amicably settled may, if both Parties agree, be submitted;*

[126]*P.N. Krishanlal v Govt. of Kerala*, (1995) Sup. (2) SCC 187 applying the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, 1966.
[127]*Vishaka v State of Rajasthan*, 1997 (6) SCC 241
[128]*Maganbhai v. Union of India*, AIR 1969 SC 783, p.299.
[129] 'Indian Investment Treaty Programme in Light of Global Experiences', 45 Economic and Political Weekly (2010), 68-73.

(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies."

The various IIAs[130]entered into by India have granted the investor the right to pursue local remedies in courts of the host state. A few specific IIAs are considered below:

Table 8

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options[131]*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Australia[132]	Y	N	Y	Y	N	N
Czech Republic[133]	Y	Y	Y	Y	N	N
Germany[134]	Y	Y	N	N	N	Y
Mauritius[135]	Y	Y	N	N	N	Y
Mexico[136]	Y	Y	Y	Y	N	N
Netherlands[137]	Y	Y	N	N	N	Y
Sri Lanka[138]	Y	Y	Y	N	N	N
Switzerland[139]	Y	Y	Y	N	N	N

[130]1983, 1984, 1987, 1991, 1992,1994, 2004 US Model BIT.
[131]India has not ratified the ICSID Convention. Consequently, wile ICSID is provided as a dispute settlement forum, it cannot be used.
[132]http://www.unctad.org/sections/dite/iia/docs/bits/australia_india.pdf.
[133]http://www.unctad.org/sections/dite/iia/docs/bits/czech_india.pdf.
[134]http://www.unctad.org/sections/dite/iia/docs/bits/germany_india.pdf.
[135]http://www.unctad.org/sections/dite/iia/docs/bits/india_mauritius.pdf.
[136]http://www.unctad.org/sections/dite/iia/docs/bits/mexico-india.pdf.
[137]http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_india.pdf.
[138]http://www.unctad.org/sections/dite/iia/docs/bits/srilanka_india.pdf.
[139]http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_india.pdf.

iii. Application

There are no judicial decisions in India on investment agreements. However, the Indian Supreme Court has been called upon to decide the scope of double taxation avoidance agreements. While these agreements are not, strictly speaking, investment agreements, the interpretation adopted by the court may serve as a guidepost for subsequent decisions on investment agreements.

In Union of India and Anr. v. AzadiBachaoAndolan and Anr.[140] ('ABA') the Supreme Court was called upon to decide the eligibility of companies for relief of tax or for avoidance of double taxation under the provisions of the Indo-Mauritius Double Taxation Avoidance Agreement ('DTAC'). The court distinguished treaty interpretation from statutory interpretation:

> *"131. The principles adopted in interpretation of treaties are not the same as those in interpretation of statutory legislation.*
> *132. An important principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief is that treaties are negotiated and entered into at a political level go ahead and have several considerations as their bases."*

The preamble of the DTAC provided that the object of the DTAC is for the "encouragement of mutual trade and investment." The Court considered that this may be a factor to be kept in mind while interpreting the treaty. However, the Court did not provide a standard for treaty interpretation.

In a latter case[141], applying *ABA*, the distinction between treaty interpretation and statutory interpretation were reiterated, but again no standard of treaty interpretation was laid down:

---

[140] (2004) 10 SCC 1
[141] *Bombay Dyeing and Mfg. Co. Ltd. V. Bombay Environmental Action Group and Ors.* (2006) 3 SCC 434.

"… the principles adopted in interpretation of treaties are not the same as those in interpretation of a statutory legislation on the ground that the principle which needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief, is that treaties are negotiated and entered into at a political level and have several considerations as their basis; whereas a statute has to be interpreted keeping in mind the well known principles or canons of interpretation of statutes."

From the dictum of the Supreme Court it can be concluded that the principles of treaty interpretation are different than those of statutory interpretation. What those principles are, however, remain uncertain.

iv. Conclusion

It is reasonable to expect that investment agreements would affect the 'rights of citizens or others' and therefore would not be justiciable in the absence of domestic legislation.

G. THE REPUBLIC OF SOUTH AFRICA

i. Legal system

The Constitution is the supreme law in the Republic of South Africa (RSA). Art. 231(4) of the constitution of the RSA governs the incorporation of treaties into national law. Any international agreement becomes domestic law in the RSA once it has been enacted into law by both houses of the Parliament It therefore appears that RSA follows a dualist approach. However, there is a distinction between treaties that require parliamentary approval (Art. 231(2)) and those technical, administrative or executive treaties (Art. 231(3)) that may be concluded by the executive alone.

Additionally, the constitution creates an exception to the principle of incorporation into domestic law. Art. 231(4) thereof provides that when a provision of a treaty that has been approved by the parliament is self-executing, it becomes law automatically without the need to be translated into domestic law, unless it is inconsistent with the constitution or an Act of the Parliament.

South African courts have not decided on the notion of self executing treaties within the domestic order.

ii. IIA Review

Some South African BITs include dispute settlement clauses that allow disputes to be settled in domestic tribunals. For example, the RSA-Belgium BIT provides that in absence of amicable settlement of the dispute through negotiation or diplomatic resolution within a period of six months from the date on which it was notified, the dispute will be submitted to the competent courts of the Party in whose territory the investment is made, or to arbitration.

The RSA-Korea BIT[142] provides that the local remedies are available for the investor and that if the dispute cannot thus be settled within six months from the date on which the disputed has been raised by either party, it shall be submitted upon request of either the investor or the Contracting Party to either. The RSA-Spain BIT[143], RSA-Madagascar BIT[144], RSA-Zimbabwe BIT[145] also contains such a provision.

Some BITs provide for investment disputes to be settled through international arbitration (for example, BITs with the Netherlands, Switzerland[146], United Kingdom, Turkey, Sweden or Greece).[147]

---

[142] Art. 8 (2) and (3) of the RSA-Korea BIT, http://www.unctad.org/sections/dite/iia/docs/bits/korea_southafrica.pdf
[143] Art. XI (2) of the RSA-Spain BIT, http://www.unctad.org/sections/dite/iia/docs/bits/spain_southafrica_sp.pdf
[144] Art. 8 (2) of the RSA-Magascar BIT, http://www.unctad.org/sections/dite/iia/docs/bits/madagascar_southafrica_fr.pdf
[145] Art. 7 (2) of the RSA-Zimbabwe,BIT, http://www.unctad.org/sections/dite/iia/docs/bits/SA_Zimbabwe.pdf
[146] Art. 10 Règlement des différends entre un investisseur et un Etat d'accueil (1) Les différends entre un investisseur d'une Partie Contractante et l'autre Partie Contractante relatifs à une obligation qui incombe à cette

Table 9

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Belgium[148]	Y	Y	N	Y	Y	N
South Africa[149]	Y	Y	N	Y	N	N
Korea[150]	Y	Y	N	N	N	N
Switzerland[151]	Y	Y	N	N	N	Y
Turkey[152]	Y	Y	Y	Y	N	Y

iii. Application

So far, there have not been any cases involving the application of a BIT in a domestic court. Nevertheless, the trend of investment dispute settlement in the RSA seems to be heading towards a greater involvement of national courts arising out of the fear that investment arbitration would undermine national sovereignty. In absence of any relevant practice in the field of investment, and in order to continue the analysis on whether national courts could effectively protect the investor's rights, we assess the application of treaties of general international law in the domestic system.

In the RSA, international law holds great weight and serves as a prescriptive guide to constitutional interpretation.[153] The 1996 Constitution shows a firm determination to ensure that

---

dernière en vertu du présent Accord et concerne un investissement dudit investisseur pourront, s'ils n'ont pas été réglés à l'amiable, être soumis à l'arbitrage international par l'investisseur en cause, après une période de trois mois à compter de la notification d'une prétention

[147] Argentina, Mauritius, Chile, Finland, France.

[148] Art. 10 RSA-Belgium BIT, http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_southafrica_fr.pdf

[149] Art. XIII RSA- Canada BIT, http://www.unctad.org/sections/dite/iia/docs/bits/canada_southafrica.pdf

[150] Art. 8 RSA-South Korea BIT, http://www.unctad.org/sections/dite/iia/docs/bits/korea_southafrica.pdf

[151] Art. 10 RSA-Swizterlan BIT, http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_southafrica_fr.pdf

[152] Art. VII RSA- Turkey BIT, http://www.unctad.org/sections/dite/iia/docs/bits/turkey_southafrica.pdf

its text and South African laws are interpreted in order to comply with international law, especially in the field of human rights.

In *Government of the RSA and Others v. Grootboom and Others* (2000), involving eviction of informal housing on a private land earmarked for formal low cost housing where the claimant applied to the Cape High Court in order to provide them with basic shelter, the court stated that "relevant international law can be a guide to interpretation, but the weight to be attached to any principle or rule of international law will vary. However, where the relevant principles of international law bind SA, it may be directly applicable."[154]

It should be noted that Art. 39(1)(b) of the constitution is only applicable to cases of interpretation of the Bill of rights, as opposed to other laws. Reliance on section 233 was not successful in using international law so far as it was demonstrated in *AM Moola Group Ldt and Others v. Commissioner, South African Revenue Services and Others* dealing with international trade law, where it overlooked section 233, thus not considering the relevant binding international law.

iv. Conclusion

RSA is not considered an international law friendly jurisdiction. This is largely attributed to (1) capacity deficiency of the RSA courts to deal with international law; and (2) to the preponderance of domestic political pressures.[155] Given these considerations and the limitations outlined above, it seems unlikely that the courts of RSA would interpret and/or apply IIAs.

H. UNITED KINGDOM

---

[153] J., Nijman, and A. Nollkaemper, A, (edit.), *New Perspective on the Divide Between National and International Law*, (Oxford, Oxford University Press, 2007), p. 312.

[154] *Ibid.*, p. 331

[155] *Ibid.*, p. 335

i. Legal System

The UK is a classical dualist country. Parliament needs to implement all international agreements before they can have effect in the domestic order. Although a treaty that has entered into force for the UK is binding, the treaty itself is not part of domestic law, even if some of its provisions may have been made part of that law[156]. However, customary international law is part of domestic law.

If the law in force does not enable the UK to fulfill its obligations, it will take the steps to change its legislation prior to giving consent to the treaty. If it discovers after becoming a party that it cannot fulfill its obligations under the treaty, steps will be taken to bring UK into line with the treaty provisions. Some decisions of the ECHR relating to interpretation or application of the convention have sometimes led to modification of particular aspects of UK domestic law.

ii. IIA Review

The UK-Argentina BIT provides that a dispute can be brought to arbitration only where, after a period of 18 months have elapsed from the moment a dispute was submitted to the competent tribunal of the host State, the said tribunal has not given its final decision, or if the parties have agreed to go to arbitration[157]. The UK-Uruguay BIT is a variant of latter, providing that parties to the dispute can go to arbitration if the final decision of the domestic tribunal is manifestly unjust or violates the provisions of the Agreement[158].

Some BITs provide that if an agreement cannot be reached within three months through local remedies or otherwise, the dispute will be taken to arbitration[159]. Other BITs do not provide for local remedies and grant direct access to arbitration (BIT with Albania, Bahrain, Bulgaria, Chile, China, India, South Africa.

---

[156] A. Aust, *United Kingdom*, in D. Sloss, *Ibid.*, pp. 478-479
[157] Art. 8 (2), http://www.unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf
[158] Art. 8 (2), http://www.unctad.org/sections/dite/iia/docs/bits/uk_uruguay.pdf
[159] BITs with Azerbaijan, Bangladesh, Benin, Belarus, Bolivia (6 months), Ecuador (6 months), Egypt, El Salvador, Malaysia, Nicaragua or Singapore.

Table 10

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Argentina[160]	Y	N	Y	N	Y	N
Ecuador[161]	Y	Y	N	N	N	N
Hong-Kong[162]	Y	Y	N	N	Undetermined	Undetermined
Venezuela[163]	Y	Y	N	N	N	Y

iii. Application

Intervention to grant provisional measures: City of London v. Ashok Sancheti

This case marks the first known instance where a foreign investor has brought an arbitration claim against the UK for breach of one of BITs. Mr. Sancheti brought an arbitration claim against "the Corporation of London", a local governmental authority under the UK-India BIT, alleging discrimination. While arbitration was being pursued, the Corporation, as landlord for leased premises, filed a case against Mr. Sancheti under the lease to recover unpaid rent, and the latter tried to stay the proceedings as the Arbitration Act, 1996 provides that a party to arbitration agreement can apply for a stay in court proceedings because the matter is to be referred to arbitration[164]. However, the Court of Appeal ruled that a stay of proceedings could only be granted under Act against someone who is either a party to an arbitration agreement, or a person who is claiming through or under such a party. The Court found that the BIT agreement bound the UK government, but not the Corporation of London.

[160] Art. 8 UK-Argentina BIT, http://www.unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf
[161] Art. 8 UK-Ecuador BIT, http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_uk.pdf
[162] Art. 8 UK-Hong-Kong BIT, http://www.unctad.org/sections/dite/iia/docs/bits/hongkong_uk.pdf
[163] Art. 8 UK-Venezuela BIT, http://www.unctad.org/sections/dite/iia/docs/bits/uk_venezuela.pdf
[164] W. Hamida, p. 80.

This can be interpreted as the courts denying direct effect to IIAs, as only it only apparently creates inter-state obligations, and does not allow a non party to the Agreement to invoke it in front on domestic courts.

In another case, a domestic court considered an IIA, albeit at the annulment stage. In *Republic of Ecuador v Occidental Exploration & Production Company*, the Court of Appeal broadly interpreted broadly the BIT and concluded that an arbitral tribunal constituted pursuant to the BIT between the United States and Ecuador had jurisdiction to determine claims relating to the refunding of value added tax payments (VAT) and that the jurisdiction was not excluded by the express terms of the treaty concerning tax disputes[165].

In this case, Occidental Exploration & Production Company claimed that it was entitled to obtain refunds of VAT payments. Occidental had a contract with Ecuador and Petroecuador, the state-owned petroleum company, and was granted exclusive rights to carry out exploration and exploitation of hydrocarbons in a certain area. Occidental was required to pay VAT on certain goods and services and did so, but later obtained refunds. Subsequently, the Ecuadorian authorities changed their position and contended that reimbursement had already been effected through a price formula in the contract, referred to as 'factor X'. Therefore, Occidental was not entitled to additional refunds of VAT. The dispute could not be resolved amicably, so Occidental invoked the UNCITRAL Model Law arbitration procedures set out in Article 7 of the BIT and claimed that the actions of the Inland Revenue Service, for which Ecuador was responsible, amounted to breach of the BIT. The place of arbitration was London.[166]
Article 10(2) carved out most tax disputes by stating that:

> "*[T]he provisions of this treaty, and in particular Articles 6 and 7, shall apply to matters of taxation only with respect to... the observation and enforcement of terms of an investment agreement or authorization as referred to in Article 6.*"

---

[165] Republic of Ecuador v Occidental Exploration & Production Co. [2006] EWHC 345 (Comm) and http://www.internationallawoffice.com/newsletters/detail.aspx?g=49bae00c-c9bc-4160-8c00-8d31c5c69581

[166] The tribunal concluded that refusing to refund the VAT had amounted to a violation of the BIT and awarded Occidental over $71 million plus interest.

Ecuador had argued that the dispute did not concern the observance and enforcement of terms of such an agreement within the meaning of Article 10. The arbitral tribunal disagreed and held that it had jurisdiction and Ecuador challenged the tribunal's award on the basis of lack of substantive jurisdiction and the High Court rendered a decision in favour of Occidental, which Ecuador appealed.

The Court of Appeal confirmed that the BIT was governed by international law and that it must be interpreted according to art. 31 of the Vienna Convention on the Law of Treaties (1969). It held that a letter submitting the BIT to the US Senate was relevant to its interpretation. More interestingly, it held that uncertainties could be interpreted in favour of the investor.

The Court of Appeal considered the wording of Article 10(2)(c) and It agreed with the High Court that "observation and enforcement of terms" encompassed performance and that the dispute involved a matter of taxation which had reference to the performance of the obligations of the contract. Occidental's request for a refund related to the proper determination of factor X and also to its wider contractual obligations, including the obligation to do all that was needed to exploit the block, which would necessarily entail payment of VAT and the contractual obligation to pay all taxes according to Ecuadorian law.

iv. Conclusion:

Given the fact that the UK is a strict dualist country, and given the conclusion of the court in the *Sancheti case*, it seems that courts in the UK denies the right of private actors (as opposed to a signatory party) to invoke an IIA in a domestic court. Nevertheless, it should be stressed that there have been interpretations of these Agreements.

I.UNITED STATES OF AMERICA

i. Legal System

In the U.S. constitutional system, there are three distinct categories of international agreements:

a. Sole executive agreements - international agreements concluded by the President without authorization from Congress;[167]
b. Congressional-executive agreements - international agreements approved by a majority vote in both houses of Congress (either in advance, before the agreement is concluded internationally, or by enacting legislation after the international agreement has already been negotiated);[168] and
c. Treaties - international agreements approved by a two-thirds majority vote in the Senate pursuant to Article II of the Constitution.[169]

Under international law, any legally binding agreement in writing between two or more nations is a 'treaty'.[170] In U.S. constitutional parlance, though, the term 'treaty' refers only to international agreements that are approved by the Senate pursuant to Article II of the US Constitution.[171]

U.S. courts apply a wide variety of canons and other doctrines for treaty interpretation. Two distinct ideologies can be ascertained from the interpretation and application of domestic courts: nationalist and transnationalist.[172] Courts have broad discretion in choosing whether to

---

[167]See L.Henkin, Foreign Affairs and the U.S. Constitution 219–24 (2d ed. 1996).
[168]Louis Henkin, Foreign Affairs and the U.S. Constitution 219–24 (2d ed. 1996), at 215–18.
[169] Article II, Section 2 of the U.S. Constitution, which deals with the powers of the President, states, inter alia, that the President is empowered "by and with the Advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur …"
[170] Article 1(a) of the Vienna Convention on the Law of Treaties provides:
"1.For the purposes of the present Convention:
(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;"
[171]The Vienna Convention on the Law of Treaties applies only to treaties and not to International Agreements (Article 2).
[172]Transnationalists believe that that courts should adopt an interpretive approach that promotes the common interests of all treaty parties and favor the use of international treaties to protect the rights of private parties. On the other hand nationalists believe that courts should adopt an interpretive approach that gives greater weight to the unilateral interests of the US and that courts should be hesitant to apply treaties for the benefit of private parties. *See*

apply the nationalist approach, transnationalist approach, both, or neither.In cases where private parties are adverse to state or federal government actors, courts adopt the nationalist approach. It is reasonable to assume that the nationalist approach would be adopted in the interpretation of IIA's.

In the U.S. constitutional system, there is an established hierarchy among different types of law. Because the U.S. Constitution ranks higher than treaties, any conflict between the Constitution and a treaty is resolved in favour of the Constitution.[173] Treaties rank higher than state laws; therefore, any conflict between a treaty and a state law is resolved in favour of the treaty.[174] Treaties and federal statutes have equal rank. Accordingly, if a treaty and a statute address the same subject matter, courts attempt to interpret both instruments to avoid a direct conflict.[175] If the conflict is unavoidable, though, the so-called later-in-time rule holds that a later-in-time treaty trumps a prior inconsistent statute, and a later-in-time statute trumps a prior inconsistent treaty.[176]

ii. IIA review

Investment agreements, being international agreements fall within type (c) above. Consequently, they require senate approval. Free Trade Agreements (containing an investment chapter) would fall in the same category.

Sloss, David L. *The role of domestic courts in treaty enforcement: a comparative study*. Cambridge University Press (2009), pg.504.

[173]See Restatement (Third) of Foreign Relations Law § 115(3) (1987).

[174]See, e.g., *Ware v. Hylton 3 U.S.* (3 Dall.) 199 (1796)..

[175]See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.") (quoting Cook v. United States, 288 U.S. 102, 120 (1933))

[176]See *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 597–98 (1884).

The predecessors of modern IIA's were the treaties on 'friendship, commerce and navigation' ('FCN Treaties') which were concluded from the 18th century onwards. Several US Court decisions have held these treaties to be self-executing.[177]

The implementing legislation for NAFTA in the US prohibits private parties from raising NAFTA violations in domestic courts.[178] NAFTA is thus considered as a non self-executing treaty.[179]

That the US Legislature found it necessary to preclude direct effect and private action before US courts indicates that NAFTA would otherwise be self-executing. Applying this principle, BIT's are considered by several authors[180] and courts to be self-executing. The self-executing character of BIT's is reinforced by the fact that their predecessors i.e. FCN Treaties have been held to be self-executing.[181]

The various US model BIT's[182] have granted the investor the right to pursue local remedies in courts of the host state. A few specific IIAs are considered below:

---

[177] *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, Et Al. 494 F.Supp. 1263; In re Fotochrome, Inc., 377 F.Supp.26, 29 (E.D.N.Y. 1974), aff'd sub nom. Foto. chrome, Inc. v. Copal Co., Ltd., 517 F.2d 512 (2d Cir. 1975) and supra n. 12.

[178] 19 U.S.C.A. § 3312(c)(2) (1993) ("No person other than the United States . . .may challenge, in any action brought under any provision of law, 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 [NAFTA] . . .")

[179] W. B. Hamida, "InvestmentTreaties and Domestic Courts: A Transactional Mosaic Reviving Thomas Wälde's Legacy" in *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought,* edited by Jacques Werner & Arif Hyder Ali.

[180] C.D. Wallace, The Multinational Enterprise and Legal Control: Host State Sovereignity in an Era of Economic Globalization (Martin Nijhoff Publishers, 2002) 264; W. Sachs, 'The new U.S Bilateral Investment Treaties' (1984) Int. tax and Bus. Law, 197.

[181] *Spiess v. C. Itoh& Co.* (America), Inc., 643 F.2d 353, 356 (5th Cir. 1981), vacated on other grounds, 457 U.S. 1128 (1982) (referring to the 1953 U.S.-Japan Treaty of Friendship, Commerce, and Navigation); see also *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (noting that the 1911 U.S.-Japan Treaty of Commerce and Navigation "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts"). On the various meanings of self-execution, see Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 AM. J. INT'L L. 695 (1995).

[182] 1983, 1984, 1987, 1991, 1992,1994, 2004 US Model BIT.

Table 11

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Bahrain[183]	Y	Y	Y	Y	N	N
Bolivia[184]	Y	N	N	N	N	Y
Czech Republic[185]	Y	Y	Y	Y	N	N
Ecuador[186]	Y	Y	Y	Y	N	N
Egypt[187]	Y	Y	N	Y	N	N
Russia[188]	Y	N	N	N	N	Y

iii. Application

Neither the FCNs nor the earlier commercial treaties provided for direct investor claims, but private parties could assert claims under these treaties in domestic court.[189] It is less certain whether private parties may rely on these treaties to recover damages for expropriation against foreign governments in U.S. courts. A few courts have held that they may[190] while the US Government has held that they may not.[191]

[183]http://www.unctad.org/sections/dite/iia/docs/bits/us_bahrein.pdf.
[184]http://www.unctad.org/sections/dite/iia/docs/bits/us_bolivia.pdf.
[185]http://www.unctad.org/sections/dite/iia/docs/bits/czech_us.pdf.
[186]http://www.unctad.org/sections/dite/iia/docs/bits/us_ecuador.pdf.
[187]http://www.unctad.org/sections/dite/iia/docs/bits/us_egypt.pdf.
[188]http://www.unctad.org/sections/dite/iia/docs/bits/usa_russia.pdf.
[189] *Bennett v. Total Minatome Corp*., 138 F.3d 1053 (5th Cir. 1998); Spiess, 643 F.2d 353; Asakura, 265 U.S. 332.
[190]*Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980), modified on other grounds, 657 F.2d 430 (D.C. Cir. 1981) ("Plaintiffs can assert their rights to recover damages in this Court for violations of the Treaty [of Amity with Iran].")
[191]Brief for the Overseas Private Investment Corp. in Opposition at 12, *McKesson HBOC, Inc. v. Islamic Republic of Iran*, Nos. 01-1521, 01-1708, available at http://www.usdoj.gov/osg/briefs/2002/0responses/2001-1521.resp.pdf ("The United States does not interpret the Treaty of Amity to create a private right of action as a matter of United States law for a United States citizen to sue Iran in the courts of this country.").

Zenith Radio Corp. V. Matsushita Electric Industrial Co., Ltd., Et Al.[192]
(United States District Court, E. D. Pennsylvania.)

An American manufacturer of electronic products made claims against company reselling in the United States products manufactured in Japan by his parent corporation claiming violations of a domestic statute. The question before the court was whether FCN Treaty between the US and Japan[193] impliedly repealed the domestic legislation.

The court reasoned that the FCN Treaty, on which defendant relied, was recognized in earlier decisions to be self-executing.[194] It observed that "a treaty provision which does not require specific measures by the political branches of government for its execution is enforceable in court as if it were a statute."

The Court interpreted the language of Article XVI(1) of the Treaty which incorporated the national treatment principle.[195] It concluded that the phrase 'like circumstances' was a qualifying phrase of 'indefinite scope'. However, it did not enter further into the analysis. In order to determine whether the Treaty would repeal the relevant federal law, the court turned to the legislative history of the Senate's consideration of the FCN Treaty with Japan. It thus adopted a nationalist approach in treaty interpretation.

Thus, although the district court did not interpret the treaty itself, it did provide some useful guidance on the nature of self-executing treaties. It also indicated that courts may adopt a nationalist approach to treaty interpretation.

A foreign investor in the United States who wishes to challenge a measure as both a violation of domestic law and NAFTA Chapter Eleven must raise its domestic law claims in

---

[192]494 F.Supp. 1263.
[193]Treaty of Friendship, Commerce and Navigation between the United States and Japan (1953).
[194] In re Fotochrome, Inc., 377 F.Supp. 26, 29 (E.D.N.Y. 1974), aff'd sub nom. Foto. chrome, Inc. v. Copal Co., Ltd., 517 F.2d 512 (2d Cir. 1975).
[195]Article XVI(1) of the Treaty provides: "Products of either Party shall be accorded, within the territories of the other Party, national treatment . . . in all matters affecting internal taxation, sale, distribution, storage and use."

domestic court and its NAFTA claims in arbitration.[196] There is, therefore, no question of advancing NAFTA Claims before a domestic court.

There are some cases where US courts have intervened in to grant provisional measures in relation to investment arbitration proceedings. The United States District Court of the southern District of New York recently denied a freezing injunction in connection with a ICSID arbitration under the US-Bolivia BIT.[197] The Court, however, did not consider the interpretation of the relevant BIT in its analysis. Similarly, the United States District Court of New Jersey found a BIT Tribunal constituted under the UK-Kyrgyz BIT to be a 'foreign tribunal' under its domestic laws for ordering discovery, without interpreting or applying the BIT.[198] Interpretive questions have also not arisen in setting aside proceedings of investment arbitration awards.[199]

iv. Conclusion

We may conclude that BIT's are likely to be held to be self-executing. Further, US courts are likely to adopt a nationalist approach in treaty interpretation.

---

[196]To the extent that the domestic legal system permits suits under customary international law, a foreign investor could presumably challenge the measure as a violation of customary international law (e.g. expropriation) in domestic court . A Canadian or Mexican investor's suit against the United States on such a theory would, however, likely be barred on grounds of sovereign immunity. See Sanchez- Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (Scalia, J.) (holding that Nicaraguan plaintiffs' damages suit against U .S. officials for violations of international law was barred by sovereign immunity).

[197] New York Southern District Court, E.T.I. Euro Telecom International N.V. v. Republic of Bolivia et al

[198]Order dated April 2, 2007, Chief Judge Garett Brown affirming the ruling of Magistrate Judge Hughes dated August 11, 2006.

[199] Tembec et al, Memorandum Opinion of the US District Court for the District of Colombia on Tembec's application to vacateaward, 14 August 2008 ; *International Thunderbird Gaming Corporation v. Mexico*, Judgment of the US District Court for the District of Columbia on petition to set asideaward, 14 February 2007 ; *Loewen Group, Inc. and Raymond L. Loewen v. United States*, Memorandum of Opinion of the United States District Court DismissingLoewen's Motion to Vacate Arbitral Award, 31 October 2005.

J. VENEZUELA

i. Legal System

The Venezuelan legal system is very similar to that of Ecuador. It is a civil law system whose constitution is the supreme law of the nation, as stated in Art. 7 of the Constitution.[200] The hierarchy of laws is: 1) the constitution and some human rights treaties 2) international treaties, and 3) other laws. Like in the Ecuadorean case, Art. 23 says that human rights treaties that have been ratified are at the same level as the constitution if they provide more favorable treatment than the constitution or the laws of the Republic. If this is the case, human right treaties also enjoy immediate and direct application by tribunals, and it can be interpreted as human rights treaties being self-executing.

ii. BIT Review

Venezuela has signed approximately 25 BITs.[201] The clauses present in Venezuelan BITs cover a wide spectrum of domestic court involvement. On the one side, the Venezuela-Argentina BIT has a Fork-in-the-Road provision that gives the investor the choice of submitting the dispute either to domestic courts or to international arbitration after a six month Cooling Off Period.

The Venezuela-Canada BIT has a 6 month cooling off period, after which the investor may submit the dispute to international arbitration. There is no mention of domestic court participation in the dispute settlement clause of the BIT.

On the other side of the spectrum, the BIT between Venezuela and the Netherlands has no cooling off period and only allows for the investor to submit the dispute to an ICSID tribunal or to the ICSID Additional Facility. This BIT does not provide for the participation of domestic courts.

---

[200] Constitucion de la Republica de Venezuela, available at http://venezuela-us.org/es/wp-content/uploads//2009/05/constitucion_enmienda2009.pdf

[201] According to UNCTAD. See: http://www.unctadxi.org/templates/docsearch.aspx?id=779

Table 12

Country/Clause Type	*Amicable Settlement*	*Cooling Off Period (3-6 months)*	*Three Options*	*Fork-in-the-Road*	*Waiting Period (18 Month)*	*Only Arbitration*
Argentina[202]	N	Y	N	Y	N	N
Canada[203]	N	Y	N	N	N	Y
Netherlands[204]	N	N	N	N	N	Y

As it can be seen from the previous table, the Canada and Netherlands BITs completely rule out the participation of domestic courts in the dispute resolution process. The BIT with Argentina at least gives the investor the choice of submitting the dispute to domestic courts.

iii. Application of BITs

In the case *Aerolineas Argentinas*[205], an Argentine company sued the Venezuelan Central Bank and the Republic of Venezuela for a change of currency laws. Claimant invoked the Venezuela-Argentina BIT, specifically invoking the MFN clause. The court determined that any damages could not be attributed to the governmental action, and that they were part of commercial risk inherent to the business environment. The Political and Administrative Chamber of the Supreme Tribunal of Justice found no objection to applying the BIT provisions invoked by the claimant.

In another case, *Transporte Saet S.A.,* [206] where a Venezuelan Court interpreted the Venezuela-Netherlands BIT. In a previous case, a Venezuelan citizen who worked for Transporte Saeta La Guiara C.A. started a legal action against said company in a court of the State of

[202] Venezuela-Argentina BIT, available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_venezuela_sp.pdf
[203] Venezuela-Canada BIT (1996), available at http://www.unctad.org/sections/dite/iia/docs/bits/canada_venezuela.pdf
[204] Venezuela-Netherlands BIT, available at http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_venezuela.pdf
[205] *Aerolineas Argentinas*, available at http://ita.law.uvic.ca/documents/DecisionNo.00736_20May2003.pdf
[206] *Transporte Saet S.A.*, available at http://ita.law.uvic.ca/documents/DecisionNo.903_14May2004.pdf

Vargas. The court gave sentence in favor of the citizen, but the sentences was against a different company, Transporte Saet S.A. This takes us to the case in point, where the claimant, *Transporte Saet S.A.* argued in front of the Constitutional Chamber of the Supreme Tribunal of Justice that it had been incorrectly sentenced since it held no direct relationship with such citizen. It also claimed that it did not have access to a fair trial since it was not called to participate in the legal proceedings. The court interpreted the concept of an investor and of control in the BIT.

Finally in the case *Minera Las Cristinas C.A.,*[207] the Supreme Tribunal of Justice interpreted the dispute settlement clause of the Venezuela-Canada BIT. Said dispute settlement clause determined that the dispute can only be submitted to international arbitration if "the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned…" (Art. 7(3)) For this reason, the court found that the action taken by claimant was inadmissible since it had previously waived its right to initiate proceedings in domestic Venezuelan courts when its parent company, Vanessa Ventures, submitted the dispute to ICSID arbitration.

iv. CONCLUSION

The Venezuelan BITs have a very limited role for domestic courts. Regardless of this limitation, case law shows that it is possible for Venezuelan courts to directly apply BITs. In terms of the legal system, like in the Ecuadorean case, treaties can be applied by local courts since they form part of the Venezuelan legal order. It is curious to see that two cases in which domestic courts were involved, the *Transporte Saet* and *Minera Las Cristinas,* involved BITs which only allowed for international arbitration as a dispute resolution mechanism. This might point to the fact that even when BITs do not explicitly allow for domestic court involvement, they might still interpret IIAs.

[207] *Minera Las Cristinas C.A.*, available at http://ita.law.uvic.ca/documents/DecisionNo.3.229_28October2005.pdf

VI. General Conclusion

Large-scale disputes will always accompany large-scale investments, especially when such investments occur in sensitive sectors such as public utilities. Investment arbitration, with its appealing characteristics of neutrality, expediency and party autonomy was long thought as the optimal dispute resolution forum. However, the burgeoning crises plaguing international investment arbitration has exacerbated over the past decade. Besides renunciations of the ICSID Convention, developed nations like Australia are increasingly adopting anti-arbitration clauses in recent FTAs. In this context, domestic courts, once relegated as biased and incapable, are being increasingly looked at as a possible alternative to the current international investment arbitration regime. Their role would depend on the feasibility of the direct application of IIAs.

This study has considered the practical difficulties in the application of IIAs by domestic courts. Highlighting the unique relationship between international law and domestic law in a cross-section of the common players in the investment dispute settlement regime, it has been shown that no universal formula can be laid down. The nuances of each jurisdiction produce an extremely diverse set of outcomes. Some countries have evaded the question, others have adopted a lackadaisical approach, a select few have readily interpreted and applied IIAs, and a large number of jurisdictions do not have the power to interpret IIAs. Nevertheless, some general conclusions can be drawn.

The first criterion which will be decisive on whether IIAs can be applied by domestic courts is the content of the **dispute settlement clause** itself. Where the clause attributes a greater role to domestic courts, such as necessary prior submission of a claim to domestic courts for a period of time (Waiting Period Clauses), or a final decision of a domestic court (Canada-Argentina BIT), the investor may be compelled to solicit a domestic court to render a decision on an investor-State dispute. However, “fork-in-the-road” clauses, which influence the investor to choose international arbitration over a domestic settlement, make it unlikely for investors to direct disputes to domestic courts. Therefore, in the existing system it seems unlikely that domestic courts would prove an attractive option to investors.

Should countries desire to increase the role of their domestic courts in settling investment disputes, they would have to draft dispute settlement clauses in future IIA's mandating foreign investor's to make a prior submission to domestic courts. In such cases, countries should ensure that the domestic courts in their negotiating counterparts are competent to apply IIA's. This could be an issue in North-South IIAs or IIAs with countries that are perceived to have a partial and inefficient judiciary.

Another relevant criteria is whether the IIA is **directly applicable** in the domestic legal order. In France and seemingly in the UK, IIAs do not have direct effect. Consequently, investors cannot invoke IIAs in French domestic courts. In Argentina, IIAs do have such a direct effect. Consequently, IIAs may be invoked before domestic courts.

Moreover, the classical distinction between **monists and dualists** has failed to provide a thumb-rule as to whether domestic courts could apply IIA's. Some monist countries (France) do not allow an investor to invoke an IIA in domestic courts. Others (Argentina), do. Similarly, some dualist countries are likely to consider IIAs self-executing (US). Others are not (India). As a result, the distinction between monist and dualist countries is not determinative the outcome of the application of an IIA by domestic courts.

Contracting parties to IIAs would therefore be well advised to undertake a thorough analysis of each other's domestic legal systems and jurisprudence before incorporating domestic courts as a dispute resolution forum in IIAs. In the absence of any specific practice on the domestic application of IIAs, the application of general international law by domestic courts would serve as a preliminary starting point for analysis and prediction.

BIBLIOGRAPHY

1. ***Treaties and BITs***

- ILC Draft on Diplomatic Protection
- Commonwealth of Australia Constitution
- Australia United States Free Trade Agreement (AUSFTA), entered into force 1 January, 2005.
- Singapore-Australia Free Trade Agreement
- Thailand-Australia Free Trade Agreement
- Australia-Poland Agreement on the Reciprocal Promotion and Protection of Investment, entered into force 27 March 1992.
- Australia-Argentina Agreement on the Promotion and Protection of Investment, entered into force 11 January 1997.
- Australia Mexico Agreement on the Promotion and Reciprocal Protection of Investments
- International Covenant of Civil and Political Right, Additional Protocol
- Convention relating to the Status of Refugees, 1951.
- International Covenant of Civil and Political Right, entered into force 1967.
- Closer Economic Relation (CER)
- CER Investment Protocol
- Canada-Argentina BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/argen_canada.pdf
- Canada-El Salvador BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/canada_elsalvador.pdf
- Canada-Urugay BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/canada_uruguay.pdf
- France-Argentina BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/france_argentina_fr.pdf
- France- Bulgaria BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/france_bulgaria_fr.pdf

- France-Chile BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/chile_france_sp.pdf
- France-China BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/france_china_fr.pdf
- France-Mexico BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/mexico_france.pdf
- France-Ecuador BIT, http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_france_fr.pdf
- RSA-Korea BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/korea_southafrica.pdf
- RSA-Spain BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/spain_southafrica_sp.pdf
- RSA-Magascar BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/madagascar_southafrica_fr.pdf
- RSA-Zimbabwe BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/SA_Zimbabwe.pdf
- UK-Argentina BIT, available at: http://www.unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf
- UK-Urugay BIT, available at : http://www.unctad.org/sections/dite/iia/docs/bits/uk_uruguay.pdf
- Argentina-Belgium BIT (1990), available at http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_argentina_esp.pdf
- Argentina-China BIT (1992), available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_china.pdf
- Argentina-Germany BIT (1991), available at http://www.unctad.org/sections/dite/iia/docs/bits/germany_argentina_sp.pdf
- Argentina-Spain BIT (1991), available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_spain_sp.pdf
- Argentina-Switzerland BIT (1991), available at http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_argentina_fr.pdf

- Argentina-US BIT (1992), available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf
- Ecuador-US BIT (1993), available at http://www.unctad.org/sections/dite/iia/docs/bits/us_ecuador.pdf
- Ecuador-Paraguay BIT (1994), available at http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_paraguay_sp.pdf
- Ecuador-France BIT (1994), available at http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_france_fr.pdf
- Venezuela-Argentina BIT, available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_venezuela_sp.pdf
- Venezuela-Canada BIT (1996), available at http://www.unctad.org/sections/dite/iia/docs/bits/canada_venezuela.pdf
- Venezuela-Netherlands BIT, available at http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_venezuela.pdf

2. Case law and national laws

- *Interhandel Case*, 1959 ICJ Reports p. 27; See also the ELSI Case, 1989 ICJ Reports.
- *Lanco v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998.
- *CME v. Czech Republic*, Partial Award, 13 September 2001.
- *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003.
- *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Germany/Argentina BIT), Award, 8 December 2008.
- *Siemens A.G. v. The Argentine Republic* (Decision on Jurisdiciton), ICSID Case No. ARB/02/8, 3 August 2004.
- *Mondev Intl. v. United States*, Award, 11 October 2002, par. 96, 42 ILM 85 (2003).
- *Metaclad Corp. v. United Mexican States*, Award, 30 August 2000.
- *Waste Management, Inc, v. United Mexican States*, Award, June 2, 2000, 40 ILM 56 (2001), 5 ICSID Reports 443.

- *The Loewen Group, Inc, and Raymond Loewen v. United States of America*, Award, 26 June 2003, par. 153, 42 ILM 811, 836 (2003).
- *Mabo v. Queeensland* [No. 2] (1992) 175 CLR 1 at 42.
- *Friends of Hinchinbrook Society v. Minister for the Environment*, [1997] 55 FCA (14 February 1997) (Federal Court of Australia).
- *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 153 ALR 490.
- *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.
- *Collins v. South Australia* [1999] SASC 257.
- *Minister for Immigration and Multicultural Affairs v. Khawar.*
- In *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH.*
- World Heritage Properties Conservation Act of 1983.
- *Council of Canadians v. Canada (Attorney General)*, 2006 CanLII 40222 (ON C.A.).
- *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 (P.C.) (*Labour Conventions*)
- Cour de Cassation, Chambre commerciale, Decision of October 17, 1995. Available at http://www.legifrance.gouv.fr/.
- Conseil d'Etat, N° 280264, Decision of October 21, 2007, available at http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018007852&fastReqId=362422170&fastPos=1
- Conseil d'Etat, N° 323046, Decision of October 8, 2010, available at http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022900782&fastReqId=578395936&fastPos=2
- Consulta de Jurisprudencia. Corte Suprema de Justicia de la Nacion, Republica Argentina, available at http://jurisprudencia.pjn.gov.ar/jurisp/principal.htm
- *Dia Argentina S.A. y otra c/ Buenos Aires*, Provincia de s/ accion de inconstitucionalidad.15/06/10.
- *Apache Energia Argentina SRL c/ Rio Negro*, provincia de s/ accion declarativa de inconstitucionalidad. 26/03/09.
- *Prodesur S.A. (T.F. 10.207-A) c/ D.G.A.* 07/01/03.
- *Cablevision SA s/ Acuerdo Preventivo Extrajudicial.* 31/03/08
- Abengoa S.A. c/ Salta, Provincia de s/ inconstitucionalidad. 14/06/05.

- *Desarrollos en Salud S.A. s/Concurso Preventivo s/ Incidente de Revision*. 10/11/03, available at http://ita.law.uvic.ca/documents/ArgentinaCommercialCourt_10Nov2003.pdf
- *Inspeccion General de Justicia v. Empresa Naviera Petrolera Atlantica S.A.* 17/05/07, available at http://fallos.diprargentina.com/2007/09/igj-c-empresa-naviera-petrolera.html
- *Aerolineas Argentinas*, available at http://ita.law.uvic.ca/documents/DecisionNo.00736_20May2003.pdf
- *Transporte Saet S.A.*, available at http://ita.law.uvic.ca/documents/DecisionNo.903_14May2004.pdf
- *Minera Las Cristinas C.A.*, available at http://ita.law.uvic.ca/documents/DecisionNo.3.229_28October2005.pdf
- Constitution of the Argentine Nation, available at http://www.senado.gov.ar/web/interes/constitucion/english.php
- Constitucion del Ecuador, available at http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf
- Constitucion de la Republica de Venezuela, available at http://venezuela-us.org/es/wp-content/uploads//2009/05/constitucion_enmienda2009.pdf
- Republic of Ecuador v Occidental Exploration & Production Co. [2006] EWHC 345 (Comm), available at: http://www.internationallawoffice.com/newsletters/detail.aspx?g=49bae00c-c9bc-4160-8c00-8d31c5c69581

3. Books and articles

- C. F. Amerasinghe, *Local Remedies in International Law*, (2nd Edition, Cambridge Studies in International and Comparative Law, CUP, 2004)
- A. Aust, *Modern Treaty Law and Practice*, (Cambridge: CUP, 2007).
- Bilateral Investment treaties : a canadian primer", working document issued by *Canada's Coalition to end Global Poverty*, available at http://www.ccic.ca/_files/en/what_we_do/trade_2010-04_investmt_treaties_primer_e.pdf

- W. S. Dodge, "National Courts and International arbitration: Exhaustion of local Remedies and Res judicata under Chapter Eleven of NAFTA", *Hasting International and comparative Law review*, vol. 23.
- W. S. Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflection on the Australia-United States Free Trade Agreement", *Vanderbilt Journal of Transnational Law*, Vol. 39, No. 1, (January 2006).
- D. DUPRAS, *NAFTA : resolving conflict between treaty provisions and domestic law*, Law and Government division, (February 1993), available at : http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp331-e.htm#%284%29
- G.P.J. McGinley, "The Status of Treaties in Australian Municipal Law: The Principle of Walker v. Baird Reconsidered", (1989-90)" 12 *Adelaide L. Rev*. 367.
- W. B, "Investment Treaties and Domestic Courts: A Transnational Mosaic Reviving Thomas Walde's Legacy", *in* "A Liber Amicorum: Thomas Walde."
- L. Mistelis, *Concise International Arbitration*, (Kluwer Law International, 2010).
- Gonzalez Napolitano, Silvina S. "Las Relaciones Entre el Derecho Internacional y el Derecho Interno Argentino".
- J., Nijman, and A. Nollkaemper, A, (edit.), *New Perspective on the Divide Between National and International Law*, (Oxford, Oxford University Press, 2007).
- B. Opeskin and F. Wheeler, *The Australian Federal, Judicial* System (2000).
- M. Pethen, NAFTA Tribunal are constitutional, Alberta Center for Constitutional Studies, (2007) available at: http://www.law.ualberta.ca/centres/ccs/rulings/naftatribunalsareconstitutional.php
- S. Schill, *The multilateralization of International Investment Law*, (Cambridge: CUP, 2009).
- C. Schreuer, *The ICSID convention: a commentary*, (Cambridge: CUP, 2009).
- C. Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law and Practice of International Courts and Tribunals* 1: (Koninklijke Brill NV, Leiden, The Netherlands, 2005).
- M. N. Shaw, *International Law*, (Cambridge: CUP, 6th edition, 2008).
- D. Sloss, *The Role of domestic Courts in Treaty Enforcement: a Comparative Study*, (Cambridge: CUP, 2009).