ARTICLE

Concurrent Investor-State Claims Before Domestic Courts and Investment Treaty Arbitration Tribunals: Philip Morris, Vattenfall and Beyond

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When a host state discriminates or otherwise treats a foreign investor illegally, under substantive commitments made (usually nowadays under an investment treaty concluded with the investor's home state), the investor not infrequently brings an investor-state dispute settlement (ISDS) arbitration claim against the host state. What does or should happen when the foreign investor brings a concurrent claim before the domestic courts of the host state? Our analysis shows that a surprising proportion of investment treaties allow this possibility without taking precautions to coordinate the claims. Such concurrent claims might incentivize domestic courts to speed up procedures, improve local law in light of international standards, or enable a fruitful dialogue among adjudicators. Yet they also raise concerns related to inefficiencies, potentially conflicting outcomes, and the rule of law more generally. Our Article shows how and why some high-profile concurrent claims have emerged against Australia (by Philip Morris, challenging its tobacco plain packaging laws) and Germany (by Vattenfall, challenging the phaseout of nuclear power plants), and can arise in other contexts due, for example, to the greater protections provided to investors under international compared to domestic public law. Both cases contributed to a wider backlash against ISDS arbitration, leading to various new initiatives and ongoing policy debates in various fora. Accordingly, our Article also considers what could be done to more effectively manage this issue of concurrent proceedings.

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I. INTRODUCTION

Concurrent legal proceedings, pursuing similar causes of action and relief across multiple forums, are usually difficult in domestic settings, if not impossible. In that context, rules such as *lis pendens* and *res judicata*[1] specifically aim at preventing such proceedings. Key concerns are the inefficiencies this would create in the administration of justice, and the possibility of inconsistencies in outcomes[2]—arguably undermining rule of law values.[3]

1. Cuniberti also mentions anti-suit injunctions and *forum non conveniens* in this regard. *See* Gilles Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID REV. 381, 382 (2006).

2. *See* Katia Yannaca-Small, *Parallel Proceedings*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1008, 1013 (Peter Muchlinski et al. eds., 2008).

3. On the latter see generally Sundaresh Menon, *Arbitration's Blade: International Arbitration and the Rule of Law*, 38 J. INT'L ARB. 1 (2021) with further references to rule of law literature.

Nonetheless, this Article shows there is surprising potential for concurrent proceedings, at least on a first look, in international investor-state dispute resolution. Foreign investors are often able to initiate a claim against a host state, say to seek compensation for expropriation of their investment, in domestic courts as well as pursuing a parallel investor-state dispute settlement (ISDS) arbitration claim against the host state. The latter claim is usually brought nowadays under the host state's bilateral investment treaty (BIT) or investment chapter within a broader Free Trade Agreement (FTA)—collectively sometimes referred to as international investment agreements (IIAs)—concluded with the foreign investor's home state.

One reason for this more permissive approach towards such concurrent proceedings could be that the risk of inconsistent outcomes is lesser, given that the substantive domestic law protections or remedies claimed are not necessarily identical to those provided under treaty-based international investment law (as we demonstrate *infra* in Parts IV and V, focusing on Australia and Germany as high-profile case studies). By contrast, in purely domestic settings, if claimants are allowed to pursue the same cause of action in multiple local courts, inconsistent outcomes become likely. A second reason why concurrent proceedings before ISDS arbitration tribunals, as well as domestic courts, are often generally permissible could be that potential inefficiencies, particularly in terms of lawyer and expert witness costs, are not as large. Foreign investors might be expected to try one forum first anyway before taking the extra time and expense to turn to another forum.

The negotiators of now over 3,000 IIAs[4] may not have explicitly thought through such reasons,[5] especially if they represent states comprising developing economies—arguably less familiar, at least initially, with IIAs.[6] Moreover, capital-exporting states may have held the view that they would not be sued anyway, and therefore did not feel the need to take precautions

4. As per UNCTAD's International Investment Agreements Navigator, there are currently 2,828 BITs and 451 treaties with investment provisions. *See International Investment Agreements Navigator*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements (last visited Jan. 22, 2024).

5. Yet at least for the North American Free Trade Agreement (NAFTA), the travaux préparatoires indicate that Canada specifically wanted to avoid parallel proceedings before domestic courts and arbitral tribunals. *See* NAFTA, Draft of June 4, 1992, at 20, https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-11.pdf; Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga*, 5 MEXICAN L. REV. 199, 215 (2013).

6. *Compare* LAUGE PAULSSON, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (2015) (emphasising "bounded rationality" by treaty negotiators especially in developing economies), *with* Luke Nottage, *Rebalancing Investment Treaties, and Investor-State Arbitration: Two Approaches*, 17 J. WORLD INV. & TRADE 1015 (2016) (noting, however, evidence of Thailand's likely sophistication in negotiations and drafting ISDS provisions).

against concurrent proceedings.[7] Alternatively, negotiators may have agreed to generally allow concurrent proceedings, extending the calculus as follows. For foreign direct investment (FDI) exporting states with greater outbound than inbound FDI stocks, negotiators may have favored such a potential dual track to benefit their outbound investors by maximizing chances for significant redress from host state interference. For net FDI-importing states, IIA negotiators could have conceded this point to signal more credible commitments in order to attract more FDI.[8] Another impetus may have been that concurrent proceedings could improve domestic law for the protection of (all) investors in terms of substantive law (as arguably happened later with Mexico in disputes involving sweeteners)[9] or the procedures in domestic courts (by encouraging them to speed up proceedings, getting ahead of the investment treaty arbitrators).[10]

Nonetheless, at least some concurrent proceedings have been at the heart of the critique against ISDS. One high-profile example was the Philip Morris claim of indirect expropriation brought in 2011 against Australia over its tobacco plain packaging legislation, under an early BIT[11] with Hong Kong.[12] Extensive media coverage and public concerns arguably contributed to a center-left government in Australia adopting a blanket refusal to agree to ISDS in future IIAs over 2011–13, and again from October 2022.[13] This outcome arose despite Australia successfully defending the constitutional challenge and, on jurisdictional grounds, the

7. Such an understanding is implicit in the Germany-Indonesia BIT which only prevents concurrent proceedings by German investors, *infra* note 88.

8. On the literature and studies about whether ISDS-backed treaties do in fact significantly correlate—and perhaps lead to—more FDI, see, for example, Shiro Armstrong & Luke Nottage, *Mixing Methodologies in Empirically Investigating Investment Arbitration, and Inbound Foreign Investment*, *in* THE LEGITIMACY OF INVESTMENT ARBITRATION: EMPIRICAL PERSPECTIVES 315 (2022).

9. *See also* Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking*, 9 J. INT'L ECON. L. 197 (2006) (discussing the interrelationship of NAFTA and the WTO in these disputes). *See generally* Puig, *supra* note 5, at 222–33 (giving an overview of the sweeteners disputes). As well as domestic court and investment treaty arbitration claims, those disputes also had the extra complication of further concurrent proceedings brought by the United States against Mexico through the WTO dispute settlement process. *See* Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/AB/R (adopted Mar. 6, 2006).

10. *See generally* Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 953, 971 (2005) (arguing that investment arbitration can be an important tool to remedy deficiencies in the domestic system). On the ways to understand such an interaction, see Steven R. Ratner, *International Investment Law, and Domestic Investment Rules: Tracing the Upstream and Downstream Flows*, 21 J. WORLD INV. & TRADE 7, 13–20 (2020) (stressing the lack of empirical studies on the extent of such interaction).

11. Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, H.K.-Austl., Oct. 15, 1993, [1993] A.T.S. 30 (terminated).

12. Phillip Morris Asia Ltd. v. Australia, Case No. 2012-12 (Perm. Ct. Arb. 2017).

13. *See* Luke Nottage, *Australia's (Dis)Engagement with Investor-State Arbitration: A Sequel*, WOLTERS KLUWER ARB. BLOG (Dec. 21, 2022), https://arbitrationblog.kluwerarbitration.com/2022/12/21/australias-disengagement-with-investor-state-arbitration-a-sequel/.

BIT arbitration claim.[14] A second example comprised the Vattenfall parallel claims brought around the same time under the Energy Charter Treaty (ECT) by a Swedish state-owned enterprise against Germany, after the latter decided to shut down all nuclear power plants following Japan's Fukushima disaster in 2011.[15] Although Vattenfall was eventually successful in its claim under domestic law and then settled its ECT arbitration claim, this saga also generated much controversy about ISDS in Germany.[16] Indeed, it contributed to the European Union from 2015 insisting instead on a novel hybrid "investment court" arbitration procedure as a condition to creating new IIAs for protecting foreign investments.[17]

In turn, both sagas have influenced debates about the pros and cons of ISDS generally. Those have extended to reforms, including the possibility of a multilateral investment court, discussed since 2019 in the UN Commission for International Trade Law (UNCITRAL).[18] Another recent and ongoing multilateral discussion has involved the "modernization" of the ECT.[19] Accordingly, prominent examples of concurrent proceedings feed into wider controversy about ISDS arbitration and IIAs more generally.

Whilst domestic proceedings *before* an ISDS case are rather common, and perhaps even desirable to give the host state a chance to make good for the violation,[20] concurrent claims *simultaneously* before domestic courts and ISDS tribunals are inherently more problematic, and they will thus be the focus of this Article. So far, there have not been many examples of concurrent proceedings.[21] While it is difficult to ascertain whether there may

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14. *Id.*

15. Vattenfall AB and others v. Federal Republic of Ger. (II), ICSID Case No. ARB/12/12 (Mar. 6, 2019).

16. MARC BUNGENBERG, A HISTORY OF INVESTMENT ARBITRATION AND INVESTOR-STATE DISPUTE SETTLEMENT IN GERMANY 15–17 (Ctr. for Int'l Governance Innovation, 2016).

17. *Id.*

18. *See* Comm. on Int'l Trade L., Rep. of Working Group III (Investor-State Dispute Settlement Reform) on Its Forty-Fifth Session, U.N. Doc. A/CN.9/1131 (2023).

19. *See* INT'L ENERGY CHARTER, https://www.energychartertreaty.org/modernisation-of-the-treaty/ (last visited July 31, 2023); *see also* Maria José Alarcon, *ECT Modernisation Perspectives: Revamping International Investment Law: A Comparative Look at Substantive ISDS Reform in the ECT and Beyond*, WOLTERS KLUWER ARB. BLOG (May 10, 2023), https://arbitrationblog.kluwerarbitration.com/2023/05/10/ect-modernisation-perspectives-revamping-international-investment-law-a-comparative-look-at-substantive-isds-reform-in-the-ect-and-beyond/.

20. On the purpose of the local-remedies-rule in the law of diplomatic protection, see Andrea K. Bjorklund, *Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 253, 258 (Todd Weiler ed., 2004).

21. The authors have identified concurrent cases against Argentina, Australia, Belize, Egypt, Estonia, France, Germany, Mexico, Slovakia, and Uruguay. *See, e.g.*, *Phillip Morris*, Case No. 2012-12; Vattenfall AB, Vattenfall Europe AG, Vattenfall Eur. Generation AG v. Federal Republic of Ger. (I), ICSID Case No. ARB/09/6, Award (Mar. 11, 2011); *Federal Republic of Ger. (II)*, ICSID Case No. ARB/12/12; Alex Genin and others v. Republic of Est., ICSID Case No. ARB/99/2, Award (June 25, 2001), 17 ICSID Rev. 395 (2002); Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas,

be more ISDS cases lying under the radar,[22] this observation is consistent with some reasonable assumptions. Firstly, pursuing both claims in parallel requires sufficient financial capacities, which not all investors will have. In addition, more cost-sensitive investors are more likely to try domestic proceedings initially and only turn to more expensive ISDS arbitration as a measure of last resort.[23] In addition, investors will only pursue domestic remedies if they perceive them to be an attractive option because they are fair, unbiased, and (relatively) speedy. In less developed economies and judicial systems, foreign investors will usually not regard domestic court processes as an attractive option compared to (arguably) more neutral and expert international arbitration tribunals.

The actual number of concurrent cases is small so far and the two best-known cases are unusual as they involved large corporate groups (Philip Morris and Vattenfall) bringing claims in large and politically sensitive cases concerning investment sectors with uncertain long-term business prospects (tobacco and nuclear power, respectively). Those corporate groups may

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Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006); British Caribbean Bank Ltd. (Turks & Caicos) v. Government of Belize, Case No. 2010-18 (Perm. Ct. Arb. 2014); Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009); Casinos Austria Int'l GmbH & Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Award (Nov. 25, 2021); Champion Trading Co. & Ameritrade Int'l, Inc v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award (Oct. 27, 2006); CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Order (Aug. 31, 2009); Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Award (Aug. 18, 2009); Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007); Eur. Am. Inv. Bank AG (Austria) v. Slovak Republic, Case No. 2010-17 (Perm. Ct. Arb. 2017); GAMI Invs. Inc. v. United Mexican States, Final Award (UNCITRAL 2004), https://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf.; Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002); Severgroup LLC & K.N. Holding OOO v. French Republic, Case No. 2022-13 (Perm. Ct. Arb. 2023); Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award (July 8, 2016). Van Harten lists further examples of "parallel cases," as he puts it. *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 111 n.100 (2007). Yet those cases that we did not include either concern parallel arbitral proceedings, see, for example, *Petrobart Ltd. v. The Kyrgyz Republic*, Case No. 126/2003 (Stockholm Chamber of Com. 2005), or just contemplate the possibility of such proceedings, see, for example, *Sempra Energy Int'l v. Argentine Republic*, ¶ 42, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), which are irrelevant for our purposes. In other instances, the proceedings overlapped only briefly, see, for example, *Siemens A.G. v. Argentine Republic*, ¶ 160, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), and they are also therefore of little value for this Article.

22. Often, domestic cases are difficult to identify because the parties are different than in the arbitral proceedings, and cases are not easily accessible for language or other reasons. Thus, the only cases that typically surface are those where the other party invokes a waiver or fork-in-the-road clause to challenge arbitral proceedings. To identify suitable cases (in addition to those which are widely reported anyways), we analyzed the literature on waiver and fork-in-the-road clauses. The cases we thereby identified form the basis of our analysis.

23. Other reasons for pursuing claims in domestic courts may be, for example, that limitation periods (increasingly inserted) in investment treaties could have expired, political risk insurance policies may require the filing of some proceedings, and starting a domestic proceeding may be useful for obtaining interim measures for an arbitration (or vice versa).

have considered the extra costs involved in concurrent proceedings to be justified in order to maximize their chances of a successful settlement or other negotiated outcome. They involved situations where the relief under international investment law was arguably more expansive than that available through domestic courts, which might not always be true or obvious. Nonetheless, such situations may become more frequent, as foreign investors and legal advisors become more aware of the possibility of concurrent proceedings against the backdrop of growing ISDS arbitration filings over the last two decades.[24]

Whilst some literature has already dealt with parallel proceedings, the main focus of such treatments has been parallel arbitrations or domestic proceedings *before* or *after* the ISDS arbitration, rather than simultaneous proceedings that bring sharply into focus the possibilities of inefficiencies or inconsistent outcomes.[25] Part II of this Article therefore elaborates on some other more specific concerns about concurrent proceedings in cross-border investment disputes. Part III.A shows how IIAs often do not preclude this possibility, especially as interpreted by most ISDS arbitration tribunals and commentators (Part III.B), although there has been some recent evolution in IIA drafting to reduce the scope for concurrent proceedings.

Part IV then takes a closer look at the Philip Morris claims against Australia. It demonstrates how Australian domestic law provides significantly lower protections than international investment treaty law not only regarding expropriation, but also fair and equitable treatment (notably concerning denial of justice and substantive legitimate expectations). This situation is somewhat surprising, as one might expect such an outcome as more likely to arise in developing economies with poorer governance systems, "on the books" and/or "in action." Yet the lower standards of protections under Australian domestic law raise greater prospects of concurrent proceedings, and there has been a recent dispute involving Western Australia (elaborated in Part IV.A) that could have resulted in such proceedings.

Part V turns to a closer examination of the Vattenfall cases. This Part emphasizes the possible attractions of ISDS arbitrations in terms of

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24. For trends in global ISDS case filings, see *Known Treaty-Based ISDS Cases*, UNCTAD INV. POL'Y HUB (Dec. 31, 2023), https://investmentpolicy.unctad.org/investment-dispute-settlement; UNCTAD, TREATY-BASED INVESTOR—STATE DISPUTE SETTLEMENT CASES AND CLIMATE ACTION (2022), https://investmentpolicy.unctad.org/publications/1270/treaty-based-investor-state-dispute-settlement-cases-and-climate-action.

25. *See* Emmanuel Gaillard, *Parallel Proceedings: Investment Arbitration*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW 2019 (arguing that "[p]arallel national court proceedings in investor-State disputes are most likely to occur at the enforcement and annulment stage"); Yannaca-Small, *supra* note 2, at 1009 (excluding concurrent proceedings before domestic courts and investment tribunals in his enumeration of scenarios leading to parallel proceedings).

substantive protections as well as time efficiencies compared to domestic court proceedings in Germany. Yet this analysis also highlights possible effects of a concurring arbitration on the domestic proceedings, which seems to have been the situation in the earlier claims against Mexico concerning soft drink sweeteners.[26]

Part VI concludes that concurrent proceedings before ISDS tribunals and domestic courts raise fundamental issues of procedural law which require adequate regulation. Yet our analysis also highlights potential benefits of concurrent proceedings, but in light of the concerns over such proceedings, we propose to limit and channel their potential effects, e.g., by inserting tools of coordination.

II. THE PROBLEM WITH CONCURRENT PROCEEDINGS

While it might feel intuitively wrong that a claimant is allowed to pursue the very same claim simultaneously in more than one forum, the two most famous examples for concurrent proceedings in international investment law provide useful starting points to ground this intuition. From that basis, we can identify general problems with concurrent proceedings.

In Australia, following the Government's Productivity Commission's trade policy review recommendations in 2010, the then (center-left Labor/Greens coalition) Gillard Government's Trade Policy Statement in 2011 eschewed all ISDS in future investment agreements.[27] This new policy was applied until the Gillard Government lost the general election in 2013, whereupon Australia reverted to including ISDS provisions on a treaty-by-treaty assessment,[28] until the Labor Government regained power in 2022 and reapplied the anti-ISDS policy.[29] The criticism persists that it is unfair for claimants to be able to invoke greater procedural and substantive rights under international investment law.

Importantly for this Article, the anti-ISDS policy shift under the Labor-led government over 2011–13 and revived since late 2022 was driven significantly by the *Philip Morris Asia* arbitration under Australia's 1993 BIT

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26. Guillermo J. Garcia Sanchez, *Investment Cases in the Mexican Legal System: Willingness to Compensate, Federalism Issues, and Parallel Litigation*, *in* INTERNATIONAL INVESTMENT LAW: AN ANALYSIS OF THE MAJOR DECISIONS 591, 596 (Hélène Ruiz Fabri et al. eds., 2022). On the pros and cons of arbitration versus domestic litigation generally for resolving cross-border investment disputes, see Wanli Ma & Michael Faure, *Is Investment Arbitration an Effective Alternative to Court Litigation? Towards a Smart Mix of Litigation and Arbitration in Resolving Investment Disputes*, 48 BROOK. J. INT'L L. 1, 22–49 (2022).

27. *See* LUKE NOTTAGE, INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION: AUSTRALIA AND JAPAN IN REGIONAL AND GLOBAL CONTEXTS 260 (2021).

28. *See id.*

29. Nottage, *supra* note 13.

with Hong Kong (replaced in 2019).[30] That was the first ever ISDS claim against Australia, contesting the *Tobacco Plain Packaging Act* 2011 (Cth) enacted by the federal government that prevented use of trademarks, including a claim for indirect expropriation.[31] The Hong Kong subsidiary of Swiss (originally U.S.) tobacco company Philip Morris notified Australia of its dispute on June 22, 2011,[32] and the arbitration commenced on November 21, 2011.[33] The claim was dismissed on jurisdictional grounds on December 17, 2015, for abuse of process with a final award on costs rendered only on March 8, 2017.[34]

In parallel, Philip Morris (and Imperial Tobacco) intervened in lawsuits pursued by other tobacco companies claiming compensation for acquisition of their (intellectual) property rights under the federal Constitution.[35] These challenges were filed in the High Court of Australia on December 1, 2011 (when the Act was given Royal Assent, although the legislation barring the use of trademarks did not come into force for another year).[36] On October 5, 2012, the court ruled unanimously against the tobacco companies, maintaining that the Constitution only protects against direct expropriation.[37] By that stage, the tribunal had been formed in the *Philip Morris Asia* arbitration and two Procedural Orders had been issued.[38]

After the apex court's ruling and as the ISDS arbitration proceeded, some leading Australian judges also started to raise concerns that Australian treaty commitments should not unduly hamper domestic court adjudication.[39] A prominent commentator was the High Court's then Chief Justice Robert French, who did not necessarily favor 'the nuclear option' of rejecting any form of ISDS-backed treaty.[40]

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30. Luke Nottage & Ana Ubilava, *Novel and Noteworthy Aspects of Australia's Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties*, *in* NEW FRONTIERS IN ASIA-PACIFIC INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION 115, 118 (Luke Nottage et al. eds., 2021).

31. *Phillip Morris*, Case No. 2012-12, Written Notice of Claim, ¶ 10 (June 22, 2011).

32. *Id.*

33. *Phillip Morris*, Case No. 2012-12, Notice of Arbitration (Nov. 21, 2011).

34. *Phillip Morris*, Case No. 2012-12. For the procedural history, see also *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, PERMANENT CT. OF ARB., https://pca-cpa.org/en/cases/5/ (last visited Jan. 20, 2024).

35. Philip Morris appearing as intervenor, with exposure to legal costs, explains why it does not figure in the case name: *JT Int'l SA v Commonwealth; British American Tobacco Australasia Ltd v Commonwealth* [2012] HCA 43 (Austl.). The chronology and related documents in these combined matters can be found via *British American Tobacco Australasia Limited and Ors v. The Commonwealth of Australia*, HIGH CT. OF AUSTL., www.hcourt.gov.au/cases/case-s389/2011 (last visited Apr. 20, 2024).

36. *Id.*

37. *Id.*

38. *See supra* note 34.

39. For details, see NOTTAGE, *supra* note 27, 362–64 (including reference to a letter sent to the then federal Attorney-General from Australia's Council of Chief Justices).

40. *Id.*

After losing the 2013 general election, the Labor Opposition maintained its anti-ISDS policy but ultimately voted with successive (center-right) Coalition governments—unlike the Greens—to enact tariff reduction legislation allowing ratification of entire FTAs with investment chapters containing ISDS with major trading partners.[41] Leading into the May 2022 election, however, the Labor Party's national platform in March 2021 recommitted to not agreeing to ISDS provisions in future treaties and added that, if elected, it would engage with counterpart states to review existing treaties.[42] On November 14, 2022, the new Labor Government publicly announced this position.[43] A contributing factor may have been an ISDS claim orchestrated by right-wing politician Clive Palmer being notified against Australia, in late 2021 regarding Western Australian state measures, as elaborated *infra* Part IV.

Quite similarly, in Germany and then for the European Union, concurrent proceedings in the *Vattenfall (II)* dispute became a *cause célèbre* around a decade ago.[44] The case resulted from Germany's U-turn in its nuclear energy policy in the wake of Japan's 2011 earthquake and tsunami and consequent Fukushima power plant meltdown. Just a few months after having prolonged the operation period of Germany's existing nuclear power plants, the government decided to phase out nuclear power plants roughly 12 years earlier than envisaged. This plan was put into practice by an act of

41. *Id.* at 318.

42. *See* AUSTRALIAN LABOR PARTY, ALP NATIONAL PLATFORM 81, ¶ 40 (2021), https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf.

43. *See* Don Farrell, Minister for Trade and Tourism, Speech at the Australian APEC Study Centre: Trading Our Way to Greater Prosperity and Security (Nov. 14, 2022).

44. BUNGENBERG, *supra* note 16, at 14 (noting that the *Vattenfall (II)* case was "among the most cited in the current anti-ISDS critique). One of the main points of criticism in these cases is that ISDS would lead to better treatment of foreign investors in comparison to German enterprises ("Inländerdiskriminierung": reverse discrimination). "This argument tends to leave undiscussed the fact that German investors abroad are guaranteed extra protection based on BITs," as is well-illustrated by cases brought by German investors on the basis of BITs, such as *Mr. Franz Sedelmayer v. The Russian Federation* (Stockholm Chamber of Com. 1998). *Id.* "Furthermore, in the national system, nationals may have different and more extensive rights in comparison to foreign investors." *Id.* Bungenburg adds that as the European Union started to discuss the Transatlantic Trade and Investment Partnership (TTIP) treaty with the U.S., from 2014 "heavy and one-sided public debate began in the German media" that mostly "described ISDS in very negative terms, usually mentioning the still undecided *Vattenfall* and *Philip Morris* cases." *Id.* at 15. In May 2015, Germany proposed the inclusion of a permanent investment "court" in TTIP, instead of traditional ISDS (where the foreign investor directly nominates an arbitrator for the tribunal), which (despite TTIP negotiations stalling) became the EU's take-it-or-leave-it proposal for dispute settlement in its future investment treaties. For the EU Commission's policies for negotiating further agreements with investment regulations, see *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Trade for All—Towards a More Responsible Trade and Investment Policy*, at 15, COM (2015) 497 final (Oct. 14, 2015). Bungenberg notes that this German government proposal derived from a February 2015 position paper from the Socialists and Democrats, leading to the government commissioning a study by Erlangen University Professor Markus Krajewski that elaborated on this alternative mechanism and recommended various other reforms to substantive standards, including that "foreign investors should not be granted more rights than nationals." BUNGENBERG, *supra* note 16, at 17.

parliament.[45] Swedish state-owned enterprise (SOE) Vattenfall, like other domestic energies companies, filed a constitutional complaint with the Federal Constitutional Court (FCC) challenging the nuclear plant phase-out and initiated arbitral proceedings administered by the International Centre for the Settlement of Investment Disputes (ICSID).[46] The arbitration commenced on May 31, 2012, but was discontinued on November 9, 2021 (settled for €1.424 billion of the €4.7 billion plus costs and interest claimed)[47] after the FCC found the nuclear energy phase-out to be unconstitutional insofar as it did not provide for any compensation.[48] Vattenfall reportedly pursued both proceedings concurrently for reasons of time: it could not afford to wait several years for a decision by the FCC.[49]

This case has come to be synonymous with the alleged misuse of investment law by big companies. It is often an example advanced by NGOs to highlight the dangers of investment arbitration and specifically "parallel justice," as it is frequently called.[50] While the main reason is the linkage to a legislator's "right to regulate" being impeded, the point of pursuing legal avenues in parallel also sparked critique (similarly on both points in the *Philip Morris* challenges).[51] Additionally, the parallel complaints by the German companies E.ON and RWE against the phase-out, that is to say by companies unable to bring investment cases, brought the preferential treatment for foreign investors into sharper perspective.[52] In Europe, concurrent proceedings (e.g. lately *Uniper v. the Netherlands* and *RWE v. the Netherlands*)[53] might be motivated by the decisions of the European Court

45. Dreizehntes Gesetz zur Änderung des Atomgesetzes [Thirteenth Act Amending the Atomic Energy Law], July 31, 2011, ELEKTRONISCHER BUNDESANZEIGER [eBAnz] at BGBl. I 2011, 1704 (Ger.).

46. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Dec. 6, 2016, 143 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 246 (Ger.).

47. *Federal Republic of Ger. (II)*, ICSID Case No. ARB/12/12, Discontinuance Order (Nov. 9, 2021).

48. 143 BVerfGE 246, ¶ 373 (Ger.).

49. Daniela Páez-Salgado, *A Battle on Two Fronts: Vattenfall v. Federal Republic of Germany*, WOLTERS KLUWER ARB. BLOG (Feb. 18, 2021), http://arbitrationblog.kluwerarbitration.com/2021/02/18/a-battle-on-two-fronts-vattenfall-v-federal-republic-of-germany/.

50. *See Handelspolitik und Finanzpolitik: Investitionsschutz und Schiedsgerichte*, BEWEGT POLITIK CAMPACT, https://www.campact.de/handelspolitik-und-finanzpolitik/ (last visited July 31, 2023); *Kein Profit auf Kosten von Mensch und Umwelt*, UMWELTINSTITUT MÜNCHEN E.V., https://umweltinstitut.org/welt-und-handel/ (last visited July 31, 2023).

51. UMWELTINSTITUT MÜNCHEN E.V., *supra* note 50.

52. *See, e.g.*, Kerstin Kohlenberg, Petra Pinzler & Wolfgang Uchatius, *Im Namen des Geldes*, 10 DIE ZEIT. 15, 16 (Feb. 27, 2014), https://www.zeit.de/2014/10/investitionsschutz-schiedsgericht-icsid-schattenjustiz?utm_referrer=https%3A%2F%2Fwww.google.com%2F#comments.

53. Uniper SE, Uniper Benelux Holding B.V. & Uniper Benelux N.V. v. Kingdom of the Neth., ICSID Case No. ARB/21/22, Note on the Discontinuance (Mar. 17, 2023); RWE AG & RWE Eemshaven Holding II BV v. Kingdom of the Neth., ICSID Case No. ARB/21/4, Discontinuance Order (Jan. 12, 2024). On these proceedings, see Damien Charlotin, *Netherlands Poised to Face Its First Investment Treaty Claim, Over Closure of Coal Plants*, INV. ARB. REP. (Sept. 7, 2019), https://www.iareporter.com/arbitration-cases/uniper-v-the-netherlands/.

of Justice (ECJ) in *Achmea*[54] and *Komstroy*.[55] As a consequence of the ECJ's stance on intra-EU investment arbitration (being contrary to Articles 344 and 267 of the Treaty on the Functioning of the European Union (TFEU)),[56] member state courts have started to find that there was no valid arbitration agreement.[57] At least one investment tribunal has declined jurisdiction based on what is commonly called the "intra-EU-objection."[58] Thus, investors face a serious risk that investment arbitration will either not be available or an award will not be enforceable in the European Union (and possibly beyond).[59] Accordingly, starting both proceedings concurrently might just reflect the uncertainty around the availability of investment arbitration particularly in intra-EU settings. In turn, such proceedings may become more frequent in the coming years.

Despite these two infamous cases, we argue that there are broader issues with such proceedings. Concurrent proceedings are normatively undesirable if there are no clear mechanisms in place which coordinate both proceedings. Such proceedings are undesirable firstly because they create a need for coordination in terms of fact-finding, determinations of law, assessment of damages, etc. Yet such rules barely exist and, if they exist at all, are only rudimentarily developed. Put simply, they bear the risk of fundamentally different outcomes (which in turn sparks public outrage, and perhaps rightly so).[60] As the tribunal in *GAMI v. Mexico* put it: "The overwhelming implausibility of a simultaneous resolution of the problem by national and international jurisdictions impels consideration of the practically certain scenario of unsynchronized resolution."[61]

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54. Case C-284/16, Slowakische Republik v. Achmea BV, ECLI:EU:C:2018:158 (Mar. 6, 2018). On this case and its impact, see Robert Stendel, *Achmea Case*, *in* MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds., 2019).

55. Case C-741/19, Republic of Mold. v. Komstroy LLC, ECLI:EU:C:2021:655 (Sept. 2, 2021).

56. Consolidated Version of the Treaty on the Functioning of the European Union arts. 267, 344, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

57. See most recently the decisions by the German Federal Supreme Court: Bundesgerichtshof [BGH] [Federal Court of Justice] July 27, 2023, I ZB 43/22 (Ger.) (confirming the decision of the Higher Regional Court of Cologne against Uniper, Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] Sept. 1, 2022, 19 SchH 14/21 (Ger.)); Bundesgerichtshof [BGH] [Federal Court of Justice] July 27, 2023, I ZB 74/22 (Ger.) (confirming the decision of the Higher Regional Court of Cologne against RWE, Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] Sept. 1, 2022, 19 SchH 15/21 (Ger.)); Bundesgerichtshof [BGH] [Federal Court of Justice] July 27, 2023, I ZB 75/22 (Ger.) (reversing a decision of the Higher Regional Court of Berlin against Germany which had denied Germany's request to declare intra-EU arbitration under the ECT to be inadmissible, Oberlandesgericht [OLG] [Higher Regional Court of Berlin] Apr. 28, 2022, 12 SchH 6/21 (Ger.)).

58. Green Power K/S v. Kingdom of Spain, Case No. V2016/135, Award, paras. 331–478 (Stockholm Chamber of Com. 2022).

59. However, it might be enforceable in other jurisdictions. *See, e.g.*, *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (Austl.).

60. *See generally* Julian Arato, Chester Brown & Federico Ortino, *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 J. WORLD INV. & TRADE 336 (2020) (on different types of inconsistency in ISDS).

61. *GAMI Invs., Inc.*, ¶ 119.

Secondly, from a rule of law perspective,[62] concurrent proceedings put undue pressure on the respective other proceeding. In order to avoid diverging outcomes or to stop the other proceeding, the judges or arbitrators may decide the case less freely. There might also be excessive "regulatory chill" and pressure on the government when threatened by legal battles on two fronts.

Thirdly, even for investors, such a scenario is undesirable. While there may be an argument that concurrent proceedings mean doubling the chances of recovery (and perhaps even a double dip for damages),[63] one should not forget that these are merely chances. As the overall dynamic of big corporations will push management to pursue all open avenues—if only to avoid their own liability exposure—the costs for such proceedings rise significantly. After all, concurrent proceedings can mean double the cost without any damages for an investor. Put simply, dual-track proceedings are less efficient.[64]

Interestingly, in the other concurrent cases we identified, the fact of pursuing claims in parallel sparked less media attention than in *Philip Morris* or *Vattenfall*. Firstly, this might be due to a North-South-Divide, i.e. such cases only spark outrage in the Global North. Thus, their popularity in the literature might reflect western centricity. Yet, it is worth noting that also cases involving countries from the Global North gained little attention.[65] Even if there is something to this point, this should not lead us to the conclusion that focusing on the two cases is inappropriate, because they raise fundamental concerns which also apply to the Global South. Secondly, the Mexican cases formed part of a larger trade dispute between the U.S. and Mexico on sweeteners,[66] so the issue of concurrent proceedings before domestic courts and ISDS tribunals received less attention.[67] This is, of course, different in *Vattenfall* and, to some extent, *Philip Morris*. Last, but not least, the cases against Mexico occurred in the early 2000s and therefore before the emergence of a widespread scholarly and public critique against ISDS.[68] Before taking a closer look at such high-profile proceedings highlighting how concurrent claims before international arbitration and domestic court forums can arise and then seem to add significantly to

62. *See generally* Menon, *supra* note 3 (discussing how arbitration interacts with rule of law values).

63. HANNO WEHLAND, THE COORDINATION OF MULTIPLE PROCEEDINGS IN INVESTMENT TREATY ARBITRATION ¶ 1.34 (2013); Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash between Formalistic and Pragmatic Approaches*, 18 WASH. U. GLOB. STUD. L. REV. 391, 422 (2019).

64. See further on the disadvantages of concurrent proceedings in WEHLAND, *supra* note 63, ¶¶ 1.32–1.41.

65. *See supra* note 21.

66. Similarly to *Philip Morris*, Case No. 2012-12, these issues were also brought before the WTO. *See, e.g.*, Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, *supra* note 9.

67. *But see* Puig, *supra* note 5; Garcia Sanchez, *supra* note 26.

68. See, for example, the seminal work of VAN HARTEN, *supra* note 21.

discontent about ISDS-based investment treaties, we address next (Part III) several more technical or doctrinal issues. These are also more applicable to developing as well as developed economies and legal systems.

III. GENERAL ISSUES AND PRACTICE IMPACTING ON CONCURRENT PROCEEDINGS

Given the media and political reaction to concurrent proceedings, one would expect treaty drafters to take care to avoid the possibility of such proceedings. This expectation seems natural in light of the problems arising from such proceedings, such as the need for coordinating proceedings. Yet a closer look at treaty practice, even recently, reveals that states rarely include clauses that could effectively limit the likelihood of concurrent proceedings (Part III.A). Additionally, an analysis of arbitral practice suggests that many of these clauses are interpreted in a way that seriously limits their ability to stop concurrent proceedings (Part III.B).

A. Treaty Drafting Practice

Treaty drafters have several tools at their disposal to exclude concurrent proceedings. They could require the investor to either exhaust or pursue local remedies for some time,[69] or include clauses which make the investor's choice of one forum binding. The latter effect may be achieved by fork-in-the-road clauses or waiver clauses. Fork-in-the-road clauses allow the investor to choose one forum but preclude a later resort to another forum.[70] In contrast, a waiver clause requires the investor to waive the right to initiate or continue court proceedings before initiating arbitral proceedings.[71] Notably, a waiver clause would allow the investor to first pursue domestic court proceedings and later switch to arbitration, whilst a fork in the road clause would not. In any case, investors are, in theory, barred from pursuing the same claim in both fora at the same time.

Before analyzing to what extent such clauses can prevent concurrent proceedings, we will first look into the frequency with which treaties include such clauses. Because of the high-profile cases in Australia and Germany, we will focus on these states in particular. As the general numbers for all states suggest, their treaty practice is representative of the practice worldwide at least in some respects. Most importantly, only a minority of IIAs include provisions addressing concurrent proceedings.

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69. *See, e.g.*, Agreement between the United States of America, the United Mexican States, and Canada art. 14.D.5., ¶ 1(b), July 1, 2020, 134 Stat. 11.

70. *See* Petsche, *supra* note 63, at 395–98 (distinguishing three main types of such clauses).

71. *See, e.g.*, North Atlantic Free Trade Agreement art. 1121, Dec. 17, 1992, 32 I.L.M. 289.

Table 1 is based on the United Nations Conference on Trade and Development's (UNCTAD) "mapping" of "forum" clauses within ISDS provisions, coded from 2,581 BITs and other investment treaties through to 2016.[72] Whilst we are aware of some problems of the database in terms of comprehensiveness and the quality of its coding generally, it has an indicative value that suffices for our purposes. Additionally, we checked the treaty clauses listed for Australia and Germany, to ensure their correctness and complemented it with a selected review of Australia's and Germany's investment treaties.

72. *International Investment Agreements Navigator*, *supra* note 4.

Table 1: UNCTAD Mapping of Investment Treaty Forum Provisions

Provision in IIA	Total	Australia	Germany
No reference	1469	12	68
Fork in the road	584	Philippines 1995[73] Argentina 1995[74] Chile 1996 (terminated)[75] Uruguay 2001 (terminated)[76] Mexico 2005 (terminated)[77]	Bulgaria 1986[78] (terminated) Paraguay 1993[79] Botswana 2000[80] Bosnia and Herzegovina 2001[81] Mexico 1998[82]

73. Agreement on the Promotion and Protection of Investments, Austl.-Phil., art. 13(2), Jan. 25, 1995, [1995] A.T.S. 28 ("If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may: (a) in accordance with the law of the Party which admitted the investment, initiate proceedings before that Party's competent judicial or administrative bodies; (b) if both Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention"), refer the dispute to the International Centre for Settlement of Investment Disputes ("the Centre") . . . .").

74. Agreement on the Promotion and Protection of Investments, and Protocol, Arg.-Austl., art 13(2), Aug. 23, 1995, [1997] A.T.S. 4 ("Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party which has admitted the investment or to international arbitration in accordance with paragraph 3 of this Article, this choice shall be final.").

75. Agreement on the Reciprocal Promotion and Protection of Investments (with Protocol), Austl.-Chile, art. 11(3), July 9, 1996, [1999] A.T.S. 37 ("Once the investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration, that election shall be final.").

76. Agreement on the Promotion and Protection of Investments, Austl.-Uru., art. 13(2), Sept. 3, 2001, [2003] A.T.S. 10 ("Once a party has invoked a form of dispute settlement under this paragraph neither party shall pursue any other form of dispute settlement except as provided in paragraph 4.").

77. Agreement on the Promotion and Reciprocal Protection of Investments, and Protocol, Austl.-Mex., art. 13(5), Aug. 23, 2005, 2007 A.T.S. 20.

78. Treaty Concerning the Reciprocal Encouragement and Protection of Investments (with Protocol and Exchange of Letters), Bulg.-Ger., art. 4(3), Apr. 12, 1986, 3 U.N.T.S. 1518 ("If agreement has not been reached within three months from the commencement of the consultations, the amount of the compensation shall, at the request of the investor, be reviewed *either* in a properly constituted proceeding of the Contracting Party that has carried out the expropriation measure, *or* by means of an international arbitral tribunal.") (emphasis added).

79. Treaty for the Promotion and Reciprocal Protection of Capital Investments (with Protocol), Ger.-Para., art. 11(2), Aug. 11, 1993, 2047 U.N.T.S. 509 (providing for ICSID arbitration if the parties do not agree otherwise).

80. Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Bots.-Ger., art. 11(2), May 23, 2000, 2470 U.N.T.S. 327 (providing for ICSID arbitration if the parties do not agree otherwise).

81. Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Bosn. & Herz.-Ger., art. 10(2), Oct. 18, 2001, 2501 U.N.T.S. 155 (providing for ICSID arbitration if the parties do not agree otherwise).

82. Agreement on the Promotion and Reciprocal Protection of Investments, Ger.-Mex., art. 12(5), Aug. 25, 1998, 2140 U.N.T.S. 393 ("If a national or company of a Contracting State submits a dispute to arbitration, neither he nor his investment that is an enterprise may initiate or continue proceedings before a national tribunal.")

No U-turn (waiver clause)	135	Turkey 2005[83] Korea FTA 2014[84] China FTA 2015[85] TPP FTA (not in force)[86]	China 2003[87] CETA investment chapter (not in force)[88] Indonesia 2003 (terminated)[89]

83. *See, e.g.*, Agreement on the Reciprocal Promotion and Protection of Investments, Austl.-Turk., art. 13(4), June 16, 2005, 2631 U.N.T.S. 261 ("As a precondition to electing arbitration under paragraph 13(2), the investor must waive any right it may have to initiate or continue proceedings on the same matter before judicial or administrative bodies of either Party.").

84. Free Trade Agreement, Austl.-S. Kor., art. 11.18(2), Apr. 8, 2014, [2014] A.T.S. 43 ("No claim may be submitted to arbitration under this Section unless: . . . (b) the notice of arbitration is accompanied: (i) for claims submitted to arbitration under Article 11.16.1(a), by the claimant's written waiver; and (ii) for claims submitted to arbitration under Article 11.16.1(b), by the claimant's and the enterprise's written waivers, of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.").

85. Free Trade Agreement, Austl.-China, art. 9.14(2), June 17, 2015, [2015] A.T.S. 15 ("No claim may be submitted to arbitration under this Section unless: . . . (d) the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 9.12.2(a), by the claimant's written waiver, and (ii) for claims submitted to arbitration under Article 9.12.2(b), by the claimant's and the enterprise's written waivers, and written waiver by all persons through which the claimant owns or controls the enterprise, of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure or event alleged to constitute a breach referred to in Article 9.12.2.").

86. Trans-Pacific Partnership art. 9.21(2), Feb. 4, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3573/download ("No claim may be submitted to arbitration under this Section unless: . . . (b) the notice of arbitration is accompanied: (i) for claims submitted to arbitration under Article 9.19.1(a) (Submission of a Claim to Arbitration), by the claimant's written waiver; and (ii) for claims submitted to arbitration under Article 9.19.1(b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers, of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration).").

87. German investors only are required to bring administrative review procedures beforehand (and pursue them for at least three months) and withdraw any court cases pending before Chinese courts before initiating arbitral proceedings. *See* Protocol No. 6 to the Agreement on the Encouragement and Reciprocal Protection of Investments, China-Ger., Nov. 11, 2005, 2362 U.N.T.S. 253.

88. Comprehensive Economic and Trade Agreement, Can.-E.U., art. 8.22, Oct. 30, 2016, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en.

89. Protocol to the Agreement Concerning the Promotion and Reciprocal Protection of Investments, Ger.-Indon., art. 10, May 14, 2003, Bundesgesetzblatt, Teil II [BGBL II] at 522 [hereinafter Germany-Indonesia BIT] ("An investor from the Federal Republic of Germany who has made an investment in the Republic of Indonesia can appeal to an international arbitration tribunal or to a local court. In case the dispute has been brought to an Indonesian court, the dispute can only be submitted for arbitration if it can be withdrawn by the investor according to Indonesian laws and regulations."). Note that this waiver only applies to German investors.

Preserving rights to arbitration after domestic court proceedings	125	Czech 1991 (terminated, replaced by 1993 BIT[90]) Hungary 1991[91]	Angola 2003[92] Chile 1991[93] Ecuador 1996 (terminated)[94] Ethiopia 2004[95] Indonesia 2003 (terminated)[96] Iran 2002[97] Mexico 1998[98]

90. *See also Australia's Bilateral Investment Treaties*, AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFS. & TRADE, https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties (last visited July 31, 2023); Agreement on the Reciprocal Promotion and Protection of Investments, Austl.-Czech, art. 11(3), Sept. 30, 1993, [1994] A.T.S. 18 ("Either party to a dispute may take the following action irrespective of whether any local remedies available pursuant to action under paragraph (2) of this Article have already been pursued or exhausted: [ICSID etc.].").

91. Agreement Between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments, Austl.-Hung., art. 12(3), Aug. 15, 1991, [1992] A.T.S. 19 (entered into force May 10, 1992) ("Where the dispute arises under Article 7 of this Agreement, either party to the dispute may take the following action irrespective of whether any local remedies available pursuant to action under paragraph (2) of this Article have already been pursued or exhausted . . . .").

92. Note, however, that only Angolan investors' rights are fully preserved. Treaty Between the Federal Republic of Germany and the Republic of Angola Concerning the Encouragement and Reciprocal Protection of Investments, Angl.-Ger., art. 9(4), Oct. 30, 2003, 2424 U.N.T.S. 125 (entered into force Mar. 1, 202507). German investors are barred from filing for arbitration when an Angolan court has decided on the merits of the case. *See id.* art. 9(3).

93. Under the Treaty Between the Republic of Chile and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, investors must first resort to domestic courts, without however being barred from arbitral proceedings if the domestic proceedings take longer than 18 month or within a year after a final domestic decision. Chile-Ger., art. 10(3), Oct. 21, 1991, 2081 U.N.T.S. 141.

94. Treaty Between the Federal Republic of Germany and the Republic of Ecuador on the Promotion and Mutual Protection of Capital Investments, Ecuador-Ger., Mar. 21, 1996, 2074 U.N.T.S. 3 (entered into force Feb. 12, 1999).

95. Treaty Between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia Concerning the Encouragement and Reciprocal Protection of Investments, Eth.-Ger., art. 11(3), Jan. 19, 2004, 2771 U.N.T.S. 215 (entered into force May 4, 2006) ("If an investor from the Federal Republic of Germany has seized a local court in the Federal Democratic Republic of Ethiopia, the dispute can be submitted to international arbitration only if the local court has not yet rendered a decision which finally disposes the case.").

96. Germany-Indonesia BIT, *supra* note 89, at 522 ("An investor from the Republic of Indonesia who has made an investment in the Federal Republic of Germany can appeal to an international arbitration tribunal in the same dispute after a German national court has rendered a decision in substance.") (applies only to Indonesian investors).

97. Agreement Between the Federal Republic of Germany and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investments, Ger.-Iran, art. 11(3), Aug. 17, 2002, 2364 U.N.T.S. 638 ("In the event an investor of a Contracting Party has submitted a dispute to the local competent court the dispute may be referred to international arbitration *provided the party submitting the dispute to arbitration bears the costs of the proceedings so far incurred and the court has not yet rendered a judgement in substance*, if so required.") (emphasis added).

98. Agreement Between the United Mexican States and the Federal Republic of Germany for the promotion and reciprocal protection of investments, Ger.-Mex., art. 12(4), Aug. 25, 1998, 2140 U.N.T.S. 393 (entered into force Feb. 23, 2001) [hereinafter Mexico-Germany BIT] ("In case the national or company of a Contracting State or its investment has initiated proceedings before a national tribunal of the United Mexican States, the dispute may only be submitted to arbitration if the competent Mexican tribunal has not rendered a judgement in the first instance on the merits of the case.").

Local remedies first [recourse or exhaustion]	89	Poland 1991[99]	Algeria 1996[100] Argentina 1991[101] Chile 1998[102] Jamaica 1992[103] Peru 1995[104]

99. *Cf.* Agreement Between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, Austl.-Pol., art. 13, May 7, 1991, [1992] A.T.S. 10 ("(2) If the dispute in question cannot be resolved through consultations and negotiations either party to the dispute may [not: shall], in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before that Contracting Party's competent judicial or administrative bodies. (3) Where the dispute arises under Article 7 of this Agreement [expropriation], either party to the dispute may take the following action irrespective of whether any local remedies available pursuant to action under paragraph (2) of this Article have already been pursued or exhausted: [ICSID or ad hoc arbitration]"). Therefore, contrary to UNCTAD coding, at least for expropriation claims through ISDS, there is *not* a requirement to exhaust local remedies first. For other claims, it seems there is no consent to ISDS at all. But see, for example, the pending ICSID claim between Prairie Mining Ltd. And Poland brought under this BIT, as well as the Energy Charter Treaty—even though Australia has only signed and not ratified this. *Prairie v. Poland*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1104/prairie-v-poland (last visited July 31, 2023); Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S 95 (entered into force Apr. 16, 1998) [hereinafter ECT].

100. Agreement Between the Federal Republic of Germany and the People's Democratic Republic of Algeria Concerning the Encouragement and Reciprocal Protection of Investments, Alg.-Ger., art. 10(2), May 30, 2002, Bundesgesetzblatt, Teil II [BGBL II] at 291 (Si à l'expiration d'un delai minimum de six (06) mois a compter de la date à laquelle le différend aura été souievé, ledit différend n'aura pas été réglé par la voie amiable, *par l'utilisation des voies de recours internes ou autres*, et si le national concerné ou la société concernée le demande, il sera soumis à arbitrage.") (emphasis added).

101. Treaty Between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments, Arg.-Ger., art. 10(3), Apr. 9, 1991, 1910 U.N.T.S. 171 (entered into force Aug. 14, 1993) ("(3) The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of one of the parties of the dispute where, after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision has been made but the Parties are still in dispute . . . .").

102. Treaty Between the Republic of Chile and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, Chile-Ger., art. 10(3), Oct. 21, 1991, 2081 U.N.T.S. 181 (entered into force July 17, 1998) ("At the request of one of the parties concerned, the dispute shall be submitted to an international arbitral tribunal: (a) If within 18 months from the institution of judicial proceedings under paragraph 2 of this article, there has been no ruling on the merits; or (b) If, even such a ruling exists, one of the parties to the dispute considers that it violates the provisions of this Treaty, in which case arbitral proceedings shall begin within one year from written notification of the award.").

103. Treaty Between the Federal Republic of Germany and Jamaica Concerning the Reciprocal Encouragement and Protection of Investments, Ger.-Jam., art. 11(2), Sept. 24, 1992, [1996] BGBl 58 (entered into force May 19, 1996) ("If the dispute has not been settled to the satisfaction of both parties within a period of twelve months from its submission to a competent body for the purpose of pursuing local remedies, it shall, at the request of either party to the dispute, be submitted for arbitration. Unless the parties in dispute agree otherwise, the dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.").

104. Agreement Between the Federal Republic of Germany and the Republic of Peru on the Promotion and Reciprocal Protection of Investments, Ger.-Peru, art. 10(3), Jan. 30, 1995, [1997] II BGBl. 197 (entered into force Jan. 22, 1997) ("Under any of the following conditions, the differences of opinion may be submitted to an international arbitration court: (a) At the request of a party to the dispute, if, within 18 months from the commencement of the judicial proceedings pursuant to paragraph 2, a court decision has not been taken or if such a decision exists, the differences of opinion between the parties to the dispute continue.").

			Romania 1979 (terminated)[105] UAE 1997[106]
Inconclusive	47	0	Saudi Arabia 1996[107]
Not applicable	134	Japan EPA (2014) Malaysia FTA (2012)	52

From this analysis, only a minority of treaties seem to exclude concurrent proceedings before domestic courts and arbitral tribunals. Yet, some caution is needed for two reasons. Firstly, there are arguably "implied fork-in-the-road-clauses:" by offering the investor several fora to choose from, the treaty might implicitly limit the investor's remedies to the one forum chosen.[108] Secondly, Article 26 of the 1965 Convention on Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) provides that: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."[109] Consequently, opting for ICSID Convention arbitration would automatically exclude resort to other remedies. Taken together, Article 26 of the ICSID

105. Treaty Between the Federal Republic of Germany and Romania Concerning the Promotion and Reciprocal Protection of Capital Investment, Ger.-Rom., art. 3(3), Oct. 12, 1979, 1246 U.N.T.S. 381 (entered into force Jan. 10, 1981) ("The amount of the compensation shall be reviewed in a legal proceeding of the Contracting Party concerned. If, after the conclusion of the legal proceeding, the investor and the Contracting Party concerned continue to disagree on the amount of the compensation, they may, with the consent of the investor, submit the dispute for conciliation and arbitration to the International Centre for Settlement of Investment Disputes in accordance with the procedure provided for in the Convention on the settlement of investment disputes between States and nationals of other States, opened for signature at Washington on 18 March 1965. The request to institute proceedings under this Convention must be made within two months from the date when the decision in the legal proceeding acquires the force of *res judicata*.").

106. Agreement Between the Federal Republic of Germany and the United Arab Emirates for the promotion and reciprocal protection of investments, Ger.-U.A.E., art. 8, June 21, 1997, 2084 U.N.T.S. 355 (entered into force July 2, 1999) ("(2) If the dispute cannot be settled in the way prescribed in paragraph (1) within six months of the date the request for settlement has been submitted, it shall at the request of the investor be filed to the competent court of the Contracting State in whose territory the investment was made. (3) If there still exists a dispute between the parties after 24 months from the date of notification of the above-mentioned procedures the investor may submit the dispute to international arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States, unless the parties agree otherwise.").

107. Agreement Between the Kingdom of Saudi Arabia and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments (with Protocol), Ger.-Saudi Arabia, Oct. 29, 1996, 2075 U.N.T.S. 377 (entered into force Jan. 9, 1999). The treaty provides for a choice between domestic proceedings and ICSID-arbitration, without, however, making any specifications as to their interrelationship.

108. Petsche, *supra* note 63, at 397. Jan Paulsson as the sole arbitrator in Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶¶56–68 (July 30, 2009) took this approach.

109. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 26, Mar. 18, 1965, 575 U.N.T.S. 159.

Convention and the concept of an implied fork-in-the-road-clause could mean that the collected data is misleading because either way there is already a mechanism in place to prevent concurrent proceedings. However, the concept of such an implied fork-in-the-road is controversial and Article 26 applies to parties to the ICSID Convention only. Thus, the impact of both would be limited. In any case, their effect largely hinges upon how such clauses are interpreted.

B. Interpretation of Forum Clauses in Arbitral Practice

Upon a closer look, such clauses seem to be an insufficient barrier against concurrent proceedings. Of course, much depends on the respective wording of the clause. Generally speaking, tribunals have construed such clauses strictly, using a "triple-identity-test" ("same dispute involving the same cause of action, the same object, and the same parties")[110] to test whether the claim is barred by a fork-in-the-road or waiver clause. In consequence, only proceedings by the same person would trigger the clauses. As subsidiaries often bring claims before national courts,[111] the clauses would not bar concurrent proceedings. For example, in Australia's tobacco plain packaging dispute, mentioned *supra* note 12, the Philip Morris subsidiary incorporated in Hong Kong brought the BIT claim, and in *Vattenfall*, the constitutional complaint was brought by German subsidiaries[112] while the investment arbitration was brought on behalf of their parent companies.[113] In any case, the fork-in-the-road provision in the 1994 ECT does not apply vis-à-vis Germany.[114] Of course, treaty-makers

110. URSULA KRIEBAUM ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 385 (2022). Alternatively, tribunals have relied on the "fundamental-basis-of-the-claim"-test. *See Pantechniki S.A. Contractors & Engineers*, ICSID Case No. ARB/07/21, ¶ 61; H&H Enterprises Invs., Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/09/15, Award, ¶¶ 369–70 (May 6, 2014). This test is less restrictive, more flexible, and would cover more instances of concurrent proceedings. Yet the "triple-identity-test" is still dominant, see Stanimir Alexandrov, *Art. 26*, *in* SCHREUER'S COMMENTARY ON THE ICSID CONVENTION 539, 558 ¶ 67 (3d ed. 2022).

111. As is the case with RWE and Uniper in the already mentioned proceedings against the Netherlands, see *supra* notes 53, 57.

112. The Vattenfall Europe Nuclear Energy GmbH and the Kernkraftwerk Krümmel GmbH & Co. oHG. *See* 143 BverfGE 246, 248 (Ger.). While the Vattenfall Europe Nuclear Energy GmbH is a 100% subsidiary of Vattenfall AB (the Swedish mother which is ultimately, but perhaps not directly, owned by the Kingdom of Sweden), the Kernkraftwerk Krümmel GmbH & Co. OHG is owned by Vattenfall's German subsidiary and E.ON Energie AG, a German private company.

113. *See Federal Republic of Ger. (II)*, ICSID Case No. ARB/12/12; *see supra* note 112 (explaining the companies' relationships).

114. ECT, *supra* note 99, art. 26(3)(b), Annex ID. Even if this were different, one might doubt whether Vattenfall might be covered by the fork-in-the-road. For example, Dederer argues that the F.C.C. case and the investment arbitration are different disputes for the simple fact that the remedy sought is different. Hans-Georg Dederer, *Rechtsschutz bei Investitionsstreitigkeiten vor ICSID-Schiedsgerichten*,

could employ language to bar such proceedings more effectively,[115] but this seems to rarely be the case. Indeed, most invocations of fork-in-the-road clauses in investment arbitration have remained unsuccessful.[116] This is partially why modern treaty practice favors waiver clauses.[117] An example is the waiver clause in Article 3.7 of the EU-Singapore Investment Agreement,[118] providing as follows:

> A claim may be submitted under this Section only if [. . .]
>
> 1(f). the claimant:
>
> (i) withdraws any pending claim submitted to the Tribunal, or to any other domestic or international court or tribunal under domestic or international law, concerning the same treatment as alleged to breach the provisions of Chapter Two (Investment Protection);
>
> (ii) declares that it will not submit such a claim in the future; and
>
> (iii) declares that it will not enforce any award rendered pursuant to this Section before such award has become final, and will not seek to appeal, review, set aside, annul, revise, or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section.
>
> 2. For the purposes of subparagraph 1(f), the term "claimant" refers to the investor and, where applicable, to the locally established company. In addition, for the purposes of subparagraph 1(f)(i) the term "claimant" includes all persons who directly or indirectly have an ownership interest in, or who are controlled by the investor or, where applicable, the locally established company.

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in AUS DER WERKSTATT DES NUKLEARRECHTS 119, 136 (2016). While the constitutional court case concerned the validity of an act of parliament (the 13th Act on Nuclear Power [13. Atomgesetz]), the investment arbitration was aimed at money damages.

115. *E.g.*, the wording of the Mexico-Germany BIT, *supra* note 98 would cover such cases because under Article 12(5), local subsidiaries would also be barred from continuing or initiating local proceedings after the investors submitted the claim to arbitration.

116. KRIEBAUM ET AL., *supra* note 110, at 386. This was the case when the tribunal did not apply the "triple-identity-test," but rather looked at the "fundamental basis of the dispute." *See, e.g.*, Supervision y Control S.A. v. Republic of Costa Rica, ICSID Case No. ARB/12/4, Award, ¶ 308 (Jan. 18, 2017).

117. Hanno Wehland, *The Regulation of Parallel Proceedings in Investor-State Disputes*, 31 ICSID REV. 576, 582 (2016).

118. *Commission Annex to the Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and Its Member States of the One Part, and the Republic of Singapore, of the Other Part*, COM (2018) 194 final (Apr. 18, 2018) (not yet in force). See generally on the treaty, Mahdev Mohan, *The European Union's Free Trade Agreement with Singapore—One Step Forward, 28 Steps Back?*, *in* INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA 180 (Julien Chaisse & Luke Nottage eds., 2018).

> 3. Upon request of the respondent, the Tribunal shall decline jurisdiction where the claimant fails to respect any of the requirements or declarations referred to in paragraphs 1 and 2.[119]

This clause consciously tries to avoid the weaknesses of fork-in-the-road-clauses by also covering subsidiaries and by tying the clause's effect to the measure at the heart of the dispute rather than the remedy sought.

Additionally, waiver clauses have the benefit of not forcing the claimant to choose between domestic complaints and arbitration proceedings. Rather, the investor can first file a domestic complaint, which allows the state to remedy the situation internally, and then—only when this effort is unsuccessful—initiate arbitral proceedings. Yet the ultimate effect of waiver clauses depends on their exact wording and actual use. Regarding the wording, the *Lone Star v. Korea* case is a good example to illustrate the effects of the treaty's language. Here, the tribunal found that the peculiar wording of the waiver clause in the Korea-Belgium and Luxemburg Economic Union BIT only obliged a claimant to waive the right to initiate proceedings, but not to discontinue existing proceedings.[120] An example of a more effective clause to prevent concurrent proceedings was featured in the *Casino Austria v. Argentina* case.[121] Here, Article 8(4) of the Argentina-Austria BIT stipulated, "[f]rom the commencement of an arbitration proceeding, each party to the dispute shall take all the required measures to withdraw . . . [the] pending judicial proceedings."[122] As the tribunal found, "dispute" had to be read broadly in light of the requirement to first pursue local remedies, thus also covering disputes involving subsidiaries.[123] To protect the investor from withdrawing the claim before knowing whether an ISDS tribunal possesses jurisdiction, the tribunal found that the clause would only apply once a tribunal had established its jurisdiction.[124]

The problem is that these (often newer) clauses are the exception rather than the rule. Given that the majority of cases are still based on old-

119. *Commission Annex to the Proposal*, *supra* note 118, art. 3.7.

120. LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37, Award, ¶ 118 (Aug. 30, 2022).

121. Casinos Austria International GmbH & Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction (June 29, 2018).

122. Agreement Between the Republic of Argentina and the Republic of Austria for the Promotion and Protection of Investments, BGBI.Nr. 893/1994 ST0277 (entered into force Jan. 1, 1995). English translation of the passage taken from *Casinos Austria International GmbH & Casinos Austria Aktiengesellschaft*, ICSID Case No. ARB/14/32, ¶ 5.

123. *See Casinos Austria International GmbH & Casinos Austria Aktiengesellschaft*, ICSID Case No. ARB/14/32, ¶ 330.

124. *Id.* ¶¶ 331–35.

generation IIAs,[125] there is still a high likelihood that similar cases arise. Even where states have started to introduce more effective waiver clauses, provisions offering "most-favored-nation" (MFN) treatment may allow investors to circumvent these clauses if other IIAs have more favorable clauses on access to arbitration.[126] Of course, this depends on the interpretation of such MFN clauses and whether they cover procedural aspects. While it is beyond the scope of this Article to engage with this debate, it is worth noting that states having waiver clauses only in some IIAs do run the risk that investors can successfully engage in treaty shopping.[127] Additionally, Article 26 of the ICSID Convention, which prima facie would preclude concurrent cases to some extent, has been interpreted as narrowly as fork-in-the-road-clauses,[128] and so is not an effective bar against concurrent cases.

Alternatively, requiring the claimant to exhaust local remedies prior to arbitrating a claim before investment tribunals would prevent the danger of concurrent proceedings. Yet suspending investment treaty claims to allow domestic forums first to decide investor disputes has been rare in treaty provisions and awards. Such "deference as deferral" is uncommon as treaty drafters and ISDS tribunals have increasingly favored various forms of "concurrent decision-making authority."[129] In particular, it has been the hallmark of international investment law to not require investors to exhaust local remedies.[130] Accordingly, it would be a paradigm shift to introduce such a requirement.

Apparently, some German BITs do provide for a primacy of local remedies, falling short of requiring the exhaustion of local remedies (outlined *supra*). Adding exhaustion of local remedies requirements in

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125. According to a recent analysis by UNCTAD, ninety-five percent of all ISDS decisions in 2021 were based on treaties signed between 1980 and 2010. UNCTAD, REVIEW OF 2021 INVESTOR–STATE ARBITRATION DECISIONS: INSIGHTS FOR IIA REFORM 1 (2023), https://unctad.org/system/files/official-document/diaepcbinf2023d3_en.pdf.

126. For example, investors might argue that the M.F.N. clause allows them to invoke a BIT which does not require a waiver before instituting arbitral proceedings. Thereby, a waiver clause contained in a BIT might be circumvented by virtue of the M.F.N. clause.

127. See further on this debate Puig, *supra* note 5, at 211–14.

128. Alexandrov, *supra* note 110, at 605, ¶ 249.

129. ESMÉ SHIRLOW, JUDGING AT THE INTERFACE: DEFERENCE TO STATE DECISION-MAKING AUTHORITY IN INTERNATIONAL ADJUDICATION 201 (2021) (only one percent of ISDS awards apply "deference as deferral"); *id.* at 215 (indicating a rise instead of concurrent authority especially over last 15 years; deference as restraint, reference, or respect). Shirlow also notes a study by Paul Peters, *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties*, 44 NETH. INT'L L. REV. 233, 234 (1997) according to which of 409 investment treaties concluded between 1990–95, only five required exhaustion of local remedies and twenty-eight required at least recourse to local remedies with the exhaustion requirement further "specifically excluded in 20 BITs and implicitly renounced in 345." *Id.* at 132 n.8 (quoting Peters *supra*). *See also* FRANCO FERRARI & FRIEDRICH ROSENFELD, DEFERENCE IN INTERNATIONAL ARBITRATION (2023) (discussing the types and extent of deference among courts, tribunals and institutions involved in international arbitration).

130. *See* KRIEBAUM ET AL., *supra* note 110, at 381.

Australian treaties was also briefly suggested for governmental consideration by Australia's former Chief Justice French extra-judicially in 2015.[131] Yet there are only rare instances of requiring something akin to the exhaustion of local remedies. For example, India's Model BIT 2016 requires an investor to pursue local remedies for five years before lodging an arbitral claim.[132] Whilst this is a rather far-reaching proposal, it seems unlikely that states will reintroduce the exhaustion of local remedies (or a de-facto similar) rule any time soon, as the discussions in the United Nations Commission on International Trade Law (UNCITRAL) suggest. It has only been a marginal topic in its multilateral deliberations on ISDS reform since 2019.[133]

Doctrinally, one could think of an argument to indirectly introduce a requirement of exhausting local remedies. The argument would be that investors who do not bring lawsuits before national courts to challenge public acts contributed to the damage,[134] so the amount awarded must be reduced as far as the investor contributed. The argument is, however, unlikely to succeed if the treaty in question does not mandate an exhaustion of local remedies, because any such argument would introduce a local remedies rule through the backdoor.

Absent effective clauses preventing such proceedings, governments have applied for anti-arbitration injunctions to stop a concurrent investment arbitration. Notably, this is what Belize did in the *British Caribbean Bank v.*

131. NOTTAGE, *supra* note 27, at 364.

132. The clause is combined with a strict limitation period, hence providing for a very narrow window for lodging ISDS claims combined with many pro-host-state carve-outs (for example, regarding taxation measures and other substantive limitations on treaty claims). *See* GOV'T OF INDIA, MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, arts. 14(3)–(4) (2016), https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. *See generally* Prabhash Ranjan & Pushkar Anand, *Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?*, *in* INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA 579–611 (Julien Chaisse & Luke Nottage eds., 2018) (critically analyzing India's current Model BIT).

133. *See, e.g.*, Comm'n on Int'l Trade L., Report of Working Group III on Its Thirty-Seventh Session, ¶ 30, U.N. Doc. A/CN.9/970 (Apr. 9, 2019) (showing very limited references in UNCITRAL and concluding that requiring the exhaustion of local remedies "was a tool to be considered in reforming ISDS rather than a concern to be addressed"). Furthermore, a draft legislative guide prepared by the Secretariat mentions requiring the exhaustion of local remedies as a possible tool to include in arbitration clauses of treaties. *See* Secretariat of Comm'n on Int'l Trade L., *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Legislative Guide on Investment Dispute Prevention and Mitigation*, ¶ 40, U.N. Doc A/CN.9/WG.III/WP.228 (Jan. 19, 2023). More recently, however, there are comments by the EU and its member states. *See* Secretariat of Comm'n on Int'l Trade L., *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues*, 8, U.N. A/CN.9/WG.III/WP.2314564 (July 26, 2023) (explaining its commitments to prevent parallel proceedings as far as possible).

134. See *Draft Articles on Responsibility for States for Internationally Wrongful Acts*, art. 39, [2001] 2 Y.B. Int'l L. Comm'n 26, 29, U.N. Doc A/56/49(Vol. I)/Corr.4 (Dec. 12, 2001), but rejecting a requirement of exhausting local remedies.

Government of Belize saga.[135] However, such injunctions are traditionally only available under very stringent conditions, at least in many common law jurisdictions.[136] For example, in Belize, under the Supreme Court of Judicature Act, courts may issue anti-arbitration injunctions only if "such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process."[137] The Caribbean Court of Justice found that neither of these conditions were met in British Caribbean Banks (BCB) case which pursued domestic as well as investment proceedings against Belize.[138] The court stressed that BCB obtained many advantages from the investment proceedings (when compared to domestic proceedings).[139] Thus, it decided against granting an anti-arbitration injunction.[140] Furthermore, it observed that "there is no presumption that the pursuit of multiple proceedings is vexatious or oppressive or an abuse of process in itself."[141] As the court relied on English precedents,[142] we may assume that at least courts in common law jurisdictions remain quite unlikely to stop concurrent ISDS cases by granting anti-arbitration injunctions.

At the very least, however, amounts awarded in investment proceedings should be offset by any compensation in domestic proceedings and vice versa. This arguably follows from first principles (like even any insurance payouts to investors).[143] For example, the tribunal in *GAMI v. Mexico*—which involved a shareholder's claim against the company's expropriation—

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135. The legal battle between British Caribbean Bank and Belize was fought before investment arbitral tribunals, see Brit. Caribbean Bank Ltd. v. Gov. of Belize, Case No. 2010-18 (Perm. Ct. Arb. 2014), but also before Belizean courts, see High Court of Belize [Supreme Court], Brit. Caribbean Bank Ltd. v. Att'y Gen. of Belize & Minister of Pub. Utilities, Claim No. 597 (June 11, 2011), and supranational courts, see BCB Holdings Ltd. & Belize Bank Ltd. v. Att'y Gen. of Belize, CCJ Appeal No. CV 001 (June 25, 2013) (Caribbean).

136. However, anti-arbitration injunctions have been growing in recent years. For a detailed analysis of Anglo-Commonwealth law, see Richard Garnett, *Anti-Arbitration Injunctions: Walking the Tightrope*, 36 ARB. INT'L 347–72 (2020). Referring also to U.S. developments, see Chief Justice Andrew Bell, President of the Court of Appeal, The Rise of the Anti-Arbitration Injunction, Third Annual ADR Address of the Supreme Court of New South Wales, ¶ 1 (Oct. 15, 2020), https://www.supremecourt.nsw.gov.au/about-us/speeches/chief-justice.html.

137. Supreme Court of Judicature Act, ch. 91, § 8(a) (2011) (Belize), https://www.belizejudiciary.org/download/LAWS-of-Belize-rev2011/Laws-of-Belize-Update-2011/VOLUME%206A/Cap%2091%20Supreme%20Court%20of%20Judicature%20Act.pdf (showing the substantive laws as of December 31, 2011).

138. *BCB v. Att'y Gen. of Belize*, ¶ 49.

139. *Id.* ¶ 45.

140. *Id.* ¶ 56.

141. *Id.* ¶ 40.

142. *See, e.g.*, *id.* ¶¶ 20, 25–28, 40.

143. This is despite treaties, including those signed by Australia, typically expressing that it is no bar to ISDS for the host state to allege that the foreign investor is seeking some or all compensation through any political risks or other insurance. An example is the protracted dispute by Kingsgate under the F.T.A. with Thailand, including a political risks insurance claim settled in Australian domestic court proceedings. *See* Sirilaksana Khoman, Luke Nottage & Sakda Thanitcul, *Foreign Investment, Corruption, Investment Treaties and Arbitration in Thailand*, *in* CORRUPTION AND ILLEGALITY IN ASIAN INVESTMENT ARBITRATION 406–13 (Nobumichi Teramura, Luke Nottage, Bruno Jetin eds., 2024).

relied on the domestic decisions brought by the company which reversed some of the expropriation to dismiss the ISDS claim.[144] Yet, without any coordination mechanism, there is no guarantee that this will actually happen.[145]

IV. CONCURRENT PROCEEDINGS IN AUSTRALIA: PAST AND POTENTIAL

As mentioned in Part II, the arbitration proceedings brought by Philip Morris Asia contesting Australia's 2011 tobacco plain packaging legislation under its 1993 BIT with Hong Kong and the parent company's constitutional challenge before the High Court of Australia, arguably contributed to significant public backlash against ISDS-backed treaties and the Gillard Government's 2011–13 Trade Policy Statement (and its revival from 2022) eschewing ISDS in future agreements. Additionally, the BIT was one of Australia's earliest and was succinctly drafted in the style of the era, containing no provisions on relationships between different dispute resolution forums.[146]

By contrast, the Australia-Hong Kong BIT[147] substituted in 2019 at least requires the foreign investor or a parent on its behalf to provide a written waiver in principle to "any right to initiate or continue before any court or administrative tribunal under the laws and regulations of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach" of that new BIT's substantive commitments.[148] Even under the latter's provisions, the foreign investor can seek relief under domestic law and court procedures regarding measures taken by the host state, and if unsuccessful in whole or part claim any extra relief that might be available for substantive treaty violations through ISDS arbitration. Although such sequential claims may attract less public and political controversy than concurrent claims, as under the Philip Morris dispute initiated in 2011, they can still attract the criticism that it is unfair for foreign investors to claim greater rights than available to local investors.

144. *GAMI Invs., Inc.*, ¶ 132. On that award, see Garcia Sanchez, *supra* note 26, at 597.

145. However, the Caribbean Court of Justice found it very unlikely that the investors would get a double dip via concurrent proceedings because this "would be contrary to elementary judicial principles that would be applied by both the arbitral tribunal and the domestic court." *See BCB v. Att'y Gen. of Belize*, ¶ 47.

146. *See* Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, Austl.-H.K., Sept. 15, 1993, [1993] A.T.S. 30.

147. Investment Agreement Between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, Mar. 26, 2019, [2020] A.T.S. 5.

148. *Id.* art. 27.

Accordingly, under the scenarios of sequential but especially concurrent proceedings, what are the past or potential areas where foreign investors may seek greater relief through ISDS arbitration under Australia's investment agreements than is available through local courts under Australian domestic law?[149] If these differences are significant, there is arguably more chance of further future claims and ongoing backlash against ISDS-backed investment treaties in this country, which in turn may influence other countries (such as neighboring New Zealand, which also eschewed ISDS from late 2017).[150] This Part shows how Australian law provides narrower protections than international investment (treaty) law particularly concerning expropriation (see Part IV.A), denial of justice (see Part III.B) and substantive legitimate expectations (see Part IV.C), as has been and/or may become further highlighted even from the few disputes so far initiated by foreign investors.

A. Limited Scope Under Australian Domestic Law for Expropriation Claims

The first major difference became evident from the Philip Morris claim. In late 2012, the High Court of Australia confirmed that the federal Constitution only protects against direct, and not indirect, expropriation.[151] Philip Morris, therefore, proceeded in its claim via its Hong Kong subsidiary under the 1993 BIT, as that contained typical wording extending to both types: foreign investors were not to be "deprived of their investments nor subjected to measures having effect equivalent to such deprivation."[152] Public concern about this potential extra liability exposure persisted until the BIT claim was dismissed on jurisdictional grounds in 2015.[153] The tribunal found it an abuse of rights for the parent company to restructure. So, the Hong Kong subsidiary held the allegedly expropriated Australian trademarks when it was reasonably foreseeable that it would get into a dispute with the government over the proposed tobacco plain packaging legislation.[154]

In addition, constitutions enacted in some states within Australia lack protections against expropriation altogether, even direct expropriation.[155] State legislation can therefore not only be changed but is quite often

149. *See* NOTTAGE, *supra* note 27, 313–37.

150. Luke Nottage & Amokura Kawharu, *Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu* (Sydney Law School Legal Studies Research Paper Series No. 18/03, 2018).

151. *JT Int'l SA* [2012] HCA 43.

152. Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, *supra* note 146, art. 6.

153. Jarrod Hepburn & Luke Nottage, *A Procedural Win for Public Health Measures*, 18 J. WORLD INV. & TRADE 307 (2017).

154. *Id.* at 310–12.

155. *See*, *e.g.*, *Constitution Act 1902* (NSW) (Austl.).

criticized for providing inadequate processes and/or compensation for property owners.[156] The relatively limited scope of protection under state law explains the threat of some U.S. NuCoal shareholders claiming expropriation instead under the 2004 FTA with Australia because the New South Wales state government cancelled NuCoal's mining licenses due to a previous Labor Government minister's corruption, despite the U.S. shareholders alleging they had no notice of this illegality.[157] This possibility arose only after local court challenges and no notice of dispute ever eventuated, rather than a concurrent claim being filed under the FTA.[158] This was probably for cost reasons but also because the FTA contains no clear provision for ISDS arbitration anyway.[159]

A more serious claim potentially involving expropriation was recently filed against Australia on March 31, 2023,[160] by Zeph Investments Pte. Ltd. (Zeph)—an entity incorporated in Singapore in 2019 and controlled by Australian mining magnate and politician Clive Palmer.[161] According to its Notice of Dispute filed on October 24, 2020,[162] it holds controlling investments in Australian companies Mineralogy Pty. Ltd. and International Minerals Pty. Ltd. (collectively, Zeph Affiliates). In 2001, Zeph Affiliates entered into an agreement with the Western Australian (W.A.) state government regarding the development of iron ore resources in the Pilbara region, ratified and enacted by the state government in the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002 (W.A.).[163] However,

156. *See, e.g.*, Peter Barakate, *Compulsory Acquisition Laws and Processes Come Under Review in New South Wales*, HWL EBSWORTH LAWS. (Aug. 16, 2022), https://hwlebsworth.com.au/compulsory-acquisition-laws-and-processes-come-under-review-in-new-south-wales/; Greg Craven, *Calvary Case Grim Omen for Religious Health, Education*, AUSTRALIAN (June 10, 2023), https://www.theaustralian.com.au/inquirer/calvary-case-grim-omen-for-religious-health-education/news-story/28a9ab9eee3d62f46aadbfd81ac5bda6.

157. Amokura Kawharu & Luke Nottage, *The Curious Case of ISDS Arbitration Involving Australia and New Zealand*, 44 UNIV. W. AUSTL. L. REV. 32, 52–54 (2018).

158. *Id.*

159. *Id.*

160. *Clive Palmer-Owned Company Initiates Long-Foreshadowed Treaty Arbitration Against Australia, Asking for 200 Billion USD on Compensation*, INV. ARB. REP. (Mar. 30, 2023), https://www.iareporter.com/articles/clive-palmer-owned-company-initiates-long-foreshadowed-treaty-arbitration-against-australia-asking-for-200-billion-usd-in-compensation/.

161. *See also* Luke Nottage, *Clive Palmer Versus (Western) Australia. He Could Survive a High Court Loss if His Company is Found to Be "Foreign,"* CONVERSATION (Sept. 9, 2020), https://theconversation.com/clive-palmer-versus-western-australia-he-could-survive-a-high-court-loss-if-his-company-is-found-to-be-foreign-145334; Donna Ross, *Up in Smoke: Will Clive Palmer's Singapore Company Be Denied Standing in Its ISDS Arbitration Against Australia?*, DONNA ROSS DISP. RESOL. (July 8, 2021), https://www.donnarossdisputeresolution.com/2021/07/08/up-in-smoke-will-clive-palmers-singapore-company-be-denied-standing-in-its-isds-arbitration-against-australia/.

162. *See* Jarrod Hepburn, *Notice Of Dispute Surfaces in Potential Treaty Claim Against Australia, Following Domestic Court Loss for Claimant's Owner*, INV. ARB. REP. (Nov. 11, 2021) [hereinafter *Notice of Dispute Surfaces*], https://www.iareporter.com/articles/notice-of-dispute-surfaces-in-potential-treaty-claim-against-australia-following-domestic-court-loss-for-claimants-owner/ (on file with the Virginia Journal of International Law Association).

163. *Iron Ore Processing (Mineralogy Pty. Ldt.) Agreement Act 2002* (W. Austl.) sch 1.

Zeph's Notice alleged that its rights under the 2003 Singapore-Australia FTA were violated due to enactment of the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020 (W.A.).[164]

As alleged in that Notice, under the original Agreement, Mineralogy could submit mining project proposals to W.A., which could respond in various ways but not outright reject such proposals.[165] However, a later elected Labor state government refused to consider a 2012 proposal, arguing it did not fall within the scope of the Agreement.[166] Zeph Affiliates initiated domestic arbitration under the agreement, and in 2014 the sole arbitrator (retired High Court judge, Michael McHugh) ruled that they were entitled to damages for breach.[167] W.A. then imposed 46 conditions on the proposal. In a second arbitration, Zeph Affiliates argued the conditions were so unreasonable they constituted a second breach.[168] In 2019, the same arbitrator confirmed Zeph Affiliates' rights to pursue damages.[169] In February 2020, the Supreme Court of W.A. refused the government's application to set aside these findings.[170] Zeph Affiliates then filed a third arbitration over damages, and hearings were set for November 2020.[171] However, the October 2020 notice of dispute alleged that by June 2020 the government had done the following:

> [The] government had already begun secretly drafting the legislation to "derail" the third arbitration and to "escape the rulings" in the first two arbitrations. In the claimant's view, this "directly contradicted" WA's commitments made in July and August 2020 in appointing the arbitrator for the third arbitration, as well as the appointment of a mediator as directed by the arbitrator.
>
> The new legislation was introduced to the WA Parliament on August 11, 2020, and it was passed and given royal assent two days later, on August 13. (While some parliamentarians had sought to send the legislation to a scrutiny committee, the state's Attorney-General rejected this, contending that there was "too much at risk" to wait for "namby-pamby inquiries".)
>
> According to Zeph, WA authorities "left no doubt in their public statements about the purposes of the 2020 Amendment Act: to terminate and thwart the arbitral proceedings brought by the

164. *See Notice of Dispute Surfaces*, *supra* note 162.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *The State of W Australia v Mineralogy Pty Ltd* [2020] WASC 58 (Austl.).
171. *See Notice of Dispute Surfaces*, *supra* note 162.

> Zeph Affiliates and to escape any liability in connection with" the 2001 agreement.
>
> The notice of dispute recounts the consequences of the 2020 Act, including that the legislation declares the two domestic arbitration awards to be of no effect, terminates the third arbitration, and requires the Zeph affiliates to indemnify WA against any loss connected with the 2012 proposal (including legal costs of any person "in connection with legal proceedings connected with" the 2012 proposal).
>
> According to the notice of dispute, "[b]y any fair and objective assessment, this conduct on the part of the Government of Western Australia shocks the conscience" and "represents an unmitigated departure . . . from the rule of law."[172]

The notice ends by briefly alleging violations of the Singapore-Australia FTA's[173] Chapter 8 provisions on national treatment, most favored nation treatment, fair and equitable treatment, and full protection and security. It did not specifically mention direct or indirect expropriation. Yet, as another commentator noted:

> The Amending Act is careful to preserve the Palmer group's underlying rights, such as the tenements and the Mining Lease referred to in the Agreement, as well as the right to submit further proposals under the State Agreement and to have such proposals dealt with according to the Agreement's terms. It is only Mineralogy's rights in relation to the "disputed matters", including its contractual rights embodied in the Australian arbitral awards of 2014 and 2019, that are extinguished.
>
> These facts raise a conceptual question of whether specific contractual rights can be "expropriated" independently of the wider investment to which they pertain. On one view, there has been no expropriation of Zeph's investment while Mineralogy retains the underlying mining rights and the ability to bring proposals to develop those mining rights under the State Agreement. However, in *Saipem v Bangladesh*, an ISDS tribunal characterised an arbitral award arising from a contractual dispute between an investor and a state entity as an "investment" that is, itself, capable of expropriation. On this view, the Australian arbitral awards of 2014 and 2019 are investments and it follows that the Amending Act's extinguishment of those awards is an expropriation that requires compensation. There is a further question as to whether a tribunal

172. *Id.*
173. *Id.*

> constituted under the FTA would follow *Saipem*, as the FTA specifically excludes judgments in judicial proceedings from the scope of "investments" protected by Chapter 8. It could be argued, by analogy, that this also excludes arbitral awards from being characterised as freestanding investments capable of expropriation.[174]

This question is certainly debatable, with ISDS arbitration tribunals ruling in various ways.[175] Interestingly, the Notice of Arbitration filed in March 2023 is not yet public but reportedly based instead on the ASEAN-Australia-New Zealand FTA (AANZFTA),[176] under which consultations had also been presumably sought.[177] Yet, that FTA has similar provisions regarding expropriation.[178]

In addition, the Attorney-General's Department of Australia revealed to Parliament committee hearings in August 2023 that Zeph initiated a second ISDS claim concerning a coal mining project after it was refused approval by the Queensland state minister.[179] This was reportedly done by "notice of dispute under [AANZFTA] on February 21, 2023, followed by a formal notice of arbitration on May 29, 2023," seeking around twenty-seven

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174. Jonathan Bonnitcha, *Can Clive Palmer Use Investor-State Dispute Settlement to Get What the High Court Wouldn't Give Him?*, AUSTRALIAN PUB. L. (Dec. 1, 2021), https://www.auspublaw.org/blog/2021/12/can-clive-palmer-use-investor-state-dispute-settlement-to-get-what-the-high-court-wouldnt-give-him.

175. For example, the tribunal in *White Industries Austl. Ltd. v. Republic of India*, Final Award (UNCITRAL 2011), under the (now terminated) BIT with Australia, ruled in 2011 that a commercial arbitration award bogged down in Indian enforcement proceedings did not constitute an expropriated investment. *See generally* Andrea K. Bjorklund, *The Use of Investor-State Arbitration as a De Facto Enforcement Mechanism for Arbitral Awards*, *in* 37 THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 97, 105–06 (2016) (discussing how some instances of national courts not enforcing international commercial arbitration awards have generated ISDS claims).

176. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Feb. 27, 2009, [2010] A.T.S. 1 [hereinafter AANZFTA]; *see also* Brad Thompson, *Clive Palmer Launches $300B Claim Against Australia*, FIN. REV. (Mar. 20, 2023), https://www.afr.com/companies/mining/clive-palmer-launches-300b-claim-against-australia-20230330-p5cwlv.

177. *See Singaporean Investor Files Notice of Intent in Long-Running Mining Dispute with Australia*, INV. ARB. REP. (Nov. 22, 2022), https://www.iareporter.com/articles/singaporean-investor-files-notice-of-intent-in-long-running-mining-dispute-with-australia/; *[Updated] Clive Palmer-Owned Company Initiates Long-Foreshadowed Treaty Arbitration Against Australia, Asking for 200 Billion USD in Compensation*, INV. ARB. REP. (Mar. 20, 2023), https://www.iareporter.com/articles/clive-palmer-owned-company-initiates-long-foreshadowed-treaty-arbitration-against-australia-asking-for-200-billion-usd-in-compensation/.

178. AANZFTA, *supra* note 176, art. 9.

179. *See* Lisa Bohmer, *Clive Palmer-Owned Company Files Second Treaty Claim Against Australia, This Time over Coal Mining Project*, INV. ARB. REP. (July 11, 2023), https://www.iareporter.com/articles/clive-palmer-owned-company-files-second-treaty-claim-against-australia-this-time-over-coal-mining-project/. The Permanent Court of Arbitration now serves as registry for this case, also under the UNCITRAL Arbitration Rules, and its Secretary-General rejected a challenge to Zeph's nominated arbitrator (Dr. Charles Poncet) on September 26, 2023. *Zeph Invs. Pte. Ltd. v. Commonwealth*, Case No. 2023-40 (Perm. Ct. Arb. 2023).

billion U.S. dollars in compensation.[180] This too was a case of sequential rather than concurrent proceedings. The treaty claim was notified after a November 23, 2022, judgment from the Queensland's Land Court recommended that the Minister refuse approval. An appeal from that judgment was reportedly withdrawn in early 2023.[181] In parallel, regarding this same project in Queensland, Zeph filed a notice of intention to commence arbitration based on SAFTA on October 20, 2023.[182] This third ISDS claim notice invokes that treaty's provisions on expropriation (including the Annex on indirect expropriation), FET (including alleged bias of the presiding judge of the Land Court), and non-discrimination provisions.[183]

Returning to Zeph's first ISDS claim concerning the W.A. state government measures against the Balmoral South project, the comparatively narrow scope of protections against (especially indirect) expropriation under Australian domestic law is evident from the fact that an earlier constitutional challenge by Palmer and Mineralogy did not even allege expropriation.[184] Instead, the High Court of Australia rejected Zeph's claims that the 2020 Amendment Act:

(i) did not follow the process set out in the original Agreement (finding the process did not apply to the sovereign W.A. parliament);
(ii) violated other state laws as the two awards had been registered in the Queensland Supreme Court (finding such laws permit awards to be set aside if invalid in the state where awards were made);
(iii) violated the separation of powers (finding that the Act did not interfere with court integrity and the W.A. government

180. Bohmer, *supra* note 179.

181. *See* Erik Brouwer, *Mining Company Owned by Billionaire Clive Palmer Submits SAFTA Notice of Intent to Australia, Raising Spectre of Third Treaty Arbitration Between the Parties; Document Sheds Light on Pending Arbitration over Coal Mine Project*, INV. ARB. REP. (Nov. 7, 2023), https://www.iareporter.com/articles/mining-company-owned-by-billionaire-clive-palmer-submits-safta-notice-of-intent-to-australia-raising-spectre-of-third-treaty-arbitration-between-the-parties-document-sheds-light-on-pending-arbitrati.

182. *Id.* As the second AANZFTA claim's notice of intention or commencement of arbitration is not public at the time of writing, it is unclear if it invokes causes of action substantially different to those made public in Zeph's third claim brought instead under SAFTA.

183. *See id.*; Steven Long, *Who Knew Queensland's Richest Man is a Foreign Investor?*, AUSTL. INST. (Nov. 24, 2023), https://australiainstitute.org.au/post/who-knew-queenslands-richest-man-is-a-foreign-investor; AUSTRALIAN GOV'T ATT'Y-GEN.'S DEP'T, NOTICE OF INTENTION TO COMMENCE ARBITRATION—ZEPH INVESTMENTS (Oct. 20, 2023), https://www.ag.gov.au/international-relations/publications/notice-intention-commence-arbitration-zeph-investments. The notice further objects to the Australian government's attempt to deny benefits of the treaty to Zeph based on Article 8, arguing that Zeph does have 'substantial business activities' in Singapore. *Id.* ¶ 3.6.

184. *Mineralogy Pty Ltd v W Australia* [2021] HCA 30 (Austl.); *Palmer v W Australia* [2021] HCA 31 (Austl.).

did not exercise judicial power—as elaborated in Part III.2); and

(iv) offended the rule of law (finding a lack of specificity, even though the Act may have changed legal rights).[185]

B. Narrower Scope for Alleging Denial of Justice

Denial of justice is the second area of potential difference between protection for investors under Australian domestic and international investment law, which could trigger concurrent or sequential claims before domestic and international tribunals. Australia's federal and state legislatures have sometimes attempted to restrict access to judicial review through "privative" clauses, which purport to remove the jurisdiction of federal or state courts. However, the High Court of Australia has placed constitutional limits on privative clauses, albeit regarding (in)action by the executive branch of government. In *Plaintiff S157*,[186] the High Court held that privative clauses cannot remove the High Court's jurisdiction to grant relief under § 75(v) of the Constitution for "jurisdictional errors" made by federal decision-makers. The High Court then extended this reasoning to the state level, holding that a state legislature cannot deprive a State Supreme Court of its inherent "supervisory" jurisdiction to grant relief for "jurisdictional errors" made by state decision-makers.[187] Thus, judicial review is always available when a federal or state decision-maker makes a "jurisdictional error," and privative clauses purporting to remove such review are invalid.

The High Court has declared that jurisdictional error occurs when the decision-maker "misapprehends the limits of its functions and powers."[188] Case law indicates that a wide range of errors may qualify as jurisdictional errors, including failure to observe procedural fairness,[189] failure to take into account relevant matters, taking irrelevant matters into account,[190] failure to abide by the rules of evidence,[191] and misinterpretation of statutes.[192] Still,

185. Murray Wesson & Ian Murray, *Explainer: Why Did the High Court Rule Against Clive Palmer and What Does the Judgment Mean?*, CONVERSATION (Oct. 13, 2021), https://theconversation.com/explainer-why-did-the-high-court-rule-against-clive-palmer-and-what-does-the-judgment-mean-169633.

186. *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476 (Austl.); *see also* Caron Beaton-Wells, *Judicial Review of Migration Decisions: Life After* S157, 33 FED. L. REV. 141 (2005).

187. *Kirk v Indus Rels Comm'n; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (Austl.).

188. *Id.* at 74–76.

189. *Re Refugee Rev Tribunal; Ex parte Aala* [2000] 204 CLR 82, ¶ 58 (Austl.).

190. *Minister for Immigr & Multicultural Affs v Yusuf* [2001] 206 CLR 323, ¶ 41 (Austl.).

191. *Kirk*, [2010] HCA 1, at 76.

192. An interesting question also arises in situations where the executive decision-maker has misinterpreted or incorrectly applied a statutory provision. In *Project Blue Sky Inc v Australian Broad Auth*

much uncertainty remains about the scope of jurisdictional error. Some judges[193] have argued that the distinction between "jurisdictional" and "non-jurisdictional" error should be abolished, as has been done in England, so that all errors are in principle reviewable. However, given the wide range of errors that Australian courts have classified as "jurisdictional," the practical difference between the Australian and English positions may be small.[194] The latter view also suggested that there may not be much difference between Australian domestic law invalidating privative clauses and the protection against denial of justice (typically encompassed by fair and equitable treatment) available under international investment (treaty),[195] regarding challenges to executive (in)action.[196]

However, the constitutional challenge brought by Palmer and his Mineralogy subsidiary, dismissed in 2021 by the High Court of Australia, did not allege denial of justice even though W.A.'s Amending Act in 2020 terminates and prevents future court proceedings (§ 11) and prevents any appeal or review including the application of natural justice principles (§ 12) related to the dispute, as well as requests under freedom of information legislation (§ 14).[197] The Act further provides for indemnities (§§ 14–15) that are triggered if the W.A. government is required to provide benefits to the federal government—presumably anticipating that the latter might have to pay out on an ISDS arbitration award, then seek reimbursement from W.A.[198]

[1998] 194 CLR 355 (Austl.), the High Court of Australia held that the Authority had set a local content standard violating national treatment obligations under Australia's F.T.A. with New Zealand (directly incorporated into the relevant Australian legislation), but that such action was not retrospectively invalid but only prospectively unlawful (although an applicant might then be able to obtain an injunction to prevent future errors). The test applied, to determine the differing remedial consequences, was an analysis of the purposes of the relevant legislation, including its language, subject-matter and objects, and consequences for the parties. *See* PETER CANE & LEIGHTON MCDONALD, PRINCIPLES OF ADMINISTRATIVE LAW 90–92 (2d ed. 2013). Relevantly, such prospectively unlawful errors are not jurisdictional errors (despite some remedial consequences), so a privative clause preventing judicial review of such errors could still be effective.

193. *See, e.g.*, Mark Leeming, *The Riddle of Jurisdictional Error*, 38 AUSTRALIAN BAR REV. 139 (2014).

194. James Spigelman, Chief Justice of New South Wales, Keynote Address at the AGS Administrative Law Symposium: Commonwealth and New South Wales, The Centrality of Jurisdictional Error (Mar. 25, 2010).

195. *See generally* Marc Jacob & Stephen W. Schill, *Fair and Equitable Treatment: Content, Practice, Method*, *in* INTERNATIONAL INVESTMENT LAW: A HANDBOOK 700, 722–23 (Marc Bungenberg et al. eds., 2015) (explaining how treaties and tribunals have defined and developed this concept). Compare the privative clause in § 11 of Abitibi-Consolidated Rights and Assets Act, an Act passed by the province of Newfoundland, outlined in the Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of the North American Free Trade Agreement. AbitibiBowater Inc. v. Gov't of Can., ICSID Case No. UNCT/10/1, Notice of Intent (Apr. 29, 2009). The federal government settled the claim the next year. Bertrand Marotte, *Ottawa Pays AbitibiBowater $130-Million for Expropriation* (Aug. 24, 2010), http://www.theglobeandmail.com/report-on-business/ottawa-pays-abitibibowater-130-million-for-expropriation/article1378193/.

196. We are grateful to Associate Professor Rayner Thwaites for elucidating these points for us.

197. *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020* (WA) (Austl.).

198. *Id.*

Palmer and his Mineralogy subsidiary presumably did not allege denial of justice in the High Court because privative clauses in §§ 11–12 are premised on *executive* decision-making, and Palmer was not seeking any further judicial review of such action. Rather, he was objecting to the W.A. legislature taking away his substantive rights as well as access to the courts. The problem is that, in deference to parliamentary sovereignty, Australia's Constitution does not prevent *legislatures* taking away rights to access courts, even when targeting a particular individual (and associates)—unlike international investment (treaty) law.

Given this lacuna under the Constitution, instead (as mentioned in Part IV.A) Palmer argued that a state parliament cannot impair the institutional integrity of state courts, nor usurp the judicial power of those courts for itself. The former is a well-established rule of constitutional law, whereas the latter would have required some innovation. This overall objection was directed at §§ 9(1)–(2) of the 2021 Amending Act, declaring that past proposals to develop the project had no contractual or other legal effect, and to §§ 10(4)–(6) declaring that contrary arbitral awards had no effect, as well as § 10(7) declaring that the arbitration agreement to the 2019 award was also invalid.[199] But the High Court did not need to decide this point because it concluded that the legislation did not interfere with the courts at all.[200] It relied on a long line of Australian case law distinguishing between legislation that determines substantive rights and that which interferes with the functions of a court.[201] As noted in the main judgment: "[T]he substantive operation and effect of each of § 9(1) and § 9(2) and § 10(4) to 10(7) of the State Act goes no further than to ascribe new legal consequences to past events and thereby to alter substantive rights."[202] Indeed, in his concurring judgment, Justice James Edelman added that "in this context the ad hominem aspect of the law served only the legislative function of focusing upon the particular rights to be extinguished"—bolstering the conclusion that this was not a law directed at the courts.[203]

Despite this adverse judgment rendered on October 13, 2021, in late 2022 Mineralogy filed a claim in the Federal Court arguing that the W.A. Amending Act's provisions on indemnities even prevent them from proceeding with ISDS arbitration, but this claim was discontinued.[204] This

199. *Mineralogy Pty Ltd v W Australia* [2021] HCA 30 (Austl.).

200. *Id.*

201. *Id.*

202. *Id.* ¶ 84.

203. *Id.* ¶ 159. We are grateful to Professor Lisa Burton Crawford for elucidating these points for us.

204. *See* Vladislav Djanic, *20 Billion USD Mining Dispute with Australia Escalates Further, as Company Owned by Local Politician Brings Court Case Claiming It Is Being Prevented from Initiating ICSID*, INV. ARB. REP. (Sept. 6, 2022), https://www.iareporter.com/articles/20-billion-usd-mining-dispute-with-

may be because the tenor of the High Court decision was unfavorable, or because the claim was considered premature. It might be revived if and when the W.A. government invokes the Act's indemnity provisions against Palmer and his affiliates now that the ISDS arbitration was commenced from March 31, 2023.

C. Narrower Scope for Claiming Legitimate Expectations

The third area where Australian domestic law is less generous to investors than investment treaties, thus potentially triggering concurrent or subsequent ISDS arbitrations, concerns legitimate expectations by investors. Courts in administrative law matters have been reluctant to expand protections for legitimate expectations with respect to matters of substance, as opposed to procedure.[205] This is partly due to the constitutional backdrop and marks a departure from English public law, which has recently allowed for the protection of some types of substantive legitimate expectations.[206] Yet international investment treaty law, mainly through a general "fair and equitable treatment" provision (like that stated in Australia's treaties, including AANZFTA Article 6),[207] protects such expectations especially when derived from (certain types of) contractual commitments or (quite specific, high-level) official representations attributable to the host state.[208]

This difference might have become relevant if a U.S. company (AFR) had again proceeded with a Notice of Dispute lodged against Australia under the FTA with the United States.[209] In addition to alleging denial of justice in Australian courts, the claimant argued that the Australian domestic law on secured transactions—affirmed by adverse domestic court rulings–was unexpectedly different from the U.S. law that had inspired it.[210] As with the dispute involving some disgruntled U.S. shareholders in Nucoal

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australia-escalates-further-as-company-owned-by-local-politician-brings-court-case-claiming-it-is-being-prevented-from-initiating-icsid-arbitration/.

205. Barakate, *supra* note 156; Craven, *supra* note 156.

206. Matthew Groves, *Substantive Legitimate Expectations in Australian Administrative Law*, 32 MELB. U. L. REV. 470, 475–77 (2008).

207. AANZFTA, *supra* note 176, art. 6.

208. Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88, 106 (2013) (contrasting, for example, representations allegedly made by Indian officials to White Industries executives, that "it was safe for Claimant to invest in India and that the Indian legal system was, to all intents and purposes, the same as the Australian legal system"). More debatable is whether and how this might extend to general expectations as to stability, predictability, or consistency in the host state's environment for foreign investment. *See also* Jacob & Schill, *supra* note 195, at 723–31. Distinct expectations (arising, for example, from specific official representations) may also lead to findings of indirect expropriation.

209. *[Updated] Clive Palmer-Owned Company Initiates Long-Foreshadowed Treaty Arbitration Against Australia*, *supra* note 177.

210. *Id.*

mentioned in Part III.1, however, this ambitious claim did not proceed to ISDS arbitration filing.[211]

The Zeph dispute over the W.A. legislation, as well as its second dispute over rejection of its Queensland coal project, may also end up highlighting the comparatively narrow scope of Australian domestic law regarding legitimate expectations compared to international investment law. As one commentator noted in response to the notice of dispute under the Singapore-Australia FTA filed in October 2020 regarding the W.A. dispute:

> The greater challenge for Australia is the "fair and equitable treatment" standard contained in Article 6 of Chapter 8 of the FTA. Although ISDS tribunals' interpretation and application of this standard has been inconsistent, the standard is often understood to protect investors from "arbitrary" conduct and conduct that breaches investors' "legitimate expectations."
>
> The decision of an ISDS tribunal in *Tethyan Copper v. Pakistan* provides some guidance as to how a tribunal might apply these vague standards in the present case. *Tethyan Copper* concerned the Pakistani province of Balochistan's refusal to issue a mining lease required for an Australian mining company to proceed with a proposed gold mine. The underlying contractual Agreement between the investor and the province stipulated that if the investor: elects to develop a mine then, subject only to compliance with routine Government requirements, it shall be entitled to convert the relevant Prospecting License(s) held by it into Mining Licenses . . . .
>
> The tribunal approached the issue through the rubric of the investor's legitimate expectations. It concluded that the refusal to issue the mining lease was not justified under Balochistan's mining regulations and that assurances from government officials reinforced the investor's legitimate expectations that the mining lease would be granted. On these grounds, the tribunal held that Pakistan had breached the investor's legitimate expectations that the grant of the mining lease would be a routine matter and, therefore, the fair and equitable treatment obligation in the treaty.
>
> An additional difficulty for Australia is that ISDS tribunals have been especially skeptical of retroactive legislation designed to reverse the outcome of earlier adjudicative proceedings.[212]

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211. Nottage & Kawharu, *supra* note 150, at 28–30.

212. Bonnitcha, *supra* note 174 (referring to the *Vodafone v India* case). The Indian government subsequently enacted legislation to remove retroactivity. *See* Prabhash Ranjan, *Corruption and Investment Treaty Arbitration in India*, *in* CORRUPTION AND ILLEGALITY IN ASIAN INVESTMENT ARBITRATION 236 n.13 (Nobumichi Teramura et al. eds., 2024).

It remains to be seen whether and how such arguments are developed in the Notice of Arbitration filed by Zeph regarding the W.A. dispute in March 2023, as well as the Queensland dispute filed in May 2023 (under AANZFTA), neither of which is publicly available as of the time of writing.

V. CONCURRENT PROCEEDINGS IN GERMANY

While it is true that the *Vattenfall* saga similarly puts a spotlight on differential treatment between foreign and domestic investors, this hardly accounts for all the public debate that the case sparked. As mentioned in Part II, the case concerned Germany's exit from nuclear power. This topic has been looming large for decades and, around 2011, there was a strong feeling in Germany that nuclear power plants had to be shut down.[213] So naturally, any legal action directed against the end of nuclear power in Germany was due to create public outrage. Yet pursuing two legal avenues added insult to injury because it brought to public attention what before only very few experts knew: foreign investors may enjoy a higher level of protection than domestic ones.[214] What is worse, there was the widely shared opinion that there is no good reason for preferential treatment accorded to foreign investors.[215]

Nonetheless, whether foreign investors really enjoy a higher standard of protection (apart from the obvious right to initiate arbitral proceedings unavailable for domestic investors), deserves a closer look. There are differences in the basis of protection (Part V.A), the treatment of indirect expropriations (Part V.B), the level of compensation (Part V.C) and the procedures available for aggrieved investors (Part V.D).

A. The Basis for Protecting Investors

From the *Vattenfall* dispute, a major difference between German law and international investment law stands out, which to some extent explains

213. *See e.g.*, Renate Köcher, *Atemberaubende Wende*, INSTITUT FÜR DEMOSKOPIE ALLENSBACH (Apr. 20, 2011), https://www.ifd-allensbach.de/fileadmin/kurzberichte_dokumentationen/April11_Fukushima.pdf. According to their data, the percentage of outright opponents of nuclear energy changed from 17% in 2010 to 42% in Western Germany in 2011 (in Eastern Germany it is at 29% without indicating a figure for 2010). *Id.* at 3.

214. *See* Kohlenberg et al., *supra* note 52.

215. This sentiment is reflected in the results of the European Commission's public consultations on the EU-U.S. trade talks which revealed a strong sentiment against ISDS. *See Commission Report on the Online Consultation on Investment Protection and Investor-to-State Dispute Settlement in the Transatlantic Trade and Investment Partnership Agreement* (Jan. 13, 2015), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/memo_15_3202/MEMO_15_3202_EN.pdf. More than twenty-one percent of received answers came from Germany and thus, the consultations, to some extent, offer insights into then-prevailing views. *Id.* at 5. Notably, 145,000 of the nearly 150,000 answers were submitted via "on-line platforms containing pre-defined answers which respondents could adhere to." *Id.* at 2.

why the corporate group pursued both claims in parallel. Notably, most causes of action relating to investments are rooted in the constitutional guarantee of private property.[216] Thus, only persons who can invoke basic rights may bring such a claim. As basic rights mostly (if not almost exclusively) protect private persons, State Owned Entities (SOE) may find it difficult to invoke them.[217] Vattenfall, being such an SOE, must have feared that all its claims before German courts would remain without success.

Eventually, the FCC in *Vattenfall* found that the company was protected under Article 14 of Basic Law, albeit only due to the influence of EU law.[218] As such, SOEs from outside the EU may not enjoy protection. Under international investment law, the protection afforded to SOEs varies, but many treaties protect them as well.[219] Indeed, this difference between German law and international investment law was reportedly one of the reasons that prompted Vattenfall to resort to ICSID arbitration in the first place.[220] While the FCC does not even mention the concurrent proceedings before an ICSID tribunal, the court's willingness to accept Vattenfall as a bearer of basic rights might have been triggered by these proceedings. As they were no doubt aware of the ICSID case, they also knew that Vattenfall would eventually be able to challenge the phase-out. This perspective might have drawn the court towards its conclusion.

B. Indirect Expropriation[221]

It would be too simplistic to just claim that German law does not know the concept of indirect expropriation, while international investment law

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216. Grundgesetz [GG] [Basic Law], art. 14, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

217. German SOEs may (generally) not invoke basic rights. *See* 143 BVerfGE 246, ¶ 190. However, some (rather obscure) causes of action are also available to state-owned companies (and even the State itself) because they are rooted in customary law. This concerns claims for compensation for "enteignende" and "enteignungsgleiche Eingriffe," i.e., unforeseen infringements of property rights resulting from legal or illegal state acts which unduly burden the owner. *See* Hans-Jürgen Papier & Foroud Shirvani, *Kommentierung von Art. 14*, *in* GRUNDGESETZ ¶ 806 (Dürig et al. eds., 2023); Otto Depenheuer & Judith Froese, *Kommentierung von Art. 14 GG*, *in* GRUNDGESETZ ¶ 503 (Mangoldt et al. eds., 2018).

218. 143 BVerfGE 246, ¶¶ 196–201. In addition, the FCC took into account the case law of the ECtHR, which also recognized foreign SOEs as a potential bearer of human rights. *See id.* ¶ 202.

219. KRIEBAUM ET AL., *supra* note 110, at 58.

220. *See* Kai Schöneberg, *Ein Sieger steht schon fest*, DIE TAGESZEITUNG (Oct. 10, 2016), https://taz.de/Verfahren-Vattenfall-vs-Deutschland/!5343570.

221. *See* Markus Perkams, *The Concept of Indirect Expropriation in Comparative Public Law—Searching for Light in the Dark*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 107, 130–37 (Stephan W. Schill ed., 2010).

compensates for it. Yet, both treat such phenomena quite differently.[222] Because German law does not have such a concept itself, a functional approach in comparing the two is in order.[223] By referring to indirect compensation, international investment law usually means all those public acts "that affect the substance of the investment but do not transfer its title to the state or to a third party."[224]

The rationale underlying the protection of property in German constitutional law provides the ideal starting point to understand the treatment of such phenomena under German law. In principle, German law aims at protecting the substance of the property and not its value.[225] In line with this focus, compensating for infringements of property rights is not the primary concern of German law, but only the measure of last resort.[226] This general stance is the direct result of the FCC's seminal 1981 decision, the so-called "Nassauskiesungsbeschluss" ("wet gravel extraction decision").[227] The court introduced two distinct, but interrelated doctrinal concepts: the primacy of primary remedies and a formal definition of expropriation (which excludes de facto or indirect expropriations).

The court argued that property owners affected by public acts other than a direct expropriation may not accept these consequences and just sue for compensation.[228] This stance reflects the so-called primacy of primary remedies. While domestic legal systems know multiple tools to limit the liability of the state, German law emphasizes the primacy of primary remedies ("Vorrang des Primärrechtsschutzes"),[229] i.e. the primacy of legal actions aimed at setting aside the public act infringing private rights. Accordingly, an investor whose permit for a power plant has been illegally revoked cannot just claim compensation, but first has to challenge the act revoking the permit. Only if this action fails can the investor try to obtain

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222. *See* MARKUS KRAJEWSKI, ANMERKUNGEN ZUM GUTACHTEN VON DR. STEPHAN SCHILL ZU DEN AUSWIRKUNGEN DER BESTIMMUNGEN ZUM INVESTITIONSSCHUTZ UND ZU DEN INVESTOR-STAAT-SCHIEDSVERFAHREN IM ENTWURF DES CETA AUF DEN HANDLUNGSSPIELRAUM DES GESETZGEBERS VOM 22.9.2014, at 4 (Global 2000, 2014), https://www.global2000.at/sites/global/files/Krajewski_Zusatzerklaerungen_Investorenschutz.PDF.

223. For a seminal statement of the functionalist approach, eschewing conceptual labels to understand what different legal orders are aiming to achieve through them, see KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34–36 (3d ed. 1998).

224. Perkams, *supra* note 221, at 110.

225. Depenheuer & Froese, *supra* note 217, ¶ 87.

226. *Id.* ¶ 88.

227. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 15, 1981, 1 BvL 77/78, 58 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 300 (Ger.). The rather peculiar name of the case is due to the gravel extraction plant which was at the heart of the case.

228. *Id.* at 324.

229. On terminology (and the distinction between primary and secondary remedies), see Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 721, 724 (Stephen W. Schill ed., 2010).

damages. If an aggrieved person does not challenge the public act beforehand, any claims for damages will generally be excluded on the basis of contributory fault.[230] This doctrinal concept is one of the trademarks of German state liability rules.[231] In contrast, the right to sue for damages directly (without being obliged to pursue or even exhaust local remedies) is often said to be one of the trademarks of international investment law.[232] Thus, international investment law offers a seemingly quicker avenue to obtain redress. Indeed, *Vattenfall* suggested that time was a crucial issue for pursuing an investment arbitration concurrently.[233] However, Puig noted that especially claims against indirect expropriations could be affected if the investor fails to exhaust local remedies: failing to mitigate the impact of the regulatory measure could mean that the measure is not attributable to the host state.[234]

Additionally, the German Federal Constitutional Court introduced a sharp distinction between direct expropriations, that is the direct taking of constitutionally protected property for public tasks to acquire a good,[235] and acts defining "content and limits" of property ("*Inhalts-und Schrankenbestimmungen*").[236] The latter have to be proportionate and, notably, may (exceptionally) require compensation in order to ensure their compatibility with the constitutional guarantee of property.[237] Consequently, an investor cannot claim compensation against an act de facto depriving them of the asset (e.g., in Vattenfall's case, using the nuclear

230. HARTMUT MAURER & CHRISTIAN WALDHOFF, ALLGEMEINES VERWALTUNGSRECHT, § 27, ¶ 99 (2020).

231. The rules on state liability in Germany are fragmented and build heavily on case law. So, different from other areas of German law, there is no codification of all the rules. While some are contained in the Civil Code (read in conjunction with the Basic Law), some are codified by the German states (Länder), and yet others are customarily recognized or derived from (constitutional) principles. For an overview in English, see Ulrich Magnus, *The Liability of Public Authorities in Germany*, *in* THE LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 177 (Ken Oliphant ed., 2017).

232. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 26, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; *see also* KRIEBAUM ET AL., *supra* note 110, at 381. Note the requirement to pursue local remedies before initiating arbitration in some German BITs. For examples, see *supra* notes 100–104.

233. Páez-Salgado, *supra* note 49.

234. Puig, *supra* note 5, at 221.

235. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 16, 2000, 1 BvR 242/91, 1 BvR 315/99, 102 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, 15; *see also* Perkams, *supra* note 221, at 134. As a consequence, the nuclear phase-out in Germany did not amount to an expropriation of the claimants. *See* 143 BVerfGE 246, ¶ 190.

236. *See* Grundgesetz [GG] [Basic Law], art. 14(1).

237. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 2, 1999, 1 BvL 7/91, 100 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 226, 244. For an English translation of the relevant passage, see ANDREAS VOßKUHLE & CHRISTIAN BUMKE, GERMAN CONSTITUTIONAL LAW 291 (2019).

power plants).[238] Instead, the investor must first challenge the act (for Vattenfall, the law providing for the phase-out). In this proceeding, the FCC may find that the act complies with the right to property only if the act also grants some compensation. Importantly, this is not a given and the regulation may be held a proportionate definition of the content and limits of private property, without triggering any compensation requirement. In any case, compensation must be provided for in the parliamentary act.[239] So, even if the FCC finds that a rule is constitutional only if it compensates property owners, it is not the court's duty to order this compensation. In line with these principles, the FCC indeed found in *Vattenfall* that the phase-out needed a provision for compensation in order to comply with Art. 14(1) Basic Law, which therefore had to be enacted by the legislature.[240] Thus, in comparison to international investment law, German law would provide no direct remedy against indirect expropriations. Rather, an investor might need to pursue two cases against the same measure: firstly, against the actual act and secondly, to gain compensation provided by law. Concomitantly, German law reserves the decision on compensation largely to the legislature, while international investment law grants tribunals the competence to decide on the if and the amount of compensation.[241]

C. The Level of Compensation

The levels of compensation also vary greatly between international investment law and German law. Under international investment law, investors are equally protected against indirect and direct expropriations.[242] Thus, compensation is usually based on the "fair market value" of the expropriated investment.[243] Yet German law is only guided by the market value to establish the amount of compensation due, and therefore also allows compensation below the market value.[244] Importantly, the legislature has to balance the owner's interests with other interests affected for

238. Yet there are the additional possibilities of claiming compensation on the basis of an expropriation-like intervention ("enteignungsgleicher Eingriff") and an expropriating intervention ("enteignender Eingriff"). Both causes of action are based on the case law of the Federal Supreme Court. While the former applies to any kind of illegal infringement of private property (subject, of course, to the primacy of primary remedies), the latter applies to unforeseeable effects on private property of (otherwise legal) public acts. *See* MAURER & WALDHOFF, *supra* note 230, § 27, 793–94, ¶ 109 (2020).

239. *See* VOßKUHLE & BUMKE, *supra* note 237, at 290, ¶ 1188.

240. 143 BVerfGE 246, ¶¶ 375–82.

241. *See* KRAJEWSKI, *supra* note 222.

242. IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 66, ¶ 3.59 (2d ed. 2017).

243. KRIEBAUM ET AL., *supra* note 110, at 428–30.

244. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 18 1968, 1 BvR 638/64, 1 BvR 673/64, 1 BvR 200/65, 1 BvR 238/65, 1 BvR 249/65, 24 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 367, 420.

determining the level of compensation which, as a consequence, may be below the fair market value.[245] Compensation for acts defining "content and limits" of property follows similar standards.[246] Importantly, lost profits are not compensable in those instances and—arguably—the compensation may cover the loss only partially, the remainder of the loss being borne by the owner as a consequence of the social obligations incumbent upon owners.[247] Thus, compensation under German law may be lower than the market value and would also not include lost profits. This means that pursuing an investor-state case in parallel may be driven by the desire to get more than would be available domestically. Indeed, this was an allegation frequently raised against Vattenfall in the media.[248]

D. Procedures

While the issue of procedures before domestic fora is not necessarily linked to less protection, the bifurcation of jurisdiction for issues of State liability in Germany may make it less attractive to pursue such claims. Importantly, administrative courts are generally not competent to hear actions for State liability.[249] However, they have jurisdiction to hear the claims for primary remedies challenging public acts.[250] Thus, the primacy of primary remedies means that affected persons have to apply to at least two courts—administrative courts (or the FCC, in Vattenfall's case) and ordinary courts—to address their grievances. Given that both avenues entail the right to appeal, judicial process can be lengthy and expensive.

In comparison, investment arbitration offers a seemingly swift way to a remedy, being a one-shot-game.[251] As Vattenfall had raised time as one of

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245. Peter Axer, *Beck'scher Online-Kommentar zum Grundgesetz*, art. 14, ¶ 12, BECK-ONLINE DIE DATENBANK (Aug. 15 2023).

246. MAURER & WALDHOFF, *supra* note 230, ¶ 100.

247. Depenheuer & Froese, *supra* note 217, ¶ 253.

248. *See, e.g.*, Christian Rath, *Regierung lehnt Schiedsverfahren ab*, DIE TAGESZEITUNG (May 6, 2018), https://taz.de/Vattenfall-klagt-gegen-Deutschland/!5500659/.

249. A notable exception is compensation for acts defining "content and limits" of property. For those, administrative law tribunals have jurisdiction. *See* Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], § 40, ¶ 2 (Ger.).

250. *Id.* ¶ 1. If the act in question is an act of parliament, the affected persons would have to file a constitutional complaint with the FCC, as Vattenfall did. *See* Grundgesetz [GG] [Basic Law], art. 93(1)(4a).

251. With the (partial) exception of annulment proceedings under the ICSID Convention and enforcement proceedings before national courts under the New York Convention. *See* ICSID Convention, *supra* note 232, art. 52; The Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 7, 1959, 330 U.N.T.S. 3. For statistics on typical times and costs in ISDS arbitrations, see *Academic Forum on ISDS—Concept Papers Project Matching Concerns and Reform Options*, CIDS, https://www.cids.ch/academic-forum-concept-papers (last visited Apr. 7, 2024); Malcolm Langford et al., *Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21 J. WORLD INVS. & TRADE 167 (2020); Luke Nottage & Aba Ubilava, *Costs, Outcomes and Transparency*

the essential factors for pursuing both claims, the bifurcation of proceedings adds some plausibility to this concern. Even after having succeeded before the FCC against the phase-out without compensation, Vattenfall had to challenge the provision on compensation enacted by the legislature after the court's first ruling. Here, Vattenfall again succeeded.[252]

In sum, Vattenfall's case touches upon various aspects where German law is arguably significantly less protective than international investment law, although more so than Australian domestic law (as outlined in Part IV). Nonetheless, Vattenfall settled the ICSID arbitration in the end perhaps motivated by the looming *Achmea* issue around enforcing even ICSID Convention awards, especially within the EU (as mentioned in Part II).[253] In any case, it seems reasonable to assume that Vattenfall gained additional bargaining power by being able to pursue additional legal avenues, concurrently through ISDS arbitration, compared to German investors limited to domestic court challenges.

VI. CONCLUSION

Given the apparent paucity of legal mechanisms effectively preventing concurrent proceedings, as outlined in Part III, one may find it surprising that such proceedings do not happen more frequently. This is even more so given the extent to which domestic law is frequently less protective than international investment law, as outlined in Parts IV and V. There could be a residual blind spot in our knowledge about international investment law because it is difficult to identify cases in municipal law. However, the more likely and straightforward explanation is that such concurrent proceedings are simply too costly for most investors.

In the normal course of events, investors would (if not without any chance of success from the outset) first file their claims before local courts and only then start investment arbitration proceedings. Given the very large and growing costs involved in such proceedings,[254] investors have a strong incentive to take this option as a measure of last resort only. While this approach of *sequential* proceedings also may fuel critique, simply because the investors get a second chance or get more than they would domestically (as illustrated in Parts IV and V), bringing *concurrent* claims before a domestic

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in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry (Sydney Law School Legal Studies Research Paper Series No. 18/46, 2018).

252. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 29, 2020, 1 BvR 1550/19, 155 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 378, ¶¶ 25–83.

253. Of course, the tribunal in Vattenfall dismissed the claimants' Achmea objection. *Federal Republic of Ger. (II)*, ICSID Case No. ARB/12/12, Decision, ¶ 232 (Aug. 31, 2018).

254. *See* Nottage & Ubilava, *supra* note 251, at 5–9; MATTHEW HODGSON ET AL., 2021 EMPIRICAL STUDY: COSTS, DAMAGES AND DURATION IN INVESTOR-STATE ARBITRATION (British Inst. of Int'l & Compar. L., 2021) (citing a more recent example of increasing costs).

court and an investment tribunal at the same time looks particularly offensive and therefore has been a major focus in this Article. What is more, the differences between domestic and international investment law are brought into sharper contrast. Accordingly, such proceedings can fuel discontent about ISDS-backed treaties as giving "unfair" extra rights to foreign investors, even leading states like Australia, and regions like the EU from backing off from agreeing to ISDS procedures in investment treaties.

Australia provides our first high-profile example. Concurrent claims by Philip Morris challenging tobacco plain packaging legislation in 2011 prompted an anti-ISDS policy shift introduced by a Labor-led government when in power from 2011–13, and again since late 2022. That claim highlighted how federal constitutional law does not provide for compensation for indirect expropriation. A recent even bigger ISDS arbitration filed in 2023 by Zeph, albeit *following* rather than *concurrently* with substantive claims before Australian courts, highlights how the Western Australian state government is not constitutionally constrained even regarding direct expropriation. It also reinforces arguments highlighting wider scope under international investment treaty law to claim for disappointed (substantive) legitimate expectations, or denial of justice before Australia's domestic courts or administrative bodies.

As for Germany, the *Vattenfall* case fueled the debate on the future of ISDS and also led the EU, which nowadays largely has the competencies to conclude investment-related treaties (per Articles 216(1) and 207(1) of the T.F.EU),[255] to push for reform of the ISDS arbitration system generally. As explained, more recent EU treaty practice (as in the FTA with Singapore) would largely limit concurrent proceedings from arising. Yet the biggest problem that remains is the existing treaties. There still seems to be no attempt to terminate those treaties in the foreseeable future—except for, of course, intra-EU BITs.[256] Thus, for the time being, there is still a good chance that investors will pursue claims simultaneously before domestic courts and ISDS tribunals. Given the small number of cases brought against Germany before ISDS tribunals in general,[257] Germany has so far been able to prevent diverging results. Perhaps this rather small number has led Germany to conclude that terminating or amending its existing treaties was not needed.

For both the cases at the heart of this Article, it is important to note that they concerned politically sensitive issues. Thus, any legal proceedings

255. TFEU, *supra* note 56, arts. 216(1), 207(1).

256. Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, May 29, 2020, 2020 O.J. (L169) 1.

257. Only five cases have been lodged against Germany. *See Investment Dispute Settlement Navigator*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited July 31, 2023).

would have caused a public reaction. Given prevalent public opinion in the respective countries on the respective issues (tobacco on the one hand, and nuclear energy on the other), any legal action would have met widespread criticism. Thus, one should be careful in drawing general conclusions. Nonetheless, having analyzed how they arose and proceeded as well as further ramifications, we may validly conclude that there is a need to better coordinate claims involving investments. For all the problems that concurrent proceedings raise (outlined particularly in Part II), treaty practice should evolve to limit the possibility of concurrent proceedings or coordinate them.

Perhaps the most reasonable way forward is to combine waiver clauses with a clause requiring the investor to first institute local proceedings (for a limited period). Such a clause should be broad enough to cover similar claims by subsidiaries to avoid the problems that conventional fork-in-the-road clauses have generated.

Additionally, allowing (or perhaps even requiring) investors to pursue local remedies has some distinct advantages.[258] Firstly, domestic remedies are often cheaper and at times more efficient. As the *Vattenfall* case demonstrates, the company received a judgment from the FCC fairly quickly while any decision on the merits in the ISDS case was in the distant future.[259] Secondly, domestic proceedings often require the investor to seek restitution, as the German system does, which can afford the investor essentially greater protection than ISDS can.[260] Thirdly, it may increase the legitimacy of the system by giving the host states the opportunity to remedy the situation without facing multiple fora at the same time. Lastly, the Mexican sweetener concurrent cases show how such proceedings can trigger cross-fertilization. Apparently, international investment law provided some inspiration or at least a justification to develop Mexican constitutional law.[261] Accordingly, while our two primary cases of concurrent proceedings have become synonymous with a flawed ISDS arbitration and indeed investment treaty system, other cases suggest that concurrent proceedings may be useful.

Nonetheless, given the dangers such proceedings create, particularly in our era of more fraught geopolitical tensions, they can and probably should be better coordinated. As we suggest, combining waiver and domestic-

258. *See also* Ma & Faure, *supra* note 26, 77–87 (arguing for a local remedies first rule which combines the advantages of domestic court proceedings with those of ISDS).

259. Markus Krajewski, *Investitionsschutzabkommen als Grenze künftigen Ordnungsrechts*, 23 DEUTSCHES ATOMRECHTSSYMPOSIUM 93, 94 (2019).

260. On the reasons for requiring the primacy of primary remedies in municipal legal systems, see van Aaken, *supra* note 229, at 729. While restitution is not impossible as a remedy under international investment law, it is rarely granted. *See* Esmé Shirlow & Kabir Duggal, *The ILC Articles on State Responsibility in Investment Treaty Arbitration*, 37 ICSID REV. 378, 387–88 (2022).

261. Puig, *supra* note 5, at 236–37; Garcia Sanchez, *supra* note 26, at 596–98.

remedies-first clauses could combine the benefits of having domestic proceedings, while limiting the risk of inefficient or even chaotic dispute resolution of investor-state disputes and further public backlash against the investment treaty regime.