# Chapter 5
# Conclusions and Recommendations


This study has sought to analyze the relationship between national and international courts in the field of foreign investment protection as it arises from the extensive investment treaty framework built by States over the last five decades. It has also suggested possible modes for regulating jurisdictional interactions under various dispute settlement scenarios that may emerge in the coming years. 213

To that end, it has first recalled why investment arbitration was created: to depoliticize dispute resolution and do away with the constraints of diplomatic protection, to attract foreign capital, and to offer an alternative to local courts.[1] Since the creation of investment arbitration (now over five decades ago), economic and political power has shifted considerably from traditionally high-income economies to emerging ones. Numerous new economic partnerships have also emerged beyond the traditional North-South (or developed-developing country) divisions. In the field of dispute resolution, investment disputes are no longer brought solely against developing or emerging economies, but also against traditionally capital-exporting States. Global concerns have evolved, too. While the attraction of foreign capital and the protection of nationals investing abroad remain notable objectives for many States, they must now be coordinated with sustainable development goals, which require strong policies for the protection of the environment, public health, human rights, among other public goods. The enforcement of these policies may well require adjustments in the balance between investment protection and regulatory powers, and a recalibration of the substantive standards can already be observed in many recent treaties. 214

Against the backdrop of these evolutions, the continuing need for international mechanisms allowing foreign investors to bring claims against sovereign States for violations of investment standards of protection is at times questioned. In the eyes of critics, the IIA investment arbitration regime does not account for situations in which 215

[1] See *supra* at Chap. 2.



G. Kaufmann-Kohler, M. Potestà, *Investor-State Dispute Settlement and National Courts*, European Yearbook of International Economic Law,
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domestic courts *do* offer adequate access to justice and discriminates against domestic investors by granting only (certain) foreign investors a privileged procedural track. While these are valid questions that States and all other stakeholders should continuously assess and re-assess, this study has shown that there are good reasons to maintain an international mechanism to settle investment disputes to which private parties have direct access; it is certainly another issue what form (or forms) this mechanism should take. In a nutshell, the reasons include the importance of giving investors signals that inspire confidence and enhance credibility, including by providing them with a neutral forum distinct from the host State's judicial system, which may be perceived, rightly or wrongly, as not entirely impartial. Furthermore, in considering whether to maintain some form of international dispute settlement mechanism with direct claims, the alternatives must be carefully weighed, in particular in terms of the consequences of a return to diplomatic protection for investors, home States and host States.[2]

**216** The determination of the future function of international investment dispute settlement bodies may well vary depending on each State's role as capital exporter, capital importer, protector of its nationals investing abroad, and potential respondent against claims brought by foreign investors. The answer for each State may also be contingent on the particular treaty partner it faces in a specific IIA negotiation. It may also hinge on whether the negotiating States share common legal traditions and comparable cultural histories, and/or place mutual trust in each other's institutions, in particular the judiciary.

**217** With these considerations in mind, the study has examined the many facets of the interaction between domestic courts and an international dispute settlement mechanism for investment disputes, from peaceful coexistence and support in the context of supervisory powers, to possible conflicts and tensions when two adjudicatory bodies rule on the same State measure.[3] This potential for conflict is due to the multiplicity of legal bases on which a given State measure can be challenged, including national constitutional, administrative, contract, tax law, and international investment law. It is further due to the fact that each of these legal bases or regimes has its own procedural remedies. In some instances, the plurality of proceedings may serve legitimate purposes, for instance when the relief sought is different and not conflicting. However, in other cases, it may be essentially duplicative and thus a waste of resources, both public and private.

**218** In those circumstances, it may not be sustainable in the long run to ignore the problems presented by concurrent domestic and international proceedings concerning the same measure. Treaty negotiators have thus appropriately designed tools to avoid these wasteful duplications, mainly in the form of fork-in-the-road and waiver clauses. The diverse solutions examined in Sect. 3.2 of this study are based on different philosophies and each presents advantages and disadvantages. No single model of regulation exists, and different types of regulations may respond to

[2] See *supra* at Chap. 2.3.

[3] See *supra* at Chap. 3.

different State needs and policies. Whatever the States' individual preferences, these clauses could be improved in order to better capture certain undesirable consequences arising from duplicative proceedings.

Finally, this study has mapped out the possible interplay between domestic courts and international dispute settlement mechanisms in the possible reform scenarios that are being considered by States.[4] States wishing to keep the current framework based on *ad hoc* arbitration, perhaps improved through targeted, incremental reforms, may consider the possibility of including rules on the coordination of domestic and international proceedings analyzed in this paper and subject to possible improvements, as previously mentioned. Furthermore, States wishing to transition toward greater institutionalization of the dispute resolution framework, such as by the creation of an AM or a MIC, will need to similarly examine the relationship between those new international bodies and domestic courts, as opportunities for judicial dialogue, overlaps, and even tensions will not disappear in more institutionalized frameworks. The prospective creation of such institutions would also require revisiting the role of domestic courts in relation to the international mechanism, in particular but not exclusively the courts' functions in supervising the international process. That role would have to be adapted to the changed dispute settlement framework. **219**

In conclusion, what emerges from this study is an investment protection system for which domestic and international court and tribunals share responsibilities in many and sometimes quite elaborate ways. The system has grown over time, organically so to say. The result is that, in certain areas of the interactions, the allocation of tasks is not always optimal and inefficiencies burden the system. In these areas, there is a need for improvement by providing for a more fruitful work division among domestic and international dispute settlement bodies. Whether or not reforms are implemented and whatever their format, the end goal should be a more efficient and just international dispute settlement system that achieves a fair balance between the private interests of the investors and the public interest represented by the States. **220**



[4] See *supra* at Chap. 4.